

Sayali Upasani

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO. 1039 OF 2023

**SAYALI
DEEPAK
UPASANI**

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SAYALI DEEPAK
UPASANI
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Azhar Musaveer Rais

...Applicant

Versus

The State of Maharashtra

...Respondent

Mr. Aniket Nikam i/b Mr. Amit Icham, for Applicant.

Mr. S. R. Aagarkar, APP for State/Respondent.

CORAM:- N. J. JAMADAR, J.

DATED:- 31st JANUARY, 2024.

ORDER:-

- 1)** Heard the learned Counsel for the applicant and the learned APP for the State.
- 2)** The applicant, who is arraigned in CR No. 151 of 2022, registered with Nizampura Police Station, Thane, for the offences punishable under Sections 328, 273 and 276 of Indian Penal Code, 1860 and Sections 18(A), 18(a)(iv), 18(c), 27 (b) (ii) and 27 (d) of the Drugs and Cosmetics Act, 1945 and Section 22 read with Section 8(c) and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ("the Act, 1985"), has preferred this application to enlarge him on bail.

3) On 23rd June, 2022, pursuant to an intimation that a person was to arrive at Mama Bhanja Masjid, Millat Nagar, Bhivandi to sell syrups containing narcotic substance, Nizampura police conducted surveillance. At about 5.40 pm, the applicant was found approaching in a car bearing registration No. MH- 46-Z-7695. The applicant was intercepted. In the search of the dickey of the car, nylon bags were found. A bag contained 146 bottles containing a label (RX Codine Phosphate and Chlorpheniramine Maleate Syrup) "RJT-Care Premium"-COUGH LINCTUS, 100 ml. In another bag 153 bottles containing a label, (RX Codine Phosphate and Chlorpheniramine Maleate Syrup) "MediTek"-COFEX COUGH SYRUP, 100 ml were found. The contraband articles were seized. Four bottles each of RJT-Care Premium"-COUGH LINCTUS and MediTek"-COFEX COUGH SYRUP were collected by way of sample. The applicant came to be arrested. The applicant disclosed that he did not hold any bill, delivery Challan or license to possess or transport those bottles containing Codine Phosphate. The applicant came to be arrested.

4) Post completion of investigation, charge-sheet came to be lodged for the offences punishable under Sections 328, 273 and 276 of the Indian Penal Code, 1860 and Sections 18(A), 18(a)(iv), 18(c), 27 (b) (ii) and 27 (d) of the Drugs and Cosmetics Act, 1945

and Section 22, read with Sections 8(c) and 29 of NDPS Act, 1985.

5) The learned Special Judge declined to exercise the discretion in favour of the applicant holding that the applicant failed to explain the circumstances in which he was found transporting the said bottles containing Codine Phosphate. Nor the applicant could show that the conditions for exemptions under relevant Notifications were satisfied and the contraband material was being transported for therapeutic practice. Thus, placing reliance on the decision of the Supreme Court in the case of **Mohd. Sahabuddin and Another Vs. State of Assam**¹, the learned Special Judge rejected the application for bail.

6) Mr. Nikam, the learned Counsel for the applicant submitted that the applicant admittedly did not hold any license to possess or transport the seized bottles. However, Mr. Nikam would urge the communication from MediTek Life Sciences Pvt Ltd dated 15th July, 2022 would indicate that the commodity which was seized was manufactured in Himachal Pradesh and was meant for sale in Gujrat.

7) Secondly, the certificate of analysis issued by the Government Analyst, Food and Drugs Administrations

1 (2012) 13 SCC 491

Laboratory, would indicate that the Cough Linctus RJT Care contained Codeine Phosphate 9.121MG/5ML and Chlorpheniramine Maleate 4.03 MG /5 ML and the contents of Codeine Phosphate and Chlorpheniramine Maleate in the said samples were within the permissible limits. Likewise, the bottles of COFEX COUGH SYRUP contained Codeine Phosphate 9.105 MG /5 ML and Chlorpheniramine Maleate 3.710 MG/ 5 ML, and the contents of Chlorpheniramine Maleate and Codeine Phosphate in the said samples were within the permissible limits. Attention of the Court was also invited to the communication by the Drugs Inspector dated 4th August, 2022 to the effect that Cough Linctus RJT Care and Cofex Cough Syrup seized from the possession of the applicant, were of Standard Quality.

8) Mr. Nikam would thus urge that in the circumstances of the case where the contents of the manufactured drugs were within the permissible limits and of standard quality, the interdict contained in Section 37 of the NDPS Act, 1985 does not come into play as the applicant cannot be said to have been found in possession of the commercial quantity of Codeine as provided at Item No.28 in the Notification dated 19th October, 2001.

9) Mr. Nikam submitted that the judgment of the Supreme Court in the case of **Mohd. Sahabuddin** (supra) would not govern the facts of the said case as the chemical analysis of the contents of Cough Syrup therein, had disclosed that it contained Codeine Phosphate beyond the prescribed quantity.

10) Mr. Aagarkar, the learned APP resisted the prayer for bail. It was submitted that the applicant was found in possession of 299 bottles of 100 ml containing Codeine Phosphate 10 mg/5ml. Therefore, it cannot be said that the applicant was not found in possession of the commercial quantity. Mr. Aagarkar placed reliance on an order of this Court in the case of **Parveen Firoz Shaikh Vs. The State of Maharashtra in Bail Application No. 3095 of 2019**, dated 18th February, 2020, wherein in an identical fact situation, a learned Single Judge of this Court after adverting to the provisions of the NDPS Act, 1985, Rule 97 of the Drugs and Cosmetics Rule, 1945 and the Notification dated 14th November, 1995 issued in exercise of the powers under Section 2 (xi) (b) of the NDPS Act, 1985 had repelled the contention that since the content of Codeine Phosphate in each 100 ml bottle contained a permissible amount of Codeine in per dosage unit, i.e. 5 ml, the applicant was entitled to bail.

11) In the said case, the learned Single judge following the decision of Supreme Court in the case of **Mohd. Sahabuddin** (supra), had observed, as under:-

“....11. The submission of the learned counsel for the appellants was that the content of the codeine phosphate in each 100 ml. bottle if related to the permissible dosage, namely, 5 ml. would only result in less than 10 mg. of codeine phosphate thereby would fall within the permissible limit as stipulated in the Notifications dated 14.11.1985 and 29.1.1993. As rightly held by the High Court, the said contention should have satisfied the twin conditions, namely, that the contents of the narcotic substance should not be more than 100 mg. of codeine, per dose unit and with a concentration of not more than 2.5% in undivided preparation apart from the other condition, namely, that it should be only for therapeutic practice. Therapeutic practice as per dictionary meaning means ‘contributing to cure of disease’. In other words, the assessment of codeine content on dosage basis can only be made only when the cough syrup is definitely kept or transported which is exclusively meant for its usage for curing a disease and as an action of remedial agent.

12. As pointed out by us earlier, since the appellants had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule ‘H’ drug containing narcotic substance was being transported and that too stealthily, it cannot be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14.11.1985 and 29.1.1993. Therefore, if the said requirement meant for therapeutic practice is not satisfied then in the event of the entire 100 ml. content of the cough syrup containing the prohibited quantity of codeine phosphate is meant for human consumption, the same would certainly fall within the penal provisions of the N.D.P.S. Act calling for appropriate punishment to be inflicted upon the appellants. Therefore, the appellants’ failure to establish the specific conditions required to be satisfied under the above referred to notifications, the application of the exemption provided under the said notifications in order to consider the appellants’ application for bail by the Courts below does not arise....”

(emphasis supplied)

12) It is true that in the case of **Mohd. Sahabuddin** (supra) ,the Supreme Court had noted that chemical analysis of contents of the cough syrup disclosed that it contained Codeine Phosphate beyond the prescribed limit. However, this Court in the case of **Parveen Firoz Shaikh** (supra), after analyzing governing provisions and aforesaid judgment in the case of **Mohd. Sahabuddin** (supra) declined to exercise the discretion observing, *inter alia*, as under:-

“...14. In the case in hand, a substantial stock of 190 bottles, each containing 100 ml Rexus Active Cough Syrup in all containing 38 gms codeine was found in possession of the applicant, without any valid license/document, contrary to notification bearing S. O. 826(F) dated 14.11.1985 under NDPS Act and therefore, holding/possessing such stock of the drugs listed in ‘H1’ Schedule of the Drugs and Cosmetics Act read with Section 8 of the NDPS Act was found to be prohibited.

15. Now, so far as the Notification dated 14th November, 1985 issued in exercise of the powers under Section 2(xi)(b) of the NDPS Act is concerned, it is to be held that twin conditions have been enumerated therein which are required to be satisfied as has been explained above. Notably, in the present case, it was found that stock of Rexus active cough syrup was not for therapeutic practice since there was no valid license/document to support the possession of the medicines in such huge quantity. In view of this fact, the Apex Court in the case of Mohammed Shahabuddin has held in paragraph 12 as under (Supra).
...(extracted above)...

16. In the cited case, on secret information, police had intercepted a truck, whereupon the search, 347 cartons, each carton containing 100 bottles of 100 ml of Phensedyl cough syrup were found. The chemical analysis of the contents of the cough syrup disclosed that it contained ‘Codeine Phosphate’ beyond the prescribed

quantity and, therefore, the said medicines were seized. The Hon'ble Apex Court, while dealing with the bail plea of the accused therein, had, thus, held twin conditions enumerated and laid down in the Notification dated 14th November, 1985 are to be necessarily satisfied. Thus, drawing cue from the judgment of the Apex Court, in the said case in hand, though the content of codeine phosphate in each 100 ml bottle contained a permissible amount of Codeine in per dosage unit, i.e., 5 ml, but having found that it was not established for therapeutic practice, it can be held prima facie, that, there was no due compliance with the said notification. Therefore, in my view, since the applicant failed to comply with the specif condition under the above referred Notification for claiming exemption in order to seek bail, for the reasons mentioned hereinabove, no case is made out for releasing the applicant on bail..."

13) The aforesaid decision in the case of **Parveen Firoz Shaikh** governs the facts of the case and renders the submission sought to be canvassed on behalf of the applicant unworthy of acceptance. The facts that the contents of Codeine Phosphate were found within permissible limit and that contents of bottles were also found to be of standard quantity, are not sufficient to dislodge the rigors of Section the 37 of NDPS Act, 1985.

14) Mr. Nikam placed reliance on the orders of the Supreme Court in the cases of **Hasanujjaman and Others Vs. The State of West Bengal** in SLA No. 3221 of 2023 dated 4th May, 2023 and **Mohammad Salman Hanif Shaikh Vs. State of Gujarat**² in support of the submission that the applicant deserves to be

released on bail. The Supreme Court had granted bail in the peculiar facts of those case without expressing any view on the merits of the cases.

15) Thus, I am not inclined to exercise the discretion in favour of the applicant. However, having regard to the nature of the accusation and the period of incarceration of the applicant, I deem it expedient to request the learned Special Judge to commence and conclude the trial, arising out of CR No. 151 of 2022, as expeditiously as possible.

16) Hence, the following order:

: O R D E R :

I) The application stands rejected.

II) The learned Special Judge seized with Special Case No. 927 of 2022 arising out of CR No.151 of 2022 is requested to make an endeavour to commence and conclude the trial in Special Case No. 927 of 2022 as expeditiously as possible and preferably within a period of one year from the date of the communication of this order.

III) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the

purpose of determination of entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial court shall not be influenced by any of the observations made hereinabove.

[N. J. JAMADAR, J.]