

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-41810-2023
Reserved on: 11.09.2023
Pronounced on:13.09.2023

Arjan Bajaj

. . . . Petitioner

Vs.

State of Punjab

. . . . Respondent

CORAM: HON'BLE MR JUSTICE DEEPAK GUPTA

Present: - Mr. Dharam Bir Bhargav, Advocate, for
Mr. Kulwinder Bhargav, Advocate, for the petitioner.

Mr. Parneet Singh Pandher, AAG, Punjab.

DEEPAK GUPTA, J.

This is the second petition filed by the petitioner under Section 439 CrPC seeking regular bail in case FIR No.0158 dated 01.09.2021 registered at Police Station Lalru, District SAS Nagar, Mohali under Sections 22 of the Narcotics Drugs and Psychotropic Substances Act, 1985 [for short 'the NDPS Act']. Earlier petition bearing CRM-M-1847-2023 was dismissed by this Court vide order dated 23.01.2023 (Annexure P14).

2. It is contended by ld. counsel for the petitioner that since the dismissal of the earlier petition, the circumstances of the case have changed, as only 3 witnesses have been examined so far by the prosecution and petitioner has undergone substantial period of custody, and that conclusion of trial may take considerable time.

3. While dismissing the earlier bail petition bearing CRM-M-1847-2023 on 23.01.2023, the following order was passed by this Court: -

“By way of this petition filed under Section 439 Cr.P.C., prayer is made to release the petitioner on regular bail in case FIR No.158 dated 01.09.2021 registered at Police Station Lalru, District SAS Nagar, Mohali under Section 22 (Act No.61) of Narcotic Drugs and Psychotropic Substances Act, 1985.

Allegations are that on 01.09.2021, petitioner and co-accused Shubham alias Monu were found carrying separate bags on their shoulders. Due to their suspicious activities, they were apprehended. From the bag of Shubham alias Monu 484 strips, each strip containing 60 tablets each i.e., totalling 29,400 tablets of I.P. Lomotil were recovered. Similarly, from the bag carried by Arjan Bajaj (present petitioner), 300 strips each strip containing 60 tablets each i.e., totalling 18,000 tablets of IP Lomotil were recovered. Necessary samples were drawn and the substance so recovered from the petitioner and co-accused were taken into possession.

*It is contended by learned counsel for the petitioner that as per the FSL report, the sample tablet on analysis was found to contain Diphenoxylate Hydrochloride to the extent of 2.4 mg and Atrophine Sulphate. Average weight of each tablet was 64 mg. It is alleged that in this way, petitioner is shown to have possessed a total 432 gram of Tramadol Hydrochloride which is of commercial quantity. Learned counsel contends that each single tablet contained 2.4 mg of Tramadol Hydrochloride which is permissible as per notification dated 14.11.1985. Learned counsel has referred to **Sehbaj Singh @ Baj Vs. State of Punjab, - CRM-M-48317 of 2017 (O&M)**, wherein a co-ordinate Bench of this Court referred to **Balkar Singh Vs. State of Punjab, - CRM-M-27245 of 2012** ; and **Kashmir Singh Vs. State of Punjab, 2012(1) RCR (Criminal) 684**. In **Kashmir Singh's case (supra)** it was held as under:-*

"Notification dated 14.11.1985 deals with Diphenoxylate with its salts and preparations, admixtures, extracts or other substances at serial No.58. A preparation having not more than 2.5 mg. of Diphenoxylate equal, to which atropine sulphate equivalent to at least one per cent of the dosage of Diphenoxylate is added would not fall in the definition of manufactured drug as per the entry at Sr. No.58. In the case in hand, the contents of Diphenoxylate Hydrochloride , as per the chemical examination, was found to be 2.3 mg and 2.4 mg per tablet in the two samples. The contents of Atropine sulphate was less than 1 per cent of that and , therefore, as per the notification dated 14.11.1985 at entry no.58, the tablets in hand would not fall within the definition of manufactured drugs.

When the Review Committee has opined that the drugs Diphenoxylate Hydrochloride and Atropine sulfate are in Schedule H of Drugs and Cosmetics Act, 1940, it cannot be said that the petitioner is liable to be prosecuted under the Act only for the reason that he did not have a chemist licence for keeping the same."

*It is contended further that the same view has been taken by a co-ordinate Bench of this Court in **CRM-M-33069 of 2013 Charno Vs. State of Punjab**; and **Himachal***

Pradesh High Court in Gurmeet Singh Vs. State of Himachal Pradesh, 2019(4) ILR (H.P.) 902. Learned counsel contends that entire mixture cannot be taken as contraband irrespective of the actual content of the contraband. It is further urged that the petitioner cannot be kept under detention merely because Section 37 of NDPS Act bars the grant of bail in case of recovery of contraband of commercial quantity. Besides, no independent witness was joined at the time of alleged recovery.

*Learned State Counsel has strongly opposed the petition by submitting that contraband of commercial category has been recovered from the petitioner; and that trial is yet to begin. Learned State Counsel has referred to **State of Kerala etc. Vs. Rajesh etc, - Criminal Appeal No.154-157/2020** decided by Hon'ble Supreme Court of India on 24.01.2020 reported as Law Finder Doc Id #1670706, wherein it was held that exercise of power to grant bail in such like offences is not only subject to limitations contained under Section 439 Cr.P.C but is also subject to limitations placed by Section 37 of the NDPS Act. No person can be enlarged on bail for the offence under the Act unless twin conditions are satisfied; firstly, prosecution must be given opportunity to oppose the application and secondly, the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these conditions are not satisfied, ban for granting bail operates. Hon'ble Supreme Court held further that the expression "reasonable grounds" mean 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 accused is not guilty of the alleged offence. The underlying object of Section 37 of the NDPS Act in addition to the limitations provided under Cr.P.C cannot be ignored.*

*Learned State Counsel has further referred to **Hira Singh and another Vs. Union of India and another, 2020(2) RCR (Criminal) 523**, wherein it has been held by Hon'ble Supreme Court that in case of seizure of mixture of narcotic drugs or psychotropic substances with one or more neutral substances, the quantity of neutral substances is not to be excluded while determining small or commercial quantity of narcotic drugs or psychotropic substances.*

The petitioner was found in possession of 18000 tablets of IP Lomotil containing the salt of Diphenoxylate Hydrochloride and Atrophine Sulphate. Since each tablet weighed 64 mg, it means total weight is 11520 gm which is of commercial category. The weight of the neutral substance cannot be excluded while determining small or the commercial quantity. For the sake of arguments, even if the neutral substance is not taken into consideration, the weight of Atrophine Sulphate, itself works out to

432 grams which again is of commercial category. Petitioner could not produce any licence or permit to possess the contraband. Trial is yet to begin.

Having regard to the facts and circumstances as noticed above, there is nothing to show existence of any reasonable ground so as to believe that petitioner is not guilty of the offence. Thus, one of the conditions of Section 37 of the Act is not fulfilled.

In view of the aforesaid discussion, present petition is hereby dismissed.

4. Ld. counsel contends that in ***Hasanujjaman and others Vs. State of West Bengal, SLP (Criminal) No.3221 of 2023 decided on 04.05.2023***, Hon'ble Supreme Court allowed bail to the accused after noticing that substantial compliance of Section 37 of the NDPS Act has been made. In that case, the accused was in custody for a period of more than 1 year and 4 months. Ld. counsel has also referred to ***Nitish Adhikary @ Bapan Vs. The State of West Bengal, SLP (Crl.) No.5769 of 2022, decided on 01.08.2022***, wherein bail was allowed in a NDPS case pertaining to the commercial category, where the accused had undergone custody of 1 year and 7 months.

5. Opposing the bail petition, ld. State counsel has drawn attention towards the custody certificate of the petitioner, as per which he is involved in one more case of NDPS bearing FIR No.270 dated 01.01.2021 registered at Police Station Janakpuri, under Sections 8/22/29 of the NDPS Act.

6. Replying to the aforesaid contention, ld. counsel for the petitioner has placed on record copy of the FIR No.270 of 2021, registered at Police Station Janakpuri, Saharanpur and submits that that FIR was registered on 17.09.2021 and not on 01.01.2021 as reflected in the custody certificate. Ld. counsel submits further that FIR No.270 was registered on 17.09.2021 against the petitioner despite the fact that at that time i.e., on the date of registration of the FIR, petitioner was in custody in the present case.

7. I have considered submissions of both the sides and have appraised the record.

8. As far as *Hasanujjaman and others (Supra)* and *Nitish Adhikary @ Bapan (Supra)* cases are concerned, bail in those cases were granted by the Hon'ble Supreme Court after taking note of the fact that the petitioner pertaining to those cases did not have any criminal antecedents. It is not so in the present case.

9. In this case, the custody certificate reveals that apart from the present case, petitioner is involved in one more case bearing FIR No.270 dated 01.01.2021 registered at Police Station Janakpuri, Saharanpur, under Sections 8/22/29 of the NDPS Act. It is true that date of the FIR mentioned as 01.01.2021 in the custody certificate apparently appears to be wrong because the copy of FIR, as placed on record by ld. counsel for the petitioner, would reveal that actual date of FIR No.270 registered at Police Station Janakpuri, Saharanpur, under Sections 8/22/29 of the NDPS Act is 17.09.2021. A perusal of the said FIR would reveal that in that case 600 intoxicating injections containing buprenorphine were recovered from the possession of one Rehan, who in his disclosure statement had disclosed that he had purchased the said injections from Arjan Bajaj-petitioner. It is on this basis that petitioner-Arjan Bajaj was nominated in that petition. Since petitioner-Arjan Singh was not arrested on the spot in case FIR No.270 of 2021, he cannot take the plea that since he was in custody in the present case at the time of registration of FIR No.270 of 2021, so he had been wrongly nominated in that case.

10. Besides above, as informed by ld. State counsel, out of 12 witnesses cited by the prosecution, 3 have already been examined. Even the examination-in-chief of the 4th witness has already been recorded.

11. Having regard to the aforesaid facts and circumstances of the case and the detailed reasons as already mentioned in the order dated 23.01.2023 passed in CRM-M-1847-2023 (Annexure P14), but without commenting anything further on the merits of the case, it is held that petitioner is not entitled to bail as he appears to be habitual offender of the offences of the similar nature.

Dismissed.

(DEEPAK GUPTA)
JUDGE

13.09.2023

Vivek

1. Whether speaking/reasoned?	Yes/No
2. Whether reportable?	Yes/No