

Deepak Rawat vs . State Of H.P. on 25 October, 2024

Deepak Rawat vs. State of H.P. Cr.MP(M) No. 328 of 2024 Order Reserved on: 11.09.2024
25.10.2024 Present: Mr. Vijay Kumar Arora, for the applicant/petitioner.

Mr. Ajit Sharma, Deputy Advocate General, for the respondent/State.

Cr.MP(M) No. 328/2024 As per the prosecution case, the police intercepted a vehicle bearing registration No. HP-62B-1112 on 30.11.2023 being driven by Pankaj Kumar (main accused). The police searched the vehicle and found 45 plastic bottles of Codeine Phosphate and Chlorpheniramine Mabeale Syrup CODOREX and 5 bottles of Codeine Phosphate and Triprolidine HCL Syrup. Each bottle contained 10 mg of Codeine Phosphate. The main accused failed to produce any documents for possessing/transporting the Codeine Phosphate. He revealed on inquiry that he had purchased these bottles from the petitioner for 9,500. The police apprehended the petitioner. The police also verified the bank statement and found that the main accused had transferred 9,600/- to the present petitioner. The Challan was filed before the court and the matter is listed before learned Additional District and Sessions Judge, Rohru. As per the report of analysis, the bottles recovered from the main accused were found to contain an active ingredient of Codeine Phosphate.

2. The petitioner filed a bail petition. This court noticed the conflicts of judgments vide order dated 24.06.2024 and referred the question whether the Drug containing Codeine Phosphate falls within the definition of manufactured drugs under the NDPS Act to a Larger Bench. A Division Bench of this court is seized of the matter. Hon'ble Division Bench was apprised of the fact that a similar question is pending before the Hon'ble Supreme Court in Criminal Appeal No. 115 of 2018 titled Union of India versus Ashok Kumar, which is scheduled to be listed on 28.11.2024. The Hon'ble Division Bench deferred the hearing of the question and directed that the application of the petitioner for grant of bail be heard during the pendency of the reference.

3. The petitioner has filed an application seeking interim bail during the pendency of the reference.

4. It has been asserted that cough syrup does not fall within the definition of manufactured drugs. No recovery is to be effected from the petitioner. The cough Syrup was manufactured in a licensed factory as per the Drugs and Cosmetics Act. Any preparation containing less than 2.5% of the drug in undivided preparation does not fall under the purview of the NDPS Act. The petitioner is a licensed drug dealer having a license to sell, stock or exhibit the drugs vide a valid licence granted to him. The petitioner is ready to join the investigation and to abide by all the terms and conditions, which the Court may impose; hence, it has been prayed that the petitioner be released on interim bail during the pendency of the reference.

5. I have heard Mr. Vijay Kumar Arora, learned counsel for the petitioner and Mr. Ajit Sharma, learned Deputy Advocate General, for the respondent/State.

6. Mr Vijay Kumar Arora, learned counsel for the petitioner submitted that the petitioner is innocent and he was falsely implicated. Assuming the prosecution case to be true, the petitioner was a licensed drug seller. He can be held liable under the Drugs and Cosmetics Act for violation of the licence but not under the NDPS Act. He prayed that the present petition be allowed and the petitioner be released on interim bail. He relied upon the judgment of a Co-ordinate Bench of this Court in Kesar Singh versus State of H.P. and Devi Dass versus State of H.P. in Cr.MP(M) Nos. 2619 and 3004 of 2023 decided on 01.03.2024 in support of his submission.

7. Mr. Ajit Sharma, learned Deputy Advocate General for the respondent/State submitted that the petitioner was found to have supplied the drugs to the main accused in contravention of the provision of the licence granted to him. The contravention of the licence is punishable under Section 21 of the NDPS Act and there is no bar for the prosecution of such person under the NDPS Act; hence, he prayed that the present application be dismissed.

8. I have given considerable thought to the submissions made at the bar and have gone through the records carefully.

9. It was held in Union Territory of Ladakh v. Jammu & Kashmir National Conference, 2023 SCC OnLine SC 1140 that mere reference to a Larger Bench does not unsettle the declared law. The High Courts and the Tribunals should not stay their hands merely because a reference was made to a larger bench. It was observed:

"32.[I]t is settled that mere reference to a larger Bench does not unsettle declared law. In Harbhajan Singh v. State of Punjab, (2009) 13 SCC 608, a 2-judge Bench said:

"15. Even if what is contended by the learned counsel is correct, it is not for us to go into the said question at this stage; herein cross-examination of the witnesses had taken place. The Court had taken into consideration the materials available to it for the purpose of arriving at a satisfaction that a case for exercise of jurisdiction under Section 319 of the Code was made out. Only because of the correctness of a portion of the judgment in Mohd. Shafi [(2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889 : (2007) 4 SCR 1023 : (2007) 5 Scale 611] has been doubted by another Bench, the same would not mean that we should wait for the decision of the larger Bench, particularly when the same instead of assisting the appellants runs counter to their contention." (emphasis supplied)

33. In Ashok Sadarangani v. Union of India, (2012) 11 SCC 321, another 2-Judge Bench indicated:

"29. As was indicated in the Harbhajan Singh case [Harbhajan Singh v. State of Punjab, (2009) 13 SCC 608 : (2010) 1 SCC (Cri) 1135], the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in Gian Singh's case [(2010) 15 SCC 118] need not, therefore, detain us. Till the

decisions cited at the Bar are not modified or altered in any way, they continue to hold the field." (emphasis supplied)

34. On the other hand, when it was thought proper that other Benches of this Court, the High Courts and the Courts/Tribunals below stay their hands, the same was indicated in as many words, as was the case in *State of Haryana v. G D Goenka Tourism Corporation Limited*, (2018) 3 SCC 585:

"9. Taking all this into consideration, we are of the opinion that it would be appropriate if in the interim and pending a final decision on making a reference (if at all) to a larger Bench, the High Courts be requested not to deal with any cases relating to the interpretation of or concerning Section 24 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. The Secretary-General will urgently communicate this order to the Registrar General of every High Court so that our request is complied with.

10. Insofar as the cases pending in this Court are concerned, we request the Benches concerned dealing with similar matters to defer the hearing until a decision is rendered one way or the other on the issue whether the matter should be referred to a larger Bench or not. Apart from anything else, deferring the consideration would avoid inconvenience to the litigating parties, whether it is the State or individuals." (emphasis supplied)

35. We are seeing before us judgments and orders by High Courts not deciding cases on the ground that the leading judgment of this Court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgments of this Court on the score that a later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge Bench in *National Insurance Company Limited v. Pranay Sethi*, (2017) 16 SCC 680. The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it." (Emphasis supplied)

10. The earliest decision dealing with this aspect exhaustively is *Praduman Justa v. State of H.P.*, 2016 SCC OnLine HP 1058; 2016 Cr. L. J. 3639, wherein the Court held that a wholesale drug dealer, retailer or their employee possessing a proper and valid licence for dealing in the drugs can be held liable under the NDPS Act for violation of the terms of the license. It was observed:

"33. Now, insofar as the contention of the petitioner that the violation, if any, falls within the ambit of Drugs and Cosmetic Act and the Rules framed thereunder and, therefore, the petitioner cannot be punished or even tried under the Narcotic Drugs and Psychotropic Substances Act, the same is equally without any force in view of the detailed judgment rendered by a learned Division Bench of the Punjab & Haryana High Court in Inderjeet Singh @ Laddi v. State of Punjab, 2015 (1) Crimes 308, wherein it was categorically held that the mere fact that the drugs which are covered under 'manufactured drugs' under the NDPS Act and the NDPS Rules as mentioned in the Schedule of the NDPS Act and Schedule I of the NDPS Rules and are also covered by the Drugs and Cosmetic Act and the Rules framed thereunder would not mean that the offender can be penalized only under the Drugs and Cosmetic Act and the Rules and not proceeded against the NDPS Act and the NDPS Rules, the stringent provisions of the latter can be resorted to."

11. Therefore, the plea of the petitioner that his act at the worst would constitute an offence under the provisions of the Drugs and Cosmetics Act and the Rules framed thereunder and that he cannot be held liable for the commission of an offence punishable under NDPS Act is not acceptable.

12. It was laid down by this Court in Om Pal v. State of H.P. 2014 Cri LJ 4147 that a drug containing Codeine Phosphate is a manufactured drug covered under the ND & PS Act. This judgment was followed in Praduman Justa v. State of Himachal Pradesh 2016 Cri LJ 3639 and it was held that a drug containing Codeine Phosphate cannot be excluded on a percentage basis from the definition of the manufactured drugs; hence, till the reference is answered by the Larger Bench, the position of law is that the Codeine Phosphate falls within the definition of manufactured drugs within the meaning of Section 21 and the violation of the licence granted under Drugs and Cosmetics Act would be punishable under Section 21 of NDPS Act.

13. Reliance upon Kesar Singh (supra) is misplaced because the judgment had not noticed Praduman Justa (supra) and as per the judgment of the Hon'ble Supreme Court in Union Territory of Ladakh (supra), the earliest judgment has to be considered which is Praduman Justa (supra). Hence, Kesar Singh cannot be preferred to Praduman Justa (supra) and this Court is bound by Praduman Justa (supra).

14. The police had collected the bank detail record of the main accused which shows the transfer of 9,600/- to the account of the petitioner. This prima facie shows his involvement in the commission of an offence under punishable Section 21 read with Section 29 of NDPS Act. The rigours of Section 37 of the NDPS Act apply to the present case since the main accused was found in possession of a commercial quantity of Codeine Phosphate and the petitioner had abetted the commission of the offence by him. There is no material on record to show that the petitioner has not committed the offence or that he is not likely to commit the offence in case of release on bail; hence, he has not satisfied the conditions laid down under Section 37 of the NDPS Act.

15. It was laid down by the Hon'ble Supreme Court in Mukesh Kishanpuria versus State of West Bengal, 2010 (15) SCC 154, that the power to grant regular bail includes the power to grant interim

bail pending final disposal of the regular bail petition. Such a power is inherent in the power to grant bail. It was observed:

"3. However, the petitioner may apply for regular bail before the Court concerned and along with the said application, he may file an application for interim bail pending disposal of the regular bail application. We have made it clear on a number of occasions that the power to grant regular bail includes the power to grant interim bail pending the final disposal of the regular bail application. This power is inherent in the power to grant bail, particularly in view of Article 21 of the Constitution of India. We are of the opinion that in view of Article 21 of the Constitution, a person should not be compelled to go to jail if he can establish prima facie that in the facts of the case he is innocent."

(Emphasis supplied)

16. Therefore, interim bail can be sought in cases, where the Court has the power to grant regular bail and interim bail is granted to ensure that the petitioner is not sent to custody until the decision of his bail petition. In the present case, the rigours of Section 37 of the NDPS Act apply to the present case and the petitioner was unable to satisfy the rigours; hence, he is not entitled to interim bail.

17. It was submitted that the rigours of Section 37 of the NDPS Act do not apply to the Constitutional Courts. This submission is only stated to be rejected. Hon'ble Supreme Court set aside the order of the High Court which had granted bail without considering Section 37 of the NDPS Act in *Union of India v. Jitendra Giri*, 2022 SCC OnLine SC 1870 and observed:

"2. Arising out of the same FIR, Criminal Appeal No 46 of 2022 was allowed by an order dated 7 January 2022 passed by this Court [*Narcotics Control Bureau v. Ajeet Kumar Yadav*]. The order of the Court is reproduced below for convenience of reference:

"Leave granted.

We have heard the learned counsel for the parties. The impugned order is unsustainable as does not take into consideration the statutory mandate of Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'NDPS Act'). In view of the aforesaid position, the impugned order is set aside and the respondent is directed to surrender within a period of seven days. If the respondent does not surrender within the aforesaid time, the investigation officer would take immediate and necessary steps to detain and arrest the respondent.

We also restore B.A. No. 3081 of 2021 to the file of the High Court with a direction to decide the bail application afresh in accordance with law and without being influenced by the impugned order. We clarify that we have not expressed any opinion

on the merits. It will be open to the respondent to move an application for early listing of bail application after the respondent surrenders. The appeal is partly allowed, setting aside the impugned order on the aforesaid terms with the direction of a fresh decision.

All pending applications stand disposed of."

3. The Single Judge of the High Court of Jharkhand has allowed the applications for bail without even advertting to the provisions of Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

4. The Office Report indicates that the respondents have been served.

5. Following the directions which were issued on 7 January 2022 in Criminal Appeal No. 46 of 2022, we pass the following order:

(i) The impugned orders of the High Court of Jharkhand dated 26 July 2021 in Bail Application No 6238 of 2021 and 23 June 2021 in Bail Application No 4881 of 2021 are set aside;

(ii) The respondents are directed to surrender within a period of seven days and, if they fail to do so within the stipulated period, the Investigating Officer would take immediate and necessary steps to detain and arrest the respondents;

(iii) Bail Application Nos 6238 of 2021 and 4881 of 2021 are restored to the file of the High Court with a direction to decide the applications afresh without being influenced by the impugned order; and

(iv) This Court has not expressed any opinion on the merits of the bail applications and it will be open to the respondents to move an application for early listing after they surrender.

6. The appeals are allowed in the above terms."

18. It was held in *Union of India v. Ajay Kumar Singh*, 2023 SCC OnLine SC 346 that the bail cannot be granted without complying with the requirement of Section 37 of the NDPS Act. It was observed:

4. This apart, it is noticed that the High Court, in passing the impugned order of bail, had lost sight of Section 37 of the NDPS Act, which, inter alia, provides that no person accused of an offence involving commercial quantity shall be released on bail unless the twin conditions laid down therein are satisfied, namely, (i) the public prosecutor has been given an opportunity to oppose the bail application; and (ii) the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any such offence while on bail.

15. For the sake of convenience Section 37(1) is reproduced hereinbelow: --

"37. Offences to be cognizable and non-bailable. -

(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for 2[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

16. In view of the above provisions, it is implicit that no person accused of an offence involving trade in a commercial quantity of narcotics is liable to be released on bail unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on bail.

19. It was held in *State of Meghalaya v. Lalrintluanga Sailo*, 2024 SCC OnLine SC 1751 that the grant of bail without considering Section 37 of the NDPS Act is impermissible. It was observed:

"5. There cannot be any doubt with respect to the position that in cases involving the commercial quantity of narcotic drugs or psychotropic substances while considering the application of bail, the Court is bound to ensure the satisfaction of conditions under Section 37(1)(b)(ii) of the NDPS Act. The said provision reads thus: --

"37(1)(b)(ii)- where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

6. While considering the cases under NDPS Act, one cannot be oblivious of the objects and reasons for bringing the said enactment after repealing the then existing laws relating to Narcotic drugs. The object and reasons given in the acts itself reads thus:--

"An act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived

from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith."

In the decision in *Collector of Customs, New Delhi v. Ahmadaliev Nodira* (2004) 3 SCC 549, the three-judge bench of this Court considered the provisions under Section 37(1)(b) as also 37(1)(b)

(ii) of the NDPS Act, with regard to the expression "reasonable grounds" used therein. This Court held that it means something more than the prima facie grounds and that it contemplates substantial and probable causes for believing that the accused is not guilty of the alleged offence. Furthermore, it was held that the reasonable belief contemplated in the provision would require the existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

As relates to the twin conditions under Section 37(1)(b)(ii) of the NDPS Act, viz., that, firstly, there are reasonable grounds for believing that the accused is not guilty of such offence and, secondly, he is not likely to commit any offence while on bail it was held therein that they are cumulative and not alternative. Satisfaction of the existence of those twin conditions had to be based on the 'reasonable grounds', as referred to above.

7. In the decision in *State of Kerala v. Rajesh* (2020) 12 SCC 122, after reiterating the broad parameters laid down by this Court to be followed while considering an application for bail moved by an accused involved in offences under the NDPS Act, in paragraph 18 thereof this Court held that the scheme of Section 37 of the NDPS Act would reveal that the exercise of power to grant bail in such cases is not only subject to the limitations contained under Section 439 of the Code of Criminal Procedure, but also subject to the limitation placed by Section 37(1)(b)

(ii), NDPS Act. Further, it was held that in case one of the two conditions thereunder is not satisfied the ban for granting bail would operate.

8. Thus, the provisions under Section 37(1)(b)

(ii) of the NDPS Act and the decisions referred supra reveal the consistent view of this Court that while considering the application for bail made by an accused involved in an offence under NDPS Act a liberal approach ignoring the mandate under Section 37 of the NDPS Act is impermissible. Recording a finding mandated under Section 37 of the NDPS Act, which is the sine qua non for granting bail to an accused under the NDPS Act cannot be avoided while passing orders on such applications."

20. Therefore, it is impermissible to say that the provisions of Section 37 of the NDPS Act do not apply to the Constitutional Courts.

21. In view of the above, the petitioner is not entitled to interim bail. Hence, the present application fails and the same is dismissed.

22. The observation made herein before shall remain confined to the disposal of the present application and will have no bearing whatsoever on the merits of the main case.

(Rakesh Kainthla) Judge 25th October, 2024 (saurav pathania)