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v.

UNION OF INDIA

(Petition for Special Leave to Appeal (Crl.) No. 5703 of 2021)

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DECEMBER 13, 2021

[N.V. RAMANA, CJI, SURYA KANT
AND HIMA KOHLI, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985: ss. 8(c), 22(c), 25, 28, 29, 67 – Seizure of psychotropic substances – Prosecution case that large number of tablets seized by Directorate of Revenue Intelligence from different locations believing to be psychotropic substances – A-1 to A-3 arrested under various provisions of NDPS Act for alleged export of psychotropic substances – Arrest of A-4 on the basis of statements of A-1 and A-3 for contravening provisions of NDPS Act – Grant of bail to A-4 by NDPS Court – However, the High Court cancelled the bail in favour of A-4 – High Court also rejected the bail application of A-1 – On appeal, held: Held: In absence of clarity on quantitative analysis of samples, prosecution cannot state at the preliminary stage that the accused were found to be in possession of psychotropic substances – Large number of tablets seized by DRI admittedly contain herbs/medicines meant to enhance male potency, and does not attract provision of NDPS Act – No tablets seized during search of office and residence of A-4 – WhatsApp messages from devices seized not sufficient to establish link between A-4 and A-1 to A-3 – Furthermore, scientific reports is still awaited – No conscious possession of psychotropic substances proved against A-4 – Order setting aside the bail of A-4 on mere reliance on statements of A-1 to A-3 u/s. 67 cannot be sustained – Thus, the order of the High Court qua A-4 is quashed and set aside – Also it is appropriate to release A-1 on bail.

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Disposing of the Special Leave Petitions, the Court

HELD: 1.1. The impugned order cancelling the bail granted in favour of A-4, is not sustainable in view of the fact that the records sought to be relied upon by the prosecution show that

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- A one test report dated 6th December, 2019, two test reports dated 17th December, 2019 and one test report dated 21st December, 2019 in respect of the sample pills/tablets drawn and sent for testing by the prosecuting agency conclude with a note appended by the Assistant Commercial Examiner at the foot of the reports
- B stating that "*quantitative analysis of the samples could not be carried out for want of facilities*". In the absence of any clarity so far on the quantitative analysis of the samples, the prosecution cannot be heard to state at this preliminary stage that the petitioners have been found to be in possession of commercial quantity of psychotropic substance as contemplated under the
- C NDPS Act. [Para 10][558-B-D]

- 1.2. A large number of the tablets that have been seized by the DRI admittedly contain herbs/medicines meant to enhance male potency and they do not attract the provisions of the NDPS Act. Most importantly, none of the tablets were seized by the
- D prosecution during the course of the search conducted, either at the office or at the residence of A-4. Reliance on printouts of WhatsApp messages downloaded from the mobile phone and devices seized from the office premises of A-4 cannot be treated at this stage as sufficient material to establish a live link between him and A-1 to A-3, when even as per the prosecution, scientific reports in respect of the said devices is still awaited. [Para 10][558-D-F]

- 2. In the absence of any psychotropic substance found in the conscious possession of A-4, mere reliance on the statement made by A-1 to A-3 under Section 67 of the NDPS Act is too tenuous a ground to sustain the impugned order. The impugned order qua A-4 is quashed and set aside and the order passed by the Special Judge, EC and NDPS Cases, is restored. As for A-1, since the charge sheet has already been filed and by now the said accused has remained in custody for over a period of two years, it is deemed appropriate to release him on bail, subject to the satisfaction of the trial court. [Para 11][558-F-H; 559-A]
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Sanjeev Chandra Agarwal vs. Union of India Criminal Appeal No. 1273 of 2021 decided on 25th October, 2021; Tofan Singh v. State of Madras (2021) 4 SCC 1 – referred to.

Case Law Reference

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(2021) 4 SCC 1 referred to. Para 5

EXTRAORDINARY APPELLATE JURISDICTION : Petition
For Special Leave To Appeal (Crl.) No.5703 of 2021.

From the Judgment and Order dated 15.07.2021 of the High Court B
of Judicature at Madras in Crl. O.P. No.18450 of 2020.

With

Petition For Special Leave to Appeal (Crl.) No.8919 of 2021.

Gopal Sankaranarayanan, Anand Grover, Sr. Advs., R. C. Paul
Kanagaraj, Karuppaiah Meyyappan, Raghunatha Sethupathy B., Ms.
Kanika Kalaiyarasan, Shrutanjaya Bhardwaj, Abhishek Kalaiyarasan,
Ms. Pariksha, Nirnimesh Dube, Ms. Tripti Tandon, Satbir Singh Pillania,
Vivekanand Rana, Sandiv Kalia, Nand Ram, Somvir Deswal, Ms. Reena
Rao, Dr. Sushil Balwada, Advs. for the Petitioner. C

Ms. Aishwarya Bhati, ASG, Rupesh Kumar, Ms. Archna Pathak
Dave, Rajat Nair, Ms. Deepabali Dutta, Mukesh Kumar Maroria, Advs.
for the Respondent. D

The Order of the Court was passed by

HIMA KOHLI J. E

1. By this common order, we propose to dispose of two Petitions
for Special Leave to Appeal filed against the common judgment and
order dated 15th July, 2021 passed by the learned Single Judge of the
High Court of Madras. SLP(Crl) No. 5703/2021 has been filed by Bharat
Chaudhary [A-4] who is aggrieved by the reversal of the bail order
dated 02nd November, 2020 granted in his favour by the learned Special
Judge, EC & NDPS Cases, Chennai whereas Raja Chandrasekharan
[A-1] has challenged the dismissal of the bail application filed by him
under Section 439 of the Criminal Procedure Code. F

2. The case set up by the prosecution is that on specific information
received by the Directorate of Revenue Intelligence, Chennai Zonal Unit¹,
Officers of DRI had seized about 1,37,665 tablets of different types
collectively weighing 90Kgs. (approx.) described as psychotropic
substances from the following four locations, all situated in Chennai: G

¹ For short 'the DRI'

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- A (i) Office of M/s. Aviation Star Express, Ekkattuthangal, a Franchisee
of M/s DHL Express India Private Limited;
(ii) 2 Destination, a Franchisee of M/s S.T. Courier;

B (iii) residence of Raja Chandrasekharan [A-1]; and
(iv) office premises of M/s. DHL Express India Private Limited.

3. Believing the tablets seized from the aforesaid premises to be composed of psychotropic substances covered under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985² read with

- C the Narcotic Drugs and Psychotropic Substances Act, 1985 read with the Customs Act, the DRI conducted investigation and summoned M.V. Srinivasan [A-2] – Director of M/s 2 Destination and Propreitor of M/s S.T. Courier; Raja Chandrasekharan [A-1] – Proprietor of Ascure Pure Herbals; M. Ashok Kumar [A-3] - employee of A-1 and after recording their statements, booked them for the offences under Section 8(c)

D punishable under Sections 22(c), 25, 28 and 29 of the NDPS Act and arrested them on 18th October, 2019. Based on the statements made by A-1 and A-3 that they had colluded with suppliers in Nagpur and Rajasthan and procured tablets composed of psychotropic substances for exporting and sending through courier service to customers in USA under the guise of herbal tablets, on orders received from Bharat Chaudhary [A-4], officers of DRI, Jaipur Unit conducted a search at his residence at Jaipur on 16th March, 2020 and seized some incriminating material. Thereafter, he was arrested on 17th March, 2020 for contravening the provisions of Section 8(c) punishable under Sections 22(c), 24 and 29 of the NDPS Act. On being granted transit bail by the learned Chief Metropolitan Magistrate, Jaipur, A-4 was produced before the NDPS Court at Chennai on 19th March, 2020 and remanded on the same day.

4. Vide order dated 2nd November, 2020, the learned Special Judge, EC & NDPS Cases, Chennai granted bail to Bharat Chaudhary[A-4]. The reasons that weighed with the said Court for granting bail to A-4 were that :-

- G were that :–

 - (i) he was not found to be in possession of any psychotropic substance and no contraband was recovered from his residence or office during the search;

H 2 For short ‘the NDPS Act’

- (ii) the electronic gadgets/devices that were seized from the office of A-4 had been sent for obtaining a scientific report which was still awaited; A
- (iii) while 1,37,665 tablets were seized from four different locations in Chennai between 15th October, 2019 and 18th October, 2019, officers of the DRI had gone to Jaipur to arrest A-4 after five months, solely on the basis of the statement made by A-1 under Section 67 of the NDPS Act; B
- (iv) there was no live link established against A-4, a resident of Jaipur of having connived with the other accused, A-1 to A-3 who were all residing in Chennai and arrested from there. C
- (v) the test reports in respect of the seized material were awaited and it was not established whether the tablets which, as per the accused were sexual enhancement tablets, would qualify either as a narcotic or psychotropic substance so as to fall within the ambit of the NDPS Act; D
- (vi) The first test report received by the DRI on 21st November, 2019, revealed that the tablets were actually sexual enhancement drugs and not covered under the NDPS Act and the test report in respect of 26 tablets sent to CFSL, Hyderabad, was still awaited. E

5. Being mindful of the recent verdict of a Three Judge Bench of this Court in *Tofan Singh v. State of Madras*³ where in as per the majority decision, a confessional statement recorded under Section 67 of the NDPS Act has been held to be inadmissible in the trial of an offence under the NDPS Act, the learned Special Judge, EC & NDPS Cases, Chennai granted bail to Bharat Chaudhary [A-4]. On the DRI challenging the aforesaid order before the High Court of Madras, the bail order granted in favour of A-4 has been cancelled by the learned Single Judge with scathing remarks made against the learned Special Judge. Citing the same reasons as have been given in the case of A4, the bail application moved by A1 has also been rejected. F G

6. The learned Single Judge has faulted the Special Judge, EC & NDPS Cases] for having conducted a roving enquiry to grant bail to A-

³ [2021] 4 SCC 1

- A 4. It has been held that the ruling in *Tofan Singh*'s case, does not bar the Prosecuting Agency from recording the statement of the co-accused for the purpose of apprehending the other accused in the offence. Observing that it was not on the basis of the statement of A-4 that he has been arrested and detained, but rather on the basis of the information furnished by A-1 to A-3 who have implicated him as a person involved in the offence and for arranging supply of contraband, it was held that absence of any evidence to establish a link between A-1, A-3 and A-4 could not form the basis for granting any relief to A-4. As for the observation of the Special Judge, EC & NDPS Cases that the test reports received by the prosecuting agency on 22nd November, 2019 revealed
- B C that many of the tablets were sexual enhancement drugs and not covered under the NDPS Act, the High Court opined that the test reports did not totally negate the fact that the seized contraband goods were not narcotic substances. Much emphasis was laid on the total quantity of the contraband seized and it was held that once the test reports showed that
- D E available and ought to have been taken into consideration.

- F 7. Appearing for Bharat Chaudhary [A-4], Mr. Gopal Shankaranarayanan, learned Senior Advocate has assailed the impugned order contending that there was no good reason for the High Court to have cancelled the bail granted to A-4 by the learned Special Judge, EC & NDPS cases. He submitted that a grave error has been committed by the High Court by completely overlooking the fact that not a single tablet was recovered from the possession of A-4; that the tablets were seized from the premises of A-1 to A-3 and some of the extracted samples sent for testing showed that a large number of the seized pills were sex enhancement drugs and not contraband; that the seized contraband had not been produced or sampled before the Magistrate and that A4 has been dragged into the matter solely on the basis of the confession/ statements made by Raja Chandrasekaran [A-1] under Section 67 of the NDPS Act, despite the fact that in a recent judgment of this Court in *Tofan Singh (supra)*, the majority view is that a confessional statement
- G H is not admissible in evidence which view has been followed in Criminal

Appeal No. 1273 of 2021 titled “*Sanjeev Chandra Agarwal vs. A Union of India*”, decided on 25th October, 2021.

8. Mr. Anand Grover, learned Senior counsel appearing on behalf of Raja Chandrasekharan [A-1] has argued that the High Court has fallen into an error by rejecting the bail application of A-1 without considering the submission made that no commercial quantity of the psychotropic substance had been proved so far. The test reports produced by the prosecution showed that the Ayurvedic/herbal medicines seized were meant for sex enhancement which do not fall under the ambit of the NDPS Act and that Standing Order 1/89 issued by the Government of India under Section 52A of the NDPS Act has been completely disregarded inasmuch as the samples were not drawn on the spot and/or recovered from the premises of A-1, nor were the samples drawn in the office of DRI in the presence of the accused and the *Panchas*. It was canvassed that the sanctity and integrity of the seizure made is highly doubtful on account of failure on the part of the prosecuting agency to follow the procedure prescribed in Sections 42 and 52 of the NDPS Act. It was also argued that the information received and recorded in the present case, was in respect of the alleged export of the psychotropic substances from the premises of M/s Aviation Star Express, a franchisee of M/s. DHL Express Limited and there is no mention of A-1 or his premises in the information referred to under Section 42 of the NDPS Act.

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9. *Per contra*, Ms. Aishwarya Bhati, learned Additional Solicitor General appearing for DRI has supported the impugned judgment and vehemently argued that A-4 is the mastermind behind the entire criminal conspiracy and he, in connivance with A-1, has been supplying contraband to A-1 to A-3, for being illegally exported abroad under the garb of sex enhancement tablets. She alluded to the 71 samples sent for testing and the test report of CRCL, Chennai dated 18th December, 2019 confirming the presence of narcotic substances along with male potency increment drugs and strenuously argued that the nexus between A-4 and A-1 to A-3 is not only established through the statements of A-1 to A-3 recorded under Section 67 of the NDPS Act, but also from the documents in the form of printouts of the data downloaded from the mobile phone and laptop of A-4, in particular, the Whatsapp chats and bank transactions between A-1 and A-4. Submitting that since the twin tests laid down under Section 37 of the NDPS Act in respect of commercial quantity for

- A grant of bail have not been satisfied, the impugned order does not deserve interference.
10. After carefully examining the arguments advanced by learned counsel for the parties and having cursorily glanced at the records, we are of the opinion that the impugned order cancelling the bail granted in favour of Bharat Chaudhary [A-4], is not sustainable in view of the fact that the records sought to be relied upon by the prosecution show that one test report dated 6th December, 2019, two test reports dated 17th December, 2019 and one test report dated 21st December, 2019 in respect of the sample pills/tablets drawn and sent for testing by the prosecuting agency conclude with a note appended by the Assistant Commercial Examiner at the foot of the reports stating that "*quantitative analysis of the samples could not be carried out for want of facilities*". In the absence of any clarity so far on the quantitative analysis of the samples, the prosecution cannot be heard to state at this preliminary stage that the petitioners have been found to be in possession of commercial quantity of psychotropic substances as contemplated under the NDPS Act. Further, a large number of the tablets that have been seized by the DRI admittedly contain herbs/medicines meant to enhance male potency and they do not attract the provisions of the NDPS Act. Most importantly, none of the tablets were seized by the prosecution during the course of the search conducted, either at the office or at the residence of A-4 at Jaipur, on 16th March, 2020. Reliance on printouts of Whatsapp messages downloaded from the mobile phone and devices seized from the office premises of A-4 cannot be treated at this stage as sufficient material to establish a live link between him and A-1 to A-3, when even as per the prosecution, scientific reports in respect of the said devices is still awaited.
- F 11. In the absence of any psychotropic substance found in the conscious possession of A-4, we are of the opinion that mere reliance on the statement made by A-1 to A-3 under Section 67 of the NDPS Act is too tenuous a ground to sustain the impugned order dated 15th July, 2021. This is all the more so when such a reliance runs contrary to the ruling in **Tofan Singh (*supra*)**. The impugned order *qua* A-4 is, accordingly, quashed and set aside and the order dated 2nd November, 2020 passed by the learned Special Judge, EC & NDPS Cases, is restored. As for Raja Chandrasekharan [A-1], since the charge sheet has already been filed and by now the said accused has remained in custody for over a
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period of two years, it is deemed appropriate to release him on bail, A
subject to the satisfaction of the trial Court.

12. Before parting with the cases, it is clarified that the *prima facie* observations made hereinabove are limited to considering the relief of regular bail prayed for by the petitioners and nothing expressed hereinabove shall be treated as an observation on the merits of the case, i.e., CC No.0000037/2020, pending trial. The petitions for special leave to appeal are disposed of in the above terms. B

Nidhi Jain

Petitions special leave disposed.