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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 09.02.2023

+ **BAIL APPLN. 3602/2022**

VINAY KUMAR MISHRA

..... Petitioner

Through: Ms Sushma Sharma, Mr Girish Kumar Sharma,
Mr Karan Verma and Ms Aayushi Gaur, Advs.

versus

CENTRAL BUREAU OF NARCOTICS

..... Respondents

Through: Mr Satish Aggarwala and Ms Ayushi Mamgain,
Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. This is an application seeking bail in FIR No. SC No. 255/2021, under Sections 8/21/28/29 NDPS Act being Case Cr. No. 01/2021.
2. The facts in issue are that the officers of Central Bureau of Narcotics

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acting on specific information, recovered and seized various narcotic drugs containing medicinal opium in huge quantities i.e. Kamini Vidrawan Ras, Habb-E-Mumsik and Barshasha totaling 2402 grams on 05.03.2021 at Anand Vihar Railway Station Bus Stand, New Delhi from the applicant.

3. In his voluntary statement under Section 67 of NDPS Act dated 05.03.2021, the applicant admitted the recovery. The applicant stated that he worked in medicines shop M/S Krishna Ayurvedic agency, Chandni Chowk in 2018 and later on he started the work of packaging and supplying of medicine in his brother's firm M/S RD Ayurveda, Ghaziabad.

4. The applicant stated that he was looking after the shop RD Ayurveda Ghaziabad. During that period, a person came to his shop for opium-based narcotics medicines and for this the present applicant / accused asked Kamlesh Sharma i.e., the marketing representative of Multani Company for 200 pieces of Kamini Vidrawan Ras (KVR) and Barshasha etc. and Kamlesh Sharma told the present applicant / accused that he would send Narcotic medicines from Vaghbhatt Remedies, Johripur, Delhi and Narcotics Medicines were delivered to him by Amit Sharma on 04/03/2021. However, no sale bill was provided to him by the firm and he purchased this item on credit. He further stated that he was to deliver the said Narcotic Medicines to one Sukhwinder of Amritsar on 05/03/2021 at Anand Vihar Railway station bus stand and he did not provide his mobile number.

5. During investigation it was found that MH Enterprises had supplied Ayurvedic Narcotic Medicines, Kamini Vidhrawan Ras Manufactured by NID Pharma to applicant.

6. Based upon the statement of the applicant made under Section 67, the officers of Central Bureau of Narcotics, New Delhi searched the premises of M/S Vaghbhatt Remedies, Johripur, Delhi and also recovered narcotics drugs containing medicinal opium. The statement of one Mr Kishan Das, the proprietor of M/S Vaghbhatt Remedies was recorded on 10/03/2021 wherein he stated that he had supplied medicines to applicant without any bill and thereafter Krishan Das was arrested on 10/03/2021. Hence, the complaint. The applicant has been in custody since 05.03.2021

7. Ms Sharma, learned counsel for the applicant states that in the present case the provision of Drugs & Cosmetics Act will be applicable and not NDPS act. She has relied upon a notification dated 25.02.2017 issued by the Government of India, Ministry of Ayurveda, Yoga & Naturopathy, Unani, Siddha and Homeopathy which reads as under:

AYUSH BHAWAN
B-Block, GPO Complex
INA, New Delhi-110023
Date: 25, February, 2017

To,

1. All state licensing Authorities for ASU & H drugs (as per list attached)
2. All associations of manufacturers of ASU (as per list attached)

Subject:- Provisions regarding license for sale of Ayurvedic, Siddha & Unani (ASU) drugs-reg:

I am directed to refer to the various representations received in this Ministry whereby it has been brought to the notice of the Ministry that some regulators of the ASU drugs are raising questions on the need for license to sell Ayurvedic, Siddha & Unani (ASU) drugs.

2. In this concern it is clarified that as far as Central Government is concerned there is no exclusive provision of licensing for sale of ASU drugs in the Drugs and Cosmetics Act, 1940 and rules thereunder.
3. The status may be brought to the notice of all concerned authorities.

Your faithfully,

8. She further relies on Section 33EEC (b) of The Drugs And Cosmetics Act to submit that the Drugs & Cosmetics Act prohibits manufacture and sale of Ayurvedic, Siddha or Unani drugs only if they are in
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contravention of the provisions of the Drugs And Cosmetics Act. The section reads as under:

“33EEC Prohibition of manufacture and sale of certain Ayurvedic, Siddha and Unani drugs:

(b) sell, stock or exhibit or offer for sale or distribute any Ayurvedic, Siddha or Unani drug which has been manufactured in contravention of any of the provisions of this Act, or any rule made thereunder,”

9. She further states that assuming that the applicant was in violation of the said section, the Act itself provides punishment under Section 33-I of the Act which is punishment of one year or with fine which shall not be less than Rs. 20,000/-.

“33-I. Penalty for manufacture, sale, etc., of Ayurvedic, Siddha or Unani drug in contravention of this Chapter —Whoever himself or by any other person on his behalf—

*(1) manufactures for sale or for distribution,—1[(a) Any Ayurvedic, Siddha or Unani drug —
(i) deemed to be misbranded under section 33E,
(ii) deemed to be adulterated under section 33EE, or
(ii) without a valid licence as required under clause (c) of section 33EEC, shall be punishable with imprisonment for a term which may extend to one year and with fine which shall not be less than twenty thousand rupees or three times the value of the drugs confiscated, whichever is more;]*”

10. She states that the alleged recovered ayurvedic medicines were purchased by the applicant from the shop of M/s Vagbhatt Remedies, Johripur, Delhi owned by accused no. 2. However, whatever else was lying

in the shop of accused no. 2 cannot be attributed to the present applicant as he had no role in supplying or procurement of the said alleged recovery to the accused no. 2. Hence, Section 29 of NDPS Act is not applicable with regards to the alleged recovery from accused no. 2. It is also stated that the applicant has been in custody for more than one year.

11. Mr Aggarwala, learned standing counsel has relied upon Section 80 of the NDPS Act as under:

“80. Application of the Drugs and Cosmetics Act, 1940 not barred.—The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Drugs and Cosmetics Act, 1940 (23 of 1940) or the rules made thereunder.”

12. He also relies on the judgment of Hon’ble Supreme Court in ***Union of India & Anr. v. Sanjeev V. Deshpande*** (2014)13SCC 1 passed in Criminal Appeal No. 660 of 2007, read as under:

“35. In view of our conclusion, the complete analysis of the implications of Section 80 of the Act is not really called for in the instant case. It is only required to be stated that essentially the Drugs and Cosmetics Act, 1940 deals with various operations of manufacture, sale, purchase, etc. of drugs generally whereas the Narcotic Drugs and Psychotropic Substances Act, 1985 deals with a more specific class of drugs

and, therefore, a special law on the subject. Further the provisions of the Act operate in addition to the provisions of the 1940 Act."

13. He further relies on the voluntary statement dated 10.03.2021 of Krishan Das made under Section 67 of NDPS Act, 1985, who has also *inter alia* admitted the aforesaid recovery and other incriminating facts.

14. He states that in NDPS Act, 1985 unless the context otherwise requires, the substances has been defined under section 2 of the Act. The sub clauses wise definition relating to the specific substance is as under

(xiv) "narcotic drug" means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured drugs.

(xi) "manufactured drug" means-

(a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;

(b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the official Gazette, declare to be a manufactured drug, but does not include any narcotic substance or preparation which the Central Government may, having regard to

the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette , declare not to be a manufactured drug .

(xv,) "opium derivative" means

(a) medicinal opium, that is , opium which has undergone the processes necessary to adapt it for medicinal use in accordance with the requirements of the Indian Pharmacopoeia or any other pharmacopoeia notified in this behalf by the Central Government, whether in powder form or granulated or otherwise or mixed with neutral materials ;

(e) all preparations containing more than 0.2 per cent. of morphine or containing any diacetylmorphine”

15. From the above stated definition it is crystal clear that the said medicines which were recovered and seized from the conscious possession of the applicant are manufactured narcotics drug .In the test report the said drugs have been found positive for the presence of opium and contains up to 5% of morphine

16. He states that the medicines containing medicinal opium are manufactured narcotics drugs and section 8 of NDPS act 1985 is attracted eventually. Additionally, the commercial quantity for opium is 2.5 KG at S.I. no. 92 of the table whereas commercial quantity for Opium Derivative (Medicinal opium) at S.L. 93 is 250gm has been mentioned specifically in

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the Act. This underlines the intention of Act towards curbing the diversion of medicinal opium specifically to illicit market.

Observation:

17. Section 8 of the NDPS Act states that no person shall possess Narcotic Drugs or Psychotropic Substances except for medical or scientific purposes. In *State of Uttaranchal v. Rajesh Kumar Gupta*, (2007) 1 SCC 355, stated as under:

“24. The exceptions contained in Section 8 of the 1985 Act must be judged on the touchstone of:

(i) whether drugs are used for medicinal purposes;

(ii) whether they come within the purview of the regulatory provisions contained in Chapters VI and VII of the 1985 Rules.

18. The contentions of the respondent are that the recovered substance falls within the parameters of a manufactured narcotic drug u/s 2 (xi) (a) as it also contains opium derivative. It also contends that since medicines contains medicinal opium. Since medicinal opium are manufactured narcotics drugs, section 8 is attracted.

19. It is not the case of the prosecution that the drugs found in possession were not Ayurvedic medicines. Whether these medicines were being used for medicinal purposes or for drug trafficking are issues which can only be adjudicated once the evidence of the parties have been led.

20. In *State of Uttaranchal v. Rajesh Kumar Gupta*, (2007) 1 SCC 355,
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the Hon'ble Supreme Court, has observed the following”

“28. Section 37 of the 1985 Act must be construed in a pragmatic manner. It cannot be construed in such a way so as to negate the right of party to obtain bail which is otherwise a valuable right for all practical purposes.

38. The respondent is charged with a grave offence. It was, therefore, all the more necessary to apply the principles of law strictly. A person cannot be denied the right of being released on bail unless a clear case of application of the 1985 Act is made out. He might have committed an offence which repulses our morality. He may ultimately be found guilty even for commission of an offence under the 1985 Act, but in a case of this nature when prima facie the provisions of the said Act are not found applicable, particularly, in view of the fact that he has been in custody for a period of more than two years now, in our opinion, it is not a fit case where we should exercise our discretionary jurisdiction under Article 136 of the Constitution of India.”

21. In the present case, the Government of India has clarified that no license is required for selling Ayurvedic Siddha and Unani (ASU) Drugs under the Drugs & Cosmetics Act.

“there is no exclusive provision of licensing for sale ASU drug in the Drugs and Cosmetic Act, 1940 and Rules thereunder.”

22. It is, therefore, clear that although license is required to manufacture

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of ASU medicines there is no license required to sell them. Hence the contention of the respondent that there is no document found on the applicant when he was apprehended, is misconceived. If there is any requirement of the document it should be from the co-accused from whom the applicant purchased the said drugs.

23. Assuming that the applicant was required to have a license, even then he is liable to be imprisoned for a term which may extend to maximum one year u/s 33-I.

24. I am of the view that in the present case, admittedly, the applicant was dealing with ASU medicines.

25. Even assuming that the NDPS act will be applicable to the facts of this case, I am of the opinion that the embargo of section 37 will not apply.

26. In the present case, the recovery from the applicant was of 2.4 kgs (2402 grams). The commercial quantity for opium is 2.5 kg. It is only opium derivative where commercial quantity is 250 gm. The recovery from the applicant is admittedly ASU medicines containing opium. It is not opium derivative. The opium derivative is defined as

“(xvi) "opium derivative" means--

(a) medicinal opium, that is, opium which has undergone the processes necessary to adapt it for medicinal use in accordance with the requirements of the Indian Pharmacopoeia or any other

pharmacopoeia notified in this behalf by the Central Government, whether in powder form or granulated or otherwise or mixed with neutral materials;

(b) prepared opium, that is, any product of opium obtained by any series of operations designed to transform opium into an extract suitable for smoking and the dross or other residue remaining after opium is smoked;

(c) phenanthrene alkaloids, namely, morphine, codeine, thebaine and their salts;

(d) diacetylmorphine, that is, the alkaloid also known as diacetylmorphine or heroin and its salts; and

(e) all preparations containing more than 0.2 per cent. of morphine or containing any diacetylmorphine;”

25. This court in *Iqbal Singh v. State*, 2020 SCC OnLine Del 2556 had stated that the determination of the “**commercial**”
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quantity” or otherwise would also only be relevant in a case where the prosecution establishes that the recovered substance was either a narcotic drug or a psychotropic substance. The High Court held:

20. In *Hira Singh (supra)*, the Supreme Court overruled the aforesaid decision in *E-Micheal Raj (supra)* and concluded as under:

“(I). The decision of this Court in the case of E. Micheal Raj (supra) 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;

(III). Section 21 of the NDPS Act is not stand-alone provision and must be construed along with other provisions in the statute including provisions in the NDPS Act including Notification No. S.O.2942(E) dated 18.11.2009 and Notification S.O. 1055(E) dated 19.10.2001;

(IV). Challenge to Notification dated 18.11.2009 adding “Note 4” to the Notification dated 19.10.2001, fails and it is observed and held that the same is not ultra vires to the Scheme and the relevant provisions of the NDPS Act. Consequently, writ petitions and Civil Appeal No. 5218/2017 challenging the aforesaid notification stand dismissed.”

21. It is relevant to refer to paragraph 8.3 of the said judgment, which indicates the rationale for doing so and the same is set out below:

“8.3 At this stage, it is required to be noted that illicit drugs are seldom sold in a pure form. They are almost always adulterated or cut with other substance. Caffeine is mixed with heroin, it causes that heroin to vaporize at a lower rate. That could allow users to take the drug faster and get a big punch sooner. Aspirin,

crushed tablets, they could have enough powder to amend reversal doses of drugs. Take example of heroin. It is known as powerful and illegal street drug and opiate derived from morphine. This drug can easily be “cut” with a variety of different substances. This means that drug dealer will add other drugs or non - intoxicating substances to the drug so that they can sell more of it at a lesser expense to themselves. Brown-sugar/smack is usually made available in power form. The substances is only about 20% heroin. The heroin is mixed with other substances like chalk powder, zinc oxide, because of these, impurities in the drug, brown-sugar is cheaper but more dangerous. These are only few examples to show and demonstrate that even mixture of narcotic drugs or psychotropic substance is more dangerous. Therefore, what is harmful or injurious is the entire mixture/tablets with neutral substance and Narcotic Drugs or Psychotropic Substances. Therefore, if it is accepted that it is only the actual content by weight of offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, in that case, the object and purpose of enactment of NDPS Act would be frustrated. There may be few punishment for “commercial quantity”. Certainly that would

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not have been the intention of the legislature.

22. *It is apparent from the above that the court was considering a case where illicit substances are sold in mixtures containing neutral substances or substances which may have the effect of enhancing the effect of the offending substance or facilitate its abuse. The court was not concerned with a non-offending substance or preparation with bifacial qualities, which may have miniscule quantities of any offending substance. The litmus test would be as to how the substance is known in common parlance and dealt with by persons in trade. Is it manufactured, distributed, purchased and sold as an illicit substance, which is one of the ingredients of it, or is it known and dealt with as a separate product.”*

27. Similarly, in the present case, although the substance recovered from the applicant had morphine, it would be considered in its entirety of composition. Hence, in view of the above what was seized from the applicant was opium and not opium derivative. The FSL report dated 30/06/2021 also revealed that the substance tested positive for *Opium*. Therefore, even if it is presumed that the recovery from the applicant comes under the category of narcotic drug (opium), it is an intermediate quantity as

the commercial quantity of opium is 2.5 Kg. Hence, prima facie the bar under section 37 of NDPS act is not applicable.

28. In the present case, the applicant is in custody since 05.03.2021, i.e., 1 year 9 months, which is more than the maximum punishment for the contravention under the Drugs and Cosmetic Act. The charge-sheet has already been filed and the applicant is not required for custodial interrogation. No further recovery is to be made from the applicant.

29. For the aforesaid reasons, the applicant is directed to be released on bail in FIR No. SC No. 255/2021, under Sections 8/21/28/29 NDPS Act being Case Cr. No. 01/2021 subject to the following conditions:

- (a) The applicant shall furnish a personal bond in the sum of Rs. 10,000/- (Rupees Ten Thousand Only) each with 01 surety in the like amount, to the satisfaction of the trial Court;
- (b) The applicant shall not leave the country and if the applicant has a passport, he shall surrender the same to the trial Court;
- (c) The applicant shall furnish to the IO/SHO concerned his cellphone number on which the applicant may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;
- (d) The applicant shall drop a Google pin location from his mobile phone to the IO concerned so as to show his whereabouts everyday;
- (e) The applicant shall not indulge in any act or omission that is unlawful, illegal or that would prejudice the proceedings in pending cases, if any;

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- (f) The applicant or his family members/relatives/friends will not tamper with any of the witnesses in anyway.
30. Nothing stated hereinabove shall tantamount to an expression of opinion on the merits of the case.
31. The application is disposed of accordingly.

FEBRUARY 9, 2023

sr

JASMEET SINGH, J

Click here to check corrigendum, if any



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