

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-47178 of 2023
Reserved on:07.03.2024
Pronounced on: 19.03.2024

Hamid
Vs.
State of Haryana

.....Petitioner
.....Respondent

CORAM:- HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Gautam Dutt, Advocate for the petitioner.
Mr. Sumit Jain, Addl. AG, Haryana.

DEEPAK GUPTA, J.

By way of present petition filed under Section 439 Cr.P.C., petitioner prays for his release on regular bail in case FIR No.0248 dated 06.05.2023 registered under Section 22(c) of Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No.61 of 1985) [for short, 'the NDPS Act'] at Police Station Hodal, District Palwal.

2. Status report by way of affidavit of Shri Sajjan Singh, Deputy Superintendent of Police, Hodal has already been received on behalf of the respondent- State.

3. As per prosecution allegations, on 6.5.2023, Hamid (present petitioner) was found in possession of following contraband:

- 115 bottles of '*Chloropheniramine Maleate Codeine Phosphate Syrup Welcyrex Cough Syrup 100 ml Welcyrex each containing 100 ml*'; and
- 115 bottles of '*Codeine Phosphate Chloropheniramine Maleate Syrup Onerex Cough Syrup 100 ml Wings Biotech LLP 100 ml each containing 100 ml*

In his disclosure statement, petitioner initially stated to have purchased the contraband syrup from Chhotu Medical Store but later on, retracting from the earlier statement, he made fresh disclosure statement to have purchased the contraband from Madhav Medical Store, Pahadi.

4.1 Learned counsel for the petitioner contends that as per FSL report, each bottle of the cough syrup contained *Codeine* to the extent of 10 mg per 5 ml; and *Chloropheniramine* to the extent of 04 mg per 05 ml and that the said quantity falls within the exception of “Manufactured Narcotic Drugs” as per Entry No.35 of the ***Manufactured Narcotic Drugs (as contained in Govt. of India's Notification S.O. 826(E) dated 14/11/1985 and S.O. 40(E) dated 29/01/1993)*** issued by Central government in exercise of the powers conferred by sub-clause (b) of Clause (xi) of Section 2 of the NDPS Act and as the recovered contraband does not fall within the scope of Manufactured Narcotic Drugs, so, petitioner cannot be prosecuted under the provisions of the NDPS Act.

4.2 Learned counsel also contends that at the most, offence under the provisions of Drugs and Cosmetics Act, 1940 may be made out but for that, a separate procedure is prescribed and it is the Drug Inspector, who is required to file the complaint. Learned counsel has relied upon ***Jagjit Singh Vs. State of Punjab – Law Finder Doc Id @ 2012209*** and ***Balkar Singh Vs. State of Punjab, 2012(22) R.C.R. (Criminal) 273.***

4.3 Learned counsel further submits that the petitioner is in custody since 06.05.2023 i.e. for the last more than ten months; that trial may take time to conclude. Attention is also drawn to the fact that co-accused Pawan Kumar Khandelwal has already been allowed regular bail by this Court vide order dated 31.08.2023 passed in CRM-M-27509 of 2023 (Annexure P3).

5.1 Refuting the afore-said contentions, learned State Counsel contends that *Codeine* is specifically notified as “Manufactured Narcotic Drug” under the NDPS Act and the contravention in relation to the manufactured drugs is punishable under Section 21 of the NDPS Act.

Learned State Counsel further contends that in case, the offence is also covered under the provisions of Drugs and Cosmetics Act due to overlapping, the prosecution can still be launched validly under the NDPS Act and that it is for the State to decide, as to in which of the two enactments i.e. the NDPS Act or the Drugs and Cosmetics Act that prosecution is to be launched.

5.2 Learned State Counsel further submits that the exception carved out under Entry 35 of the Notification referred by counsel for the petitioner is only in case the drug in question is meant for *therapeutic* use and in case the said condition is not satisfied, the case will not be covered under the exception. Learned State Counsel submits that the petitioner was found in possession of as many as 230 bottles of 100 ml each containing codeine, without carrying any licence or permit or bill to have purchased the drugs and so, it cannot be assumed that the recovered contraband was meant for human consumption and so, he does not deserve to be released on bail. Learned State Counsel has referred to ***Md. Sahabuddin & Another Vs. State of Assam, Criminal Appeal No.1602 of 2012*** [@SLP (Criminal) N: 5503 of 2012 decided on 05.10.2012 by Hon'ble Supreme Court; and also on Division Bench authority of this court rendered in ***Inderjeet Singh @ Laddi & others vs. State of Punjab*** 2015 (1) Crimes 308.

5.3 Learned State counsel contends further that in the present case, the recovered quantity of contraband falls in the commercial category and so bar of Section 37 of the NDPS Act is clearly applicable and therefore, petitioner is not entitled for regular bail.

6. I have considered submissions of both the sides and have perused the paperbook.

7. Perusal of the FSL report (Annexure R3) would reveal that each

bottle of cough syrup of 100 ml Welcyrex; as well as each bottle of cough syrup of 100 ml Onerex, contained *Codeine* to the extent of 10 mg per 5 ml; and *Chloropheniramine* to the extent of 4 mg per 5 ml. Since, each bottle was of 100 ml, it means that quantity of *Codeine* in each of the bottle was 200 mg; whereas quantity of *Chloropheniramine* was 80 mg each. Besides, weight of each bottle of *Welcyrex* was 114.1 per gram /100 ml; whereas that of Onerex was 113.5 grams /100 ml.

8. Section 2 (xi) of the NDPS Act provides that Manufactured Drug means as under:-

“(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;”

9. In exercise of powers conferred by sub-clause (b) of afore-said Clause (xi) of the Section 2 of the NDPS Act, Government of India has issued ***Manufactured Narcotic Drugs (as contained in Govt. of India's Notification S.O. 826(E) dated 14/11/1985 and S.O. 40(E) dated 29/01/1993).***

10. In the above referred notification, various drugs have been notified, some of which provide for certain kinds of exception. Serial No.35 is relevant for the purpose of present case, which is as under:-

“35. Methyl morphine (commonly known as '**Codeine**') and Ethyl morphine and their salts (including **Dionine**), all dilutions and preparations except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5% in undivided preparations and

which have been established in Therapeutic practice.”

11. The issue as involved in the present case, as to whether on account of the exception provided at Sr. No.35 of the *Manufactured Narcotic Drugs (as contained in Govt. of India's Notification S.O. 826(E) dated 14/11/1985 and S.O. 40(E) dated 29/01/1993)*, the recovered material will be covered under the provisions of the NDPS Act or not; or that whether it will fall under the provisions of Drugs and Cosmetics Act only, was considered by Hon'ble Supreme Court in *Md. Sahabuddin's case (supra)*, wherein the scope of entry at Sr. No.35 of the Notification and the provisions of Drugs and Cosmetics Act and relevant rules were discussed. In that case before Hon'ble Supreme Court, 34700 bottles of Phensedyl Cough Syrup and 10,200 bottles of Recodex Cough Syrup were recovered from the appellant. Each bottle of Recodex contained Codeine Phosphate to the extent of 182.73 mg; whereas each bottle of Phensedyl contained Codeine Phosphate to the extent of 183.15 mg. Thus, the total content of codeine was calculated to be 8.218 kg. The contentions as raised by the appellant and that of the State were discussed by Hon'ble Supreme Court and it was observed as under:-

“8. The contentions of the appellants were fourfold. In the first place, it was contended that the cough syrup Phensedyl and Recodex are pharmaceutical products covered under the provisions of the Drugs & Cosmetics Act, that the Rules prescribe the measure of dosage as 5 ml. and that under Rules 65 and 97 of the Drugs & Cosmetics Rules, it is lawfully permissible to sell such cough syrups in the open market, which can also be transported, kept in stock and sold in the pharmaceutical shops as a prescribed drug under Schedule 'H' at Serial No.132. According to the appellants, such prescribed drugs under the Rules can contain codeine to the extent permissible. While referring to Rule 97, it was contended that Schedule H Drugs containing permissible extent of narcotic substance could be sold in retail on prescription of Registered Medical Practitioner.

The learned counsel, therefore contended that each of the 100 ml. bottle, seized from the appellants, satisfy the requirement prescribed under the above referred to two Rules 65 and 97 and in the circumstances there was no question of proceeding against the appellants under the N.D.P.S. Act.

9. By referring to Rules 61(1) and 61(2) of the Drugs & Cosmetics Rules, it was contended that the prescribed licence which is required for sale, stock, exhibit, offer for sale or distribution as a mandatory requirement under Section 27 of the Drugs & Cosmetics Act providing for imposition of penalty would be applicable only to manufacturers or those who sell, stock, exhibit or offer for sale or distribution of drugs and that a transporter, in particular, the driver and a khalasi was under no obligation to hold a licence under the Drugs & Cosmetics Act.

10. At the very outset, the abovesaid submission of the learned counsel is liable to be rejected, inasmuch as, the conduct of the appellants in having transported huge quantity of 347 cartons containing 100 bottles in each carton of 100 ml. Phensedyl cough syrup and 102 cartons, each carton containing 100 bottles of 100 ml. Recodex cough syrup without valid documents for such transportation cannot be heard to state that he was not expected to fulfill any of the statutory requirements either under the provisions of Drugs & Cosmetics Act or under the provisions of the N.D.P.S. Act.

11. It is not in dispute that each 100 ml. bottle of Phensedyl cough syrup contained 183.15 to 189.85 mg. of codeine phosphate and each 100 ml. bottle of Recodex cough syrup contained 182.73 mg. of codeine phosphate. When the appellants were not in a position to explain as to whom the supply was meant either for distribution or for any licensed dealer dealing with pharmaceutical products and in the absence of any other valid explanation for effecting the transportation of such a huge quantity of the cough syrup which contained the narcotic substance of codeine phosphate beyond the prescribed limit, the application for grant of bail cannot be considered based on the above submissions made on behalf of the appellants.

12. 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.

13. 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.”

12. It is, thus, clear that in order to fall within the exception as mentioned at Sr. No.35 of the Notification in question, the following two conditions should be satisfied:

(i) 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 percent in undivided preparation; and

(ii) the contraband substance should be only for therapeutic practice.

13. In the present case, each bottle of the Narcotic Substance (cough syrup) contained 200 mg of the Codeine content, which is higher than the 100 mg so as to fall within the exception. As such, petitioner cannot be allowed to take advantage of the exception mentioned at Sr. No.35 of the notification. Besides, petitioner has not explained as to for what purpose, he was carrying a huge quantity of 230 bottles of the Narcotic Substance in question, without holding any bill or licence so as to keep the same and so, it cannot be said that the same was being carried by him for curing any disease or as an action of remedial agent i.e. for therapeutic practice.

14. As noticed earlier that each bottle of *Welcyrex* was of 114.1 gram, which means that total quantity of 115 bottles was 13121.5 grams. 115 bottles of *Onerex* contained 113.5 grams each of the content, which means that total content of these 115 bottles was 13052.5 grams. This way, the total weight of the narcotic substance works out to be 2.6174 Kg, which is more than 1 kg and thus, it falls in the commercial category.

15. Petitioner cannot be allowed to contend that only the Codeine content is required to be looked into so as to know category in which the contraband will fall. Reliance in this regard can be placed upon ***Inderjeet Singh @ Laddi (supra)***, wherein it has been held that as to whether the quantity is small or commercial relating to the drugs, is to apply to the entire mixture or any solution or any one or more narcotic drug or psychotropic substances of that particular drug in dosage form etc. wherever existence of such substance is possible and not just its pure content. Quantity of manufactured drugs is not to be determined on per capsule basis when these are carried without proper licence or authorization.

16. In view of the aforesaid discussion, petitioner also cannot be allowed to contend that he cannot be prosecuted under the provisions of the NDPS Act; or that the case will fall only under the Drugs and Cosmetics Act. As has been held by a Division Bench of this Court in *Inderjit Singh @ Laddi's Case (supra)*, whenever there is violation of provisions of the NDPS Act, to be read with the NDPS Rules, then offence will come within the ambit of said Act and Rules and the prosecution against the offender can be validly launched under the NDPS Act. The contention that the contravention also fall in the Drugs and Cosmetics Act and so he, cannot be prosecuted under the NDPS Act has no merit, as it is for the State to decide as to in which of the two enactments i.e. the NDPS Act or the Drugs and Cosmetics Act that the prosecution is to be launched.

17. Considering the view as taken by Hon'ble Supreme Court in *Md. Sahabuddin's case (supra)*, the contrary view as taken by Single Benches of this Court in *Jagjit Singh's case (supra)* and *Balkar Singh's case (supra)* cannot give any advantage to the petitioner.

18. Having regard to the fact that quantity of contraband as recovered from possession of the petitioner falls in commercial category, it is held that the bar contained in Section 37 of the NDPS Act will be applicable.

19. Consequent to above discussion but without commenting anything further on the merits of the case, this Court is not inclined to grant benefit of regular bail to the petitioner. As such, the present petition is hereby dismissed.

March 19, 2024
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(DEEPAK GUPTA)
JUDGE

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No