

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.86085 of 2023

Arising Out of PS. Case No.-290 Year-2023 Thana- SONBERSA District- Sitamarhi

Madan Sah S/O Late Kailash Sah R/O Village- Sonbersa, Ward No. 4, P.S-
Sonbersa, Distt.- Sitamarhi.

... .. Petitioner/s

Versus

1. The State of Bihar
2. The Union of India (NDPS Act)

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr.Dhirendra Pratap Singh, Advocate Mr.Satyendra Prasad Singh, Advocate
For UOI	:	Mr.Arvind Kumar Tewary, Advocate
For the Opposite Party/s	:	Mr.Ajit Kumar, APP

CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH
ORAL ORDER

3 07-03-2024 Heard Mr. Dhirendra Pratap Singh along with Mr. Satyendra Prasad Singh, learned counsels appearing on behalf of the petitioner; Mr. Arvind Kumar Tewary, learned counsel for Union of India and Mr. Ajit Kumar, learned APP for the State.

2. Petitioner seeks pre-arrest bail in connection with G.R.Case No.62/2023 arising from Sonbersa P.S.Case No.290 of 2023 registered for the offences punishable under Sections 21(B)(C) of the NDPS Act, 1985.

3. As per the allegation made in the FIR, the Deputy Inspector (SSB), Sonbarsa upon receiving secret information that the petitioner and his associate, co-accused Nageshwar Mahto, are jointly engaged in illicit trade of prohibited medicines without having drug licence, raided premises of the



co-accused, Nageshwar Mahto and in search, three types of cough syrup of different brands containing methyl morphine more than the small quantity were seized : -

1. Wincerex-T - 1445 bottles each containing 10 mg.
2. Coderyl-T - 1440 bottles each containing 10 mg.
3. Codiwell - 500 bottles
4. Nitrvet 10 Tablets - 600 tablets

4. Mr. Dharendra Pratap Singh, learned counsel appearing on behalf of the petitioner submitted that the seizure effected by the Deputy Inspector (SSB) is not in accordance with the law laid down in Chapter III and Chapter IV-A of Drug and Cosmetics Act, 1940 (hereinafter to be referred as the 'Act, 1940'), which prohibits the Police Officer to effect the seizure or prosecution. According to the provision of the Act, 1940, the Drug Inspector is the competent authority to effect the seizure.

5. Learned counsel further submitted that the law is well settled by a Constitution Bench of this Court in the case of **Bablu @ Rajesh Kumar Vs. The State of Bihar & Ors.** reported in **2021 Vol.4 BLJ 1**. He further refers to paragraph no.89 of the said judgment, which is re-produced hereinafter as follows :-

“89. In conclusion, the reference is being answered thus: -

(i) Issue No.II:



(a) The police has no power to institute and investigate the offences under Chapter III, Chapter IV and Chapter IV-A of the Drugs and Cosmetics Act, 1940.

(b) The offences under Chapter IV-A are not to be tried by the court of Sessions and except the offences under Clauses (a) and (b) of Section 13 of the Drugs and Cosmetics Act, 1940, all other offences under Chapter III would be triable by a court of Judicial Magistrate.

(c) When imported drugs and cosmetics are distributed, or sold or stocked, or exhibited, or offered for sale, they would be covered by Chapter IV of the Drugs and Cosmetics Act, 1940.

(ii) Issue No. III :

The judgments of this Court in Cr.W.J.C.No.719 of 1998, Cr. Misc. No.808 of 1998 and Cr. Misc. No.50246 of 2006 are affirmed as good law.

(iii) Issue No.IV :

The said issue is now exhaustively covered by the judgment of the Hon'ble Supreme Court in the case of **Ashok Kumar Sharma (supra)**, which lays down that the prosecution under Section 32 of the Drugs and Cosmetics Act, 1940 shall be instituted only by way of filing of complaint and that police can not register and investigate offences under Chapter IV of the Drugs and Cosmetics Act, 1940”

6. Learned counsel also submitted that once the seizure is held to be not in accordance with law effected by the Officer having no jurisdiction, the entire prosecution fails on this ground. He, however, submitted that even considering the merits of the case, total 3385 bottles of cough syrup of different brands containing methyl morphine were seized and each



containing 10 mg. of the methyl morphine, which is more than the small quantity that has been prescribed in notification dated 16.07.1996 and later amended vide notification dated 19.10.2001, i.e. total quantity seized is 33.85 gram, which is more than the small quantity and less than the commercial quantity.

7. Learned counsel also submitted that the total quantity of Nitrovet 10 tablets is only 6 gram, which is less than small quantity, as per the notification issued under NDPS Act. He further informs that the seizure was not effected in the presence of the petitioner rather the go-down belongs to co-accused Nageshwar Mahto, who had opened the door of the go-down, which also proves that the petitioner is nowhere connected with the offence in any manner to have stored illicit drug without licence.

8. In these backgrounds, learned counsel submitted that in absence of any direct allegation against the petitioner and also the seizure having not been effected by the authority having jurisdiction in accordance with the provision of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as the 'Act, 1985'), the petitioner can not be held to be responsible for storing any drug without licence for attraction



either provision of NDPS Act, 1985 or the Drugs and Cosmetics Act, 1940.

9. *Per contra* Mr. Ajit Kumar, learned APP for the State vehemently opposed the prayer for grant of pre-arrest bail to the petitioner and submitted that the specific allegation against the petitioner is that he was associated with the co-accused, Nageshwar Mahto and the said fact is also substantiated by the investigation report of the Investigating Officer, who in course of the investigation has recorded that the petitioner is a tenant of co-accused Nageshwar Mahto. Learned APP further submitted that it is not important that the seizure has not been effected by a competent authority rather it is important that what has come in the course of the investigation that in the go-down, from where the seizure was effected, the prohibited drugs were stored without valid licence and merely on technical ground the entire prosecution can not fail.

10. Having considered the rival submissions made on behalf of the parties, as well as as, having meticulously considered the FIR lodged by the Deputy Inspector (SSB), which certainly violates the provision of Chapter III and Chapter IV-A of the Drugs and Cosmetics Act, 1940 and the law in this regard has also been settled by a Constitution Bench of



this Court in the case of **Bablu @ Rajesh Kumar (supra)**. The law mandates that the Police Officer has no power to institute and investigate the offence under Chapter III, Chapter IV and Chapter IV-A of the Drugs and Cosmetics Act, 1940. The Constitution Bench relying upon the judgment of the Hon'ble Supreme Court in the case of **Union of India Vs. Ashok Kumar Sharma & Ors.** reported in **2020 SCC Online SC 683**, after answering the reference had issued direction in view of the ramification of the matter in all the cases where the seizure has been effected by the Police Officer holding that the seizure effected after the law laid down in the case of **Ashok Kumar Sharma (supra)** in all those cases where the police has not handed over the case to the Drug Inspector immediately, in all such cases FIR registered for the offence punishable under Drugs and Cosmetics Act, in which the samples of drugs and cosmetics have been seized by the Police Officer is vitiated and shall be nullity in the eye of law. Admitted fact of the case is that altogether 3385 bottles each of 100 ml. were seized on 21.09.2023 by the Deputy Inspector (SSB) each containing 10 mg. methyl morphine, total amounting nearly 30.85 gram methyl morphine certainly the same is more than the small quantity and less than the commercial quantity. 600 Nitrovet 10



tables were seized and the quantity of psychotropic substance amounts to 6 gram and it can not be considered to be either more than small quantity or less than commercial quantity, which attract the provision of NDPS Act. On these grounds, the petitioner has made out a case to be released on bail on two grounds considering the fact that the seizure effected by a non-competent Police Officer is vitiated as has been held by the Hon'ble Supreme Court in the case of **Ashok Kumar Sharma (supra)** and even considering the total quantity to be less than the commercial quantity and just above the small quantity. Prevision of NDPS Act is also not attracted taking into consideration only 6 gram of psychotropic substance is contained in Nitratet 10 tablets, I direct the district court to enlarge the petitioner on bail in connection with Sonbersa Police Station case No.290 of 2023, subject to conditions as laid down under Section 438(2) of the Cr.P.C. and the district court deems fit and proper.

(Purnendu Singh, J)

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