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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH****CRM-35217/2023 IN/AND
CRM-M-59377-2022 (O&M)
Date of Reserve:25.09.2023
Date of Decision:16.10.2023**

Mahesh @ Manish

...Petitioner

Vs.

State of Haryana

...Respondent

Coram : Hon'ble Mr. Justice N.S.Shekhawat

Present: Mr. Sunil Sihag, Advocate with
Mr.S.S Nain, Advocate
for the petitioner.

Ms. Sheenu Sura, Deputy Advocate General, Haryana.

N.S.Shekhawat J.**CRM-35217-2023**

1. Prayer in the present application is for placing on record the additional facts as well as certain documents as Annexure P-4 to Annexure P-8.
2. For the reasons mentioned in the application, the same is allowed, subject to all just exceptions. Annexures P-4 to P-8 are taken on record.

Main case

1. The petitioner has filed the present petition under Section 439 Cr. P.C. with a prayer to grant of regular bail in case arising out of FIR No.349 dated 20.06.2022, under Sections 22(c) & 29 of NDPS Act (Section 29 of the Narcotic Drugs and Psychotropic Substance Act,1985 added later on) registered at Police Station City, Sohna District Gurugram (Annexure P-1).
2. As per the case of the prosecution, a police team headed by ASI Kimti Lal was on patrolling duty and received a secret information that one boy Mahesh @ Manish son of Dhani Ram resident of Village Barota was selling

banned injections and was standing outside the Sohna, Bus Stand and was carrying the injections. If a raid was conducting immediately, he could be caught with injections. On getting the information, the raid was conducted and a boy, who was seen while carrying a black polythene in his hand was apprehended, who disclosed his name Mahesh @ Manish son of Dhani Ram resident of Village Barota. The provisions of Section 42 and 50 were complied with and from the black plastic bag held by the accused, 15 injections of Buprenorphine (leegestic) 02 ML were recovered. The injections were taken into possession after following the due process of law as the accused could not produce any permit or license and thus, by keeping the said injections in his possession illegally, he had committed the offence under Section 22 (C) of the Narcotics Drugs and Psychotropic Substances (hereinafter referred to as the “Act”).

3. Learned counsel for the petitioner contends that the petitioner was arrested in the present case on 20.06.2022 and is in custody for the last one year and three months. He further contends that as per the story of the prosecution, the petitioner was found in possession of 15 injections of Buprenorphine (leegestic) 02 ML and it has been wrongly shown that the quantity of contraband fall within the ambit of “commercial quantity”. As per learned counsel, according to the first proviso to Rule 66(ii) of the “Act”, a person is legally authorize to keep/possess upto 100 doses of the above injection. Learned counsel further submits that the alleged recovery was effected from the petitioner in the open place/bus stand, but no private person was joined as a witness in the present case. He further contends that even the police had violated the mandatory provisions of Section 42 and 50 of the Act, while

making the recovery from the present petitioner. As per him, he was in custody for the last more than one year and three months and the trial may take quite a long time. Learned counsel for the petitioner has placed heavy reliance on the Rule 66 of the Narcotics Drugs and Psychotropic Substances Rules 1985 (in short “NDPS Rules”) and the same has been reproduced as under:

“66. Possession, etc., of psychotropic substances.-3[(1) No person shall possess :!ny psychotropic substance for any of the purposes covered under 1945 rules, unless he is lawfully authorized to possess such substance for any of the said purposes under these rules:

Provided that possession of a psychotropic substance specified in Schedule I shall be only for the purposes mentioned in chapter VIIA.I

(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 authorised under the 1945 Rules, may possess a reasonable quantity of such substane as may be necessary for their genuine scientific requirements or genuine medical requirements, or both for such period as is deemed necessary by the said 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:

[Provided further that an individual may possess. the.quantity of exceeding one hundred dosage umts at a time [but not exceeding-three hundred dosage units at a time] for his personal long term medical use if specifically prescribed by a Registered Medical Practitioner'l

(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.”

4. Learned counsel for the petitioner has relied upon various judgments of this Court to contend that vide Rule 66 of the NDPS Rules possession of less than 100 units of Buprenorphine (leegestic) would not be considered as an offence in case the same is required for medicinal use. Reliance has been made on a Division Bench judgment of this Court rendered in ***Saleem Mohd. vs. State of Punjab; 2015(25) R.C.R.(Criminal) 816.*** Relevant portion of the judgment is reproduced as under:-

“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 and 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 that 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.”

5. Learned counsel for the petitioner has also placed reliance on a judgment passed by this Court in **CRM-M-37530 of 2015 titled as Dr.**

Rajinder Singla vs. State of Punjab. The relevant portion of the same is reproduced as under:-

“Buprenorphine Hydrochloride I.P. is also a medication and is used as a pain reliever. Recently, it is also being used to treat opiate addiction (such as addiction to heroin). It has legitimate uses as an analgesic and for de-addiction. However, it is also capable of misuser being a psychotropic substance. Perhaps because of this reason, it was left out of Schedule I to the Narcotic Drugs And Psychotropic Substances Act but is very much regulated under the D and C Act and Rules.

As indicated above, Buprenorphine Hydrochloride is a Schedule H drug under the D and C Act and Rules and, though it is a psychotropic substance under the Narcotic Drugs And Psychotropic Substances Act, it is not included in Schedule I to the NDPS Rules. That being the case, its manufacture, possession of sale is not prohibited. As such, there is no contravention of the provisions of the NDPS Rules. Consequently, the offence under Section 8 of the Narcotic Drugs And Psychotropic Substances Act is not made out. Obviously, punishment under Section 22 of the Narcotic Drugs And Psychotropic Substances Act is also not attracted.

Accordingly in these circumstances no offence under the Narcotic Drugs And Psychotropic Substances Act is made out, the petitioner would be entitled to bail. Accordingly, he is directed to be released on bail on furnishing a personal bond in the sum of Rs.50,000/- with one surety of the like amount to the satisfaction of the concerned trial Court.”

6. Further reliance has been made on the judgment of this Court rendered in **CRM-M-38986 of 2018 titled as Nitin Rajput @ Raman vs. State of Punjab decided on 19.11.2018.** The relevant portion of the same is reproduced as under:-

5. In the present case, the alleged recovery is 12 injections of Buprenorphine. As per proviso to Rule 66 of the NDPS Act, an individual can possess 100 doses of Buprenorphine Hydrochloride. The controversy with regard to Buprenorphine at Serial No.169 of the notification/Schedule of the NDPS Act, would be debatable as to whether it is a psychotropic substance or not.

6. In view of the conflicting opinion given in **Kismat Singh Vs. State of Punjab, 2012 (2) RCR (Criminal) 329** and **Ajaib Singh Vs. State of Punjab, 2012 (2) RCR (Criminal) 330**, wherein it was held that Buprenorphine falls under Drugs and Cosmetics Act and the salt has not been included in the Schedule I of the NDPS Rules, whereas as per judgment in case **Dilip Kumar Virvani and others Vs. State of Chattishgarh, 2014 (35) RCR (Criminal) 329**, Buprenorphine Hydrochloride is a psychotropic substance within the meaning of Section 2 (xxiii) of the Act. Same issue was there in judgments of this Court in cases **Amandeep Vs. State of Punjab CRM-M No.250 of 2018 decided on 12.01.2018**, **Sonu Vs. State of Punjab CRMM No.30008 of 2017 decided on 06.10.2017** as well as **Sulakhan Singh @ Billa Vs. State of Punjab CRM-M No.1010 of 2018 decided on 24.01.2018**.

7. Accordingly, keeping in view the ratio of law laid down in above said judgments and the orders passed under the similar circumstances, the present petition is allowed and the petitioner (Nitin Rajput @ Raman) is directed to be released on regular bail on furnishing bail/surety bonds to the satisfaction of the trial Court.”

7. Further reliance has been made on the judgment of this Court rendered in **CRM-M-52372 of 2019 titled as Shiv Kumar @ Shis vs. State of Punjab decided on 07.08.2020**. The relevant portion of the same is reproduced as under:-

“3. Learned counsel for the petitioner relies upon a decision of a Co-ordinate Bench of this Court **dated 19.06.2020 in CRM-**

M14155 of 2020 in case titled as ‘Sukhwinder Kumar versus State of Punjab’, in which there was recovery of 85 injections of Avil and 85 injections of Buprenorphine each, containing 02 ml. In said case, the coordinate Bench took into account the decision in the case of ‘Dalwinder Singh versus State of Punjab’ decided on 03.05.2019 in CRM-M-10753 of 2019 in which the petitioner therein, who was in possession of 15 injections of Buprenorphine, containing 02 ml. each, was granted regular bail on account of his having put in about a year in custody, while in the case of ‘Kamaljeet Singh @ Kamal versus State of Punjab’ i.e. CRM-M-4538 of 2019, decided on 13.03.2019, the petitioner therein who was in possession of 12 injections of Buprenorphine, containing 02 ml. each was granted regular bail after having put in about 09 months in custody and in the case of ‘Kuldeep Singh versus Union Territory, Chandigarh’ i.e. CRM-M-1400 of 2018, decided on 19.01.2018, the petitioner therein who was in possession of 12 injections of Buprenorphine, containing 02 ml. each, was granted regular bail, after having put in about 03 months in custody. The coordinate Bench after relying on the aforementioned decisions granted bail to Sukhwinder Kumar, after taking into account that he was in custody for 01 year 04 months and 17 days and was not involved in any other case under the NDPS Act, as also the prevailing Corona Virus Pandemic and the conclusion of the trial would likely take some time.

4. Per contra, learned State Counsel, on instructions from SI Rakesh Kumar, admits the custody undergone. Learned Sr. DAG also admits that the recovery of 11 injections of Buprenorphine 2/2 ml. works out to 22 ml. i.e. 22 grams only, that commercial quantity of Buprenorphine is 20 ml i.e. 20 gms only while the 145 injections of Pheniramine Maleate Avil 10x10 ml. recovered from the possession of petitioner do not constitute an offence under the NDPS Act. He however, contends that there were 03 other cases under the NDPS Act against the petitioner, although in one case he

had been acquitted while in the second case cancellation report had been submitted and in the third case, the petitioner had undergone 03 months of imprisonment.

5. Taking into account the recovery as well as the decision of the coordinate Bench relied upon, besides the fact that the petitioner has been behind bars since 10 months and 10 days, challan has been filed but none of the 09 prosecution witnesses have been examined and the trial is like to take time on account of prevailing Corona Virus Pandemic, I am of the view that no useful purpose would be served by keeping the petitioner behind bars.”

8. Further reliance has been made on the judgment of this Court rendered in **CRM-M-14155 of 2020 titled as Sukhwinder Kumar vs. State of Punjab decided on 19.06.2020**. The relevant portion of the same is reproduced as under:-

*“2. Learned counsel for the petitioner contends that the allegations in the FIR are that 85 injections of Avil and 85 injections of Buprenorphine each containing 2 ml. are stated to have been recovered from the petitioner. He further contends that Avil does not constitute an offence under the NDPS Act. The petitioner is in custody for over one year and six months and is not involved in any other case under the NDPS Act. He has relied upon the judgements of the Coordinate Benches of this Court in the case of **Dalwinder Singh versus State of Punjab, passed in CRM-M-10753-2019 on 03.05.2019** whereby the petitioner therein, who was in possession of 15 injections of Buprenorphine containing 2 ml each, was granted regular bail after having put in about a year in custody; in the case of **Kamaljeet Singh @ Kamal versus State of Punjab, passed in CRM-M4538 of 2019 on 13.03.2019**, whereby the petitioner therein, who was in possession of 12 injections of Buprenorphine containing 2 ml each, was granted regular bail after having put in about nine months in custody and*

*in the case of **Kuldeep Singh versus Union Territory, Chandigarh**, passed in CRMM-1400- 2018 on 19.01.2018 whereby the petitioner therein, who was in possession of 12 injections of Buprenorphine containing 2 ml each, was granted regular bail after having put in about three months in custody. Learned State counsel, upon instructions from SI Pargat Singh, Police Station Phillaur, contends that the petitioner is in custody for 01 year, 04 months and 17 days. He also contends that 01 out of 10 prosecution witnesses has been examined. Heard through video conferencing. In view of the submissions of the learned counsel for the petitioner, especially when the petitioner is in custody for over one year and four months; he is not involved in any other case under the NDPS Act; the orders of the Coordinate Benches of this Court, the COVID-19 pandemic and the conclusion of the trial is likely to take some time, I deem it a fit case to grant the concession of regular bail to the petitioner.”*

9. On the other hand, learned State counsel has vehemently opposed the prayer made by learned counsel for the petitioner on the ground that the quantity of contraband recovered from the present petitioner was falling within the ambit of “commercial quantity” and he did not deserve the concession of bail by this Court. Learned State counsel has further replaced reliance on the judgment passed by the Hon’ble Supreme Court in the matter of **Union of India vs. Niyazuddin SK & another; AIR (2017) SC 3932 and State of Kerala etc. vs. Rajesh etc; 2020(1) R.C.R.(Criminal) 818** and the relevant portion of the aforesaid judgment has been reproduced as under:-

“20. 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 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with nonobstante 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.

21. 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.

22. We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a sine qua non for granting bail to the accused under the NDPS Act.”

10. I have heard learned counsel for the parties and perused the record.

11. This Court is of the considered opinion that the provisions of Rule 66 of the NDPS Rules still hold good and have not been set aside by any Court. Still further, in the present case the petitioner is in custody for the last one year and three months and the State has failed to place on record any evidence to show that there is likelihood of his tampering with the evidence or influencing

the witnesses of the prosecution. Still further, in view of the Rule 66 of the NDPS Rule, at this stage, there is reasonable ground to believe that the petitioner might not be guilty of the alleged offence.

12. So keeping in view the law laid down by this Court in various judgments and totality of the circumstances of the case, the present petition is allowed and the petitioner is ordered to be released on bail pending trial on his furnishing bail bonds and surety to the satisfaction of the concerned trial Court/ Duty Magistrate/Chief Judicial Magistrate subject to the following conditions:-

(i) The petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case, so as to dissuade him to disclose such facts to the Court or to any other authority.

(ii) The petitioner shall remain present before the Court on the dates fixed for hearing of the case.

(iii) The petitioner shall not absent himself from the Court proceedings except on the prior permission of the Court concerned.

(iv) The petitioner shall surrender his passport, if any, (if already not surrendered), and in case he is not holder of the same, he shall swear an affidavit to that effect.

(v) The petitioner shall also file his affidavit before the concerned Court, mentioning his ordinary place of residence and number of mobile phone, which shall be used by him during the pendency of the trial. In case of change of place of residence/mobile number, he shall share the details with the concerned Court/learned Trial

Court.

(vi) In case, the petitioner involved in any other criminal activity, during the pendency of the trial, it shall be viewed seriously.

(vii) The concerned Court may insist on two heavy local sureties and may also impose any other condition, in accordance with law, while accepting the bails bonds and surety bonds of the petitioner.

(viii) The petitioner shall report every 1st Monday of English calender month before the concerned SHO till the conclusion of the trial and SHO shall mark his presence by making an entry in the Rojnamcha.

13. In case, the petitioner violates any of the conditions mentioned above, it shall be viewed seriously and the concession of bail granted to him shall be liable to be cancelled and the prosecution shall be at liberty to move an application in this regard.

14. The observations in the present order have been made only for the purpose of deciding the regular bail application and would not in any way be construed as expression of opinion on the merits of the case.

16.10.2023
hitesh

(N.S.SHEKHAWAT)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No