

Gavranjeet Singh @ Gavrana vs State on 1 November, 2017

Author: Pushpendra Singh Bhati

Bench: Pushpendra Singh Bhati

HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR

S.B. Criminal Misc. Bail No. 3790 / 2017

Gavranjeet Singh @ Gavrana S/o Jarnail Singh, By Caste Jat Sikh,
R/o Santpura, Tehsil Sangeria District Hanumangarh. (At Present
Lodged in Sub- Jail, Sangeria)

----Petitioner

Versus

The State of Rajasthan

----Respondent

Connected With

S.B. Criminal Misc. Bail No. 4979 / 2017

Kanwar Pal Singh S/o Shri Jagtar Singh, R/o 39 PS, Police Station-
Raisingh Nagar, District Sri Ganganagar. Presently House No. 4
Kunj Vihar, Padampur Road, Sriganganagar (Presently Lodged At
Central Jail Sriganganagar)

----Petitioner

Versus

The State of Rajasthan

----Respondent

S.B. Criminal Misc. Bail No. 5055 / 2017

Mahendra Singh S/o Hanuman Singh, By Caste Rajput, Resident of
Dhingtaniya Tehsil Sadulshahar District Sri Ganganagar. (At
Present Lodged in Sub Jail, Sangaria).

----Petitioner

Versus

The State of Rajasthan.

----Respondent

For Petitioner(s) : Mr.H.S.S. Kharlia, Senior Advocate assisted
by Mr.Trilok Singh Rathore

Mr.H.S.Sidhu, Mr.R.S.Choudhary

For Respondent(s) : Mr.V.S.Rajpurohit PP for the State.

HON'BLE DR. JUSTICE PUSHPENDRA SINGH BHATI

(2 of 23) [CRLMB-3790/2017] Order Reserved on 05/10/2017 Pronounced on 01/11/2017

1. The petitioners have moved these bail applications under Section 439 Cr.P.C.

2. The allegations in FIR No.107/2017 (S.B.Criminal Misc.

Bail Application No.3790/2017) registered at Police Station Sangeria pertain to the offence under Sections 8/21 and 25 of the NDPS Act and Section 18 C/27 B of the Drugs Act; in FIR No.244/2017 (in S.B.Criminal Misc. Bail Application No.4979/2017) registered at Police Station Jawahar Nagar pertain to the offence under Section 8/21 of the NDPS Act and; in FIR No.153/2017 (in S.B.Criminal Misc. Bail Application No.5055/2017) registered at Police Station, Sangaria, District Hanumangarh pertain to the offences under Section 8/21 of the NDPS Act and Section 18C/27B of the Drugs Act.

3. In S.B.Criminal Misc. Bail Application No.3790/2017, on 18.02.2017, when petitioner-Gavranjeet Singh @ Gavrana was caught in the nakabandi, 199 bottles of Wincerex Cough Syrup were recovered. The bail application of the petitioner was rejected by the learned court below on 25.04.2017 on the ground that the Wincerex Cough Syrup fell under the provisions of Sections 8/21 & 25 of the NDPS Act and Section 18 C/27 B of the Drug and Cosmetics Act, and was thus, a serious offence.

4. In S.B.Criminal Misc. Bail Application No.4979/2017, on 08.05.2017, when petitioner-Kanwar Pal Singh was caught in the (3 of 23) [CRLMB-3790/2017] nakabandi, 34 bottles of Codeine Phosphate Triprolidine Hydrochloride Syrup Raxee 100 ml were recovered. The bail application of the petitioner was rejected by the learned court below on 16.05.2017.

5. In S.B.Criminal Misc. Bail Application No.5055/2017, on 19.03.2017, when petitioner-Mahendra Singh was caught in the nakabandi, 250 bottles of Wincerex and 298 strips of Carisoma tablets were recovered. The bail application of the petitioner was rejected by the learned court below on 03.04.2017.

6. Learned counsels for the petitioners have shown to this Court the definition of 'Narcotic Drug', as prescribed under Section 2(xiv) of the NDPS Act and also the definition of 'manufactured drug' as prescribed under Section 2(xi) of the NDPS Act, which read as under:-

"2. Definitions.-

(xiv) "narcotic drug" means coca leaf, cannabis (hemp), opium poppy straw and includes all manufactured drugs;

(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, but does not include any narcotic substance or (4 of 23) [CRLMB-3790/2017] 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 not be a manufactured drug;"

7. Learned counsels for the petitioners also drawn the attention of this Court to the S.O. 1055(E) dated 19.10.2001, whereby the Narcotic Drugs and Psychotropic Substances and their small quantity and commercial quantity have been defined.

8. The cough syrup in question contained codeine, which is at serial No.28 of the Schedule aforementioned. The Chemical Name of Codeine is 3-o-methylmorphine. The small quantity in the Schedule for the same is 5 grams and commercial quantity is 100 grams.

9. From the record, it is clear that Wincerex contained Codeine Phosphate and Triprolidine Hydrochloride Syrup. Each bottle contained 100 ml. Wincerex, and therefore, there was 200 grams of Codeine Phosphate. Thus , in one of the petitions relating to recovery of 199 bottles, there was 39.80 grams of Codeine Phosphate in totality, and 4.97 grams of Triprolidine, with total content of 44.77 grams.

10. Thus, learned counsels for the petitioners were trying to point out that from the Schedule, as mentioned above, the commercial quantity of Codeine was 100 grams, whereas in one of the cases in hand relating to the recovery of 199 bottles of (5 of 23) [CRLMB-3790/2017] Wincerex, the quantity of Codeine Phosphate and Triprolidine Hydrochloride was only 44.77 grams; and in the case of recovery of 34 bottles, the said quantity was 340 mg i.e.10 mg per bottle;

and the third case relates to the recovery of 250 bottles of Wincerex and 298 strips of Carisoma Tablets.

11. Learned counsels for the petitioners have argued that certain precedent laws against the petitioners carried commercial quantity of Codeine Phosphate, which is not there in the present cases, and therefore, the case of the present petitioners was clearly distinguishable from the one in the said precedent laws, where the commercial quantity of Codeine Phosphate was found to be the sufficient ground for denying the bail to the accused.

12. Learned counsels for the petitioners have also shown to this Court the Schedule of appended to the Drugs and Cosmetics Rules, 1945, which includes Codeine, its salts and derivatives as prescription drugs in Schedule-H and Triprolidine in Schedule-G. Thus, as per learned counsels for the petitioners the violation, on the face of it, could have been of the Drugs and Cosmetics Rules, 1945.

13. Learned counsels for the petitioners have relied upon the precedent law laid down by the Hon'ble Punjab and Haryana High Court in Sandeep Kumar @ Shinda Vs. State of Punjab (CRM-M-14264/2013 decided on 13.05.2016), relevant paras of which read as under:-

"2. Tersely put, the case of prosecution is that on November 22, 2012 at about 12 noon, near the area of Street No.5-B, Near Bhatti Road, Bathinda, petitioner was (6 of 23) [CRLMB-3790/2017] allegedly found in possession of 4 bags containing 200 bottles of Rexcof weighing 100 mls in each bag i.e. 800 bottles in total regarding which he could not produce any permit, licence or bill. Accordingly, after taking samples and completion of other formalities, he was arrested in this case and FIR in question was registered against him.

3. The contention of learned counsel for the petitioner is that the petitioner is the sole proprietor of firm M/s New Himanshu Pharma, 4932, Balaji Market, Gandhi Market, Bathinda and is a registered Pharmacist. He has been issued licence by the Registrar of Punjab State Pharmacy Council vide certificate No. 16828, dated 17.05.1995 (Annexure P-2). He is also a holder of drug licenses bearing No.22770, dated 21.08.2012 (Annexure P-3) and 22556, dated 21.08.2012 (Annexure P-4), which have been issued by the Directorate Health and Family Welfare, Punjab vide letter dated 23.08.2012 (Annexure P-5).

4. Learned counsel for the petitioner further contends that the medicine Rexcof is a product of Cipla, a known pharmaceutical company and the said company has displayed it i.e. Rexcof to be schedule "H" drug. Even, the Drug Controller General of India vide notification No. SO- 826(E) dated 14.11.1985 issued under the NDPS Act has also exempted certain drugs which are manufactured one containing narcotic drug to the extent permitted in respect to Codeine in entry No. 35 of the said schedule. While referring to the judgement captioned as "Jagjit Singh vs. State of Punjab" decided on 16.07.2012 in CRM-M-5632 of 2010 (O&M), learned counsel for the petitioner further contends that the drugs Codeine-Phosphate being covered at Serial No. 35 of the notification No.SO-826(E) dated

14.11.1985 and, as such, is not covered under the provisions of NDPS Act.

9. Here, it would also be pertinent to mention that Drug Controller General India, Directorate General of Health Services, New Delhi has also written letters to all the State Drugs Controller in India on 26.10.2005 vide letter (Annexure P-10) regarding sale of cough linctus containing Codeine Phosphate, which clearly clarifies that by virtue of the fact that cough syrups preparation contain Codeine and other salts, they do not fall under the provisions of NDPS Act and Rules of 1985 but they fall under Schedule "H" of the Drugs and Cosmetics Rules and are governed by the said Rules. It has further been clarified in the said letter that though stocking and sales of these drugs do not attract the provisions of NDPS Act and Rules 1985, however, these formulation are prescriptions drugs and are (7 of 23) [CRLMB-3790/2017] to be dispensed on the prescription of a registered practitioner(s) only. It has further been clarified that such a drug containing Codeine comes within

the purview of entry No. 35 and, as such, not covered under the provisions of NDPS Act.

10. Rexcof is a drug of Cipla Limited, Mumbai. It has also clarified to all its Super Distributors vide (Annexure P-11) that Rexcof syrup (Codeine Phosphate 10mg+CPM 4mg/5ml) is exempted from the provisions of NDPS Act and Rules there under. In this regard reference has been given to the government notification No.SO-826(E), dated 14.11.1985.

11. It would also be important to note that a committee was constituted by the State Government to see whether such like cases are covered under the provisions of NDPS Act or under Drugs and Cosmetics Act, 1940. Jagjit Singh vs. State of Punjab (supra) relied upon by the learned counsel for the petitioner almost covers the instant case. In the said case, the drug containing Codeine-Phosphate and chlorpheniramine Maleate was recovered. The case was referred to the Committee for its report and the Committee vide its report gave its opinion which reads as under:-

"Review committee have gone through the case file and concerned record of this case. The Drugs Codeine Phosphate and chlorpheniramine Maleate in which the Drug Codeine Phosphate is covered at No. 35 of Notification No. 826 E Dtd. 14.11.1985 & hence not covered under NDPS Act, 1985 being in the form of Drugs dosage formulation whereas Drugs Chlorpheniramine, Maleate is a schedule H Drug under Drugs and Cosmetics Act, 1940. The Drug Dextropropoxyphene Hcl is covered at No. 87 of Notification No. 826 E Dt. 14.11.1985 & hence not covered under NDPS Act, 1985 being in the form of Drugs dosage formulation. Whereas Drugs Dicyclomine Hcl and Paracetamol are schedule H Drugs under Drugs and Cosmetics Act, 1940. As per record M/s Arsh Medical Agencies Ajit Road opp. St. No. 25/A Bathinda, Distt. Bathinda bearing Drugs license No. 18108-OW & 17906-W granted on 27.1.2006 which are valid upto 26.1.2011 & the firm has further applied for its renewal vide challan No. 503566 dtd. 25.2.2011. In these licenses Sh. Jagjeet Singh (8 of 23) [CRLMB-3790/2017] S/o Sh. Jaskaran Singh is the sole prop. Of the firm and Sh. Pilot Kumar S/o Sh. Gheeta Ram is the competent person of the firm. At the time of occurrence petitioner Jagjit Singh s/o Jaskaran Singh R/o Ghudda Distt. Bathinda did not produce valid drugs licences and purchase bills for drugs recovered from him on date of recovery. Hence Committee is of the opinion that Jagjeet Singh may be prosecuted under Section Drugs and Cosmetics Act, 1940 and Rules 1945".

12. Adverting to the facts of the case in hand, the recovery of 800 bottles of Rexcof even though, it contains Codeine- Phosphate and chlorpheniramine Maleate being covered at Serial No. 35 of the notification No. SO-826(E), dated 14.11.1985 do not attract punitive provisions of NDPS Act, especially, in the circumstances that the petitioner is a holder of the licence and has purchased the medicines through valid bill.

13. In the light of what has been discussed above, the petition is allowed. Consequently, FIR No.254, dated 22.11.2012, under Sections 22 of the NDPS Act along with all consequential proceedings, which have been arisen therefrom stand quashed."

14. Learned counsels for the petitioners further relied upon the judgment in the case of Ashok Kumar Thru (Brother) Rakesh Kumar Pawar Vs. Union of India Thru Ministry of Home New Delhi & Ors., (Case U/s 482/378/407 No.2976/2014 decided on 15.10.2014), relevant paras of which read as under:-

"47. Central Notification Dated 14.11.1985 and published in Gazette of India has been issued under Section 2(xi)

(b) of N.D.P.S.Act wherein "Manufactured Drugs" have been mentioned. Relevant portion of notification, Annexure-5, issued under N.D.P.S.Act reads as under:

"S.O.826(E), dated 14th November, 1985.-- In exercise of the powers conferred by sub-clause

(b) of clause (xi) of Section 2 of the Narcotic (9 of 23) [CRLMB-3790/2017] Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby declare the following narcotic substance and preparation to the (be) manufactured drugs, namely:

xx (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 not more than 2.5 percent in undivided preparations and which have been established in therapeutic practice." (emphasis supplied by me)

48. The above noted provision made in the notification indicates that if a compound contains not more than 100 milligrams of Codeine per dosage unit and with a concentration of not more than 2.5 per cent in undivided preparations of the compound, it would not be a Manufactured Drug under Section 2(xi)(b) of the N.D.P.S.Act.

49. If the facts of the present case are applied, Phensedyl contains 10 mg of Codeine per dosage unit as is evident from the above extracted licence, Annexure No.6, granted in favour of the licenced manufacturer M/s Abbott Healthcare Pvt.Ltd.

50. It needs to be highlighted that 'narcotic drug' as defined under Section 2(xiv) includes all "manufactured drugs".

51. Under the Notification issued under Section 2(xi)

(b) dated 14.11.1985 (Serial No.35) issued by the Central Government in Official Gazette, extracted above, a dilution or preparation with specified limit of Codeine per

dosage unit cannot be considered to be a 'manufactured drug'. It thus follows that if provisions of Section 2(xiv), and 2(xi)

(b) are considered in context of notification dated 14.11.1985, it has to be concluded that 'Phensedyl Cough Syrup', per se would not be a "Narcotic drug" or "Manufactured Drug."

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52. It appears that there was an apprehension that on account of presence of Codeine in drug like Phensedyl, the compound would be treated as a Narcotic Substance. It appears that so as to clarify the issue, Directorate General of Health Services addressed a memo to all the State Drugs Contollers dated 26.10.2005 in which the following was clarified :

"As you are aware there are number of Cough preparations like Corex of M/s Prizer Limited, Mumbai, Phensedyl of M/s. Nicholas Piramal India Limited Mumbai, Codokuff of M/s. German Remedies, Codeine Linctus of M/s. Zydus Alidac etc. moving in inter state commerce. These preparations contain among other drugs Codeine Phosphate 10mg as one of the ingredients. By virtue of the fact that these preparations contain Codeine and it salts they do not fall under the provisions of NDPS Act and Rules of 1985 but they fall under Schedule H of the Drugs & Cosmetics Rules and are governed by the said rules. Though stocking and sale of these drugs do not attract the provisions of NDPS act and Rules 1985 however these formulations are prescriptions drugs and are to be dispensed on the prescription of a registered Medical Practitioners only. Further you may be already aware that under notification number S.O.826 (E) dated 14th Nov, 1985 under the Narcotic Drugs and Phychotropic Substances Act and Rules 1985 certain preparations are exempted as manufactured drugs provided the preparations contain the Narcoti drug to the extent permitted . In respect of Codeine under entry no.35 it is stated that Codeine and Ethyl Morphine and their salts including Dionine all dilutions and preparations are considered to be manufactured drugs except those which are compounded with one or more other ingredients and contianing not more than 100 milligrammes of the drug per dosages unit and with a concentration of not more than 2.5 percent in-undivided preparations and which have been established in therapeutic practice."

53. The position was reiterated vide communication issued in March, 2009 (Annexure-8).

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54. Perusal of above extracted portion of the memo indicates that it has been clarified by the highest authority under the D & C Act, in context of notification dated 14.11.1985, portion whereof has been extracted above, that preparations containing Codeine Phosphate 10 mg per dosage unit as one of the ingredients would not fall under the provisions of N.D.P.S. Act and N.D.P.S. Rules, but they fall under Schedule 'H' of the D & C Rules and are governed by the said rules. These formulations are

prescription drugs and are to be dispensed on the prescription of a registered medical practitioner only.

57. Allegation against the petitioner is mainly contained in para-49 of the complaint. It has been alleged that the petitioner with other known and unknown persons entered into a criminal conspiracy and 'abetted each other to purchase and sell Phensedyl Cough Syrup containing Codeine Phosphate - a Narcotic Drug under N.D.P.S.Act, without proper bills and documents and the accused has pressurized various stockists to sell Phensedyl Cough Syrup in huge quantity to various parties and has helped Accused no.1 to purchase and sell it without bills and the accused thereby committed the offence.'

60. Case of the petitioner, as noted above, is that the petitioner has not been found abetting commission of offence involving possession of Narcotic Drug. Rather Phensedyl Cough Syrup is a Schedule 'H' drug defined under D & C Rules. Phensedyl contains "Codeine", which only in isolation would be a Narcotic Substance. In this regard provisions of D & C Act need to be considered.

62. Under the provisions of D & C Act any drug containing "Codeine" or other chemicals/substances reflected in schedule 'H', are required to be regulated. Section 18 (c) of the D & C Act provides as under:

"Prohibition of manufacture and sale or certain drugs and cosmetics. -

From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any other person on his behalf-

(a) x x x x x x x x x x

(b) x x x x x x x x x x (12 of 23) [CRLMB-3790/2017]

(c) manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale, or distribute any drug or cosmetic, except under, and in accordance with the conditions of, a licence issued for such purpose under this Chapter."

(emphasis supplied by me)

65. Section 28-A and 28-B of the D & C Act provide for penalty for not keeping documents etc. Provisions of Section 28-A and 28-B of the Act read as under :

"Section 28-A. Penalty for not keeping documents, etc., and for non-disclosure of information.--

Whoever without reasonable cause or excuse, contravenes the provisions of section 18- B shall be punishable with imprisonment for a term which may extend to one

year or with fine which may extend to one thousand rupees or with both.

Section 28-B. Penalty for manufacture, etc., of drugs or cosmetics in contravention of section 26-A.--

Whoever himself or by any other person on his behalf manufactures or sells or distributes any drug or cosmetic in contravention of the provisions of any notification issued under section 26A, shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine which may extend to five thousand rupees."

67. The above noted provisions from the D & C Rules, if considered cumulatively in context of Phensedyl Cough Syrup containing codeine, it transpires that Phensedyl is a Schedule 'H' drug, because Schedule 'H' includes "codeine" as one of the ingredients. Such Schedule 'H' drug (such as Phensedyl Syrup) can be manufactured, distributed, sold, stocked or exhibited etc. only under licence issued for that purpose under Section 18(c). Section 18-B of the D & C Act provides for maintenance of records and furnishing of information by the licensee and the same is required to be furnished to any officer or authority under the D & C Act, if such information is required.

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73. Phensedyl contains Codeine, a Narcotic Substance, however, within the prescribed limits, as per condition of licence (Annexure 6) granted to the manufacturer. The notification issued under Section 2 (xi)(b) of the N.D.P.S.Act, dated 14.11.1985 itself permits use of Codeine in manufacture of the drug, however upto 100mg per dosage unit. It is not the case of the respondents that the bottles recovered from the possession of the co- accused violated the said provisions of the notification issued under the N.D.P.S.Act.

74. Considering various aspects of this case in context of N.D.P.S.Act and D & C Act, this Court is of the considered opinion that Phensedyl Cough Syrup would not constitute a Narcotic Drug, because it is not Codeine (a narcotic drug). Codeine is only one of the ingredients, which is required for therapeutic purposes. Codeine contained in Phensedyl syrup is within the prescribed limits and percentage, as prescribed under Central Government Notification issued under the N.D.P.S.Act.

75. It cannot be disputed that Phensedyl is a Schedule 'H' drug, under the D & C Act. Conditions under the D & C Act are required to be complied with by the licenced stockist. For contravention of the said provisions, surely provisions of N.D.P.S.Act cannot be invoked to conclude that the recovered article has become a Narcotic Drug. It would be an offence punishable under the D & C Act, under the relevant provisions which are extracted above.

92. Taking a cue from the above extracted portion of the judgment in context of the present case, it is observed that the drug/substance at issue is not included under Schedule I appended to the N.D.P.S. Rules and, therefore, provisions of Section 8 of the N.D.P.S.Act would have no application. When the above noted observations of the Hon'ble Supreme Court are considered in context of

Phensedyl Syrup containing codeine, opinion of this Court is re-enforced because extent of codeine used in Phensedyl Syrup is well within the prescribed limit, prescribed under Notification dated 14.11.1985 (Annexure 5), issued under Section 2(xi)(b) of the N.D.P.S.Act.

94. This Court is of the opinion that the Hon'ble Supreme Court of India has distinguished the Punjab and Haryana High Court judgments in Md.Sahab Uddin's case (supra). The judgments rendered by the Punjab and Haryana High Court are in consideration of similar, rather identical facts as the present case. The Hon'ble Supreme Court of India, therefore, by implication has not negated the law laid down (14 of 23) [CRLMB-3790/2017] by the Punjab and Haryana High Court in the case of Deep Kumar (supra) and Rajeev Kumar (supra).

101. So far as the contention of learned counsel for the respondents and learned counsel amicus curiae to the effect that drugs such as Phensedyl are being misused by youngsters is concerned, suffice it to say that merely on such social considerations, interpretation of law cannot be changed. All penal statutes are required to be deciphered and applied strictly. It is for the legislature to provide relevant safeguards so as to ensure that the drugs under the D & C Act are used only for therapeutic purposes. In the present case no substantive material has been shown to indicate that the drug was being sold to addicts.

104. This Court is of the considered opinion that even if all the allegations made against the petitioner are accepted, no offence under Section 8/21 read with Section 29 of the N.D.P.S.Act, is made out.

15. Notification No.S.O.826(E) dated 14.11.1985 issued by the Ministry of Finance (Department of Revenue) has also been shown to this Court, whereby the Central Government declared certain narcotic substances and preparations to be within the purview of manufactured drugs. The relevant para 35 of which reads 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 milligrammes of the drug/per dosage unit and with a concentration of not more than 2.5 per cent in undivided preparations and which have been established in therapeutic practice."

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16. Learned Public Prosecutor vehemently opposed the bail applications and has shown to this Court the precedent law laid down by the Hon'ble Punjab and Haryana High Court in Inderjeet Singh Vs. State of Punjab, reported in (2014) 4 CriCC 151, whereby the manufacturing drugs were declared to be within the purview of the NDPS Act.

17. Learned Public Prosecutor has also relied upon the judgment in the case of Devilal Vs. State of Rajasthan (S.B.Criminal Misc. II Bail Application No.2638/2016 decided on 01.06.2016), whereby a

coordinate Bench of this Hon'ble High Court has dealt with the judgments referred and has also placed reliance upon the precedent law laid down by the Hon'ble Apex Court in Mohd. Sahabuddin & Anr. Vs. State of Assam, reported in (2012) 13 SCC 491, and has also dealt with the judgments cited by learned counsel for the petitioner.

18. The order passed by the coordinate Bench of this Hon'ble High Court in Devilal Vs. State of Rajasthan (supra) reads as under:-

" The instant second application for bail has been filed under Section 439 Cr.P.C. on behalf of the petitioner, who is in custody in connection with F.I.R. No.38/2016, Police Station Sangariya, District Hanumangarh, for the offences under Sections 8/21, 22 of the N.D.P.S. Act and Sections 8C/27B(2) of the Drugs and Cosmetics Act.

The first bail application submitted on behalf of the petitioner was rejected by this Court on 24.2.2016 while investigation was still pending. Now post filing of chargesheet, this second bail application has been moved.

Learned counsel for the petitioner urged that medicinal preparations were recovered from the possession of the petitioner and thus, he can only be prosecuted under (16 of 23) [CRLMB-3790/2017] the provisions of Drugs and Cosmetics Act. He relied upon the order dated 16.9.2015 passed by the Hon'ble Single Bench of this Court in a bunch of bail applications led by S.B. Criminal Misc. Bail Application No.7976/2015 (Mahesh. vs. State of Rajasthan) wherein, dealing with a case involving similar recovery, the Hon'ble Single Bench of this Court held that Drugs and Cosmetics Act is competent and self sufficient Statute for dealing with the cases where drugs for personal consumption are recovered. He submitted that this Court in the above case has unequivocally held that unless it is alleged that the drugs were manufactured by an unregistered company or a company which does not have a license to do so or they contain psychotropic content in excess of permissible limit and were in a different form than as manufactured and packed to be sold as medicine by chemist and medical practitioner, the provisions of N.D.P.S. Act would ex-facie have no application whatsoever.

He urged that there are no such allegations of the prosecution so as to bring the recovered drugs under the umbrella of N.D.P.S. Act and, therefore, the petitioner deserves to be released on bail.

Learned Public Prosecutor vehemently opposed the submissions advanced by the learned counsel for the petitioner. He urged that pursuant to the notification issued by the Government of India in the year 2009, the argument that only the net percentage of psychotropic salt content of the medicinal preparation should be segregated so as to determine the exact weight of psychotropic salt contained in the medicinal preparation as against the gross volume of the seized drugs has no legs to stand whatsoever. He urged that the gross volume/weight of the medicinal

preparation has to be taken into account for determining whether it is covered in the small, non- commercial or commercial quantity. He urged that in the case at hand, the total weight of the psychotropic drug recovered from the petitioner's possession is well above the commercial quantity. Therefore, the restrictions of Section 37 of the N.D.P.S. Act clearly operate against the petitioner and, therefore, he does not deserve to be released on bail.

Heard and considered the arguments advanced by the learned counsel for the petitioner and learned Public Prosecutor. Perused the material available on record.

Following drugs were recovered from the petitioner :-

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(i) 1150 tablets Alprazolam gross weight 172.50 grams,

(ii) 1140 capsules Parvon spas.

As per Item No.178 of the Schedule appended to the N.D.P.S. Act, upto 5 grams is defined as small quantity, whereas upto 100 grams is quantified as non-commercial quantity for the salt Alprazolam. The gross weight of the Alprazolam tablets recovered from the petitioner's possession is 172.50 grams. Therefore, definitely the gross weight of the drug recovered from the petitioner was well above the commercial quantity. The Hon'ble Supreme Court, in the case of Union of India vs. Sanjeev V. Deshpande reported in 2014 Cr.L.R. (SC) 896 considered the controversy as to whether the content of psychotropic salt in the tablet could be separately counted for calculating the weight/volume of psychotropic substance in a medicinal preparation. The Honourable Supreme Court repelled the contention and held that the gross weight of the drug is to be counted and not merely the net percentage/ content of the salt in the medicinal preparation for finding out the actual weight of the drugs in reference to the Schedule under the N.D.P.S. Act.

The Single Bench order dated 16.9.2015 in the case of Mahesh (supra) was passed by this Court relying on various orders of Punjab & Haryana Court in the cases of (1) Ashwani Kumar. vs. State of Punjab reported in 2014(1) RCR (Criminal) 715 (P&H) and (2) Jasbir Singh. vs. State of Punjab reported in 2014(1) RCR (Criminal) 179 (P&H). The judgment of Single Bench of Punjab and Haryana High Court in the case of Jasbir Singh was passed by relying on the Supreme Court judgment in the case of State of Uttaranchal. vs. Rajesh Kumar Gupta reported in 2006 MANU (SC) 5034. The said judgment was expressly overruled in the case of Sanjeev V. Deshpande (supra) and is no longer a good law. Consequently, the judgments of Punjab & Haryana High Court cannot have any persuasive value because they were based on a Supreme Court judgment which has subsequently been overruled by a larger Bench.

The Hon'ble Supreme Court in the case of Mohd. Sahabuddin & Anr. vs. State of Assam reported in MANU/SC/0836/2012 considered an identical controversy involving recovery of cough syrup containing codeine phosphate in a bail matter and held as below while rejecting the bail application

of the accused :-

(18 of 23) [CRLMB-3790/2017] "5. The Learned Counsel for the Appellants, apart from making his submissions also filed written submissions on behalf of the Appellants. The Learned Counsel submitted that Appellants were only transporting cough syrup, that the content of codeine phosphate was less than 10 mg. (per dosage), namely, 5 ml. and, therefore, by virtue of Central Government Notifications bearing S.O.826(E) dated 14.11.1985 and G.S.R.40(E) published on 29.1.1993, no offence was made out under the provisions of the N.D.P.S. Act and, therefore, the rejection of the bail application by the learned Sessions Judge as well as by the High Court was not justified. The Learned Counsel placed reliance upon certain decisions of the High Court of Punjab and Haryana in support of his submissions. Reliance was also placed upon Rules 65, 97, 61(1) and 61(2) of the Drugs & Cosmetics Rules along with Section 27 of the Drugs & Cosmetics Act in support of his submissions. It was also contended that the Appellants have spent more than 180 days in custody since 17/18.2.2012 and were entitled for bail under Section 36A(4) of N.D.P.S. Act read with proviso (a) to Section 167(2) of Code of Criminal Procedure.

6. The bail application was opposed on behalf of the State contending that the seized materials, which admittedly contained codeine phosphate of prohibited quantity, were found concealed with household articles in the vehicle, that it was not the case of the Appellants that the seized pharmaceutical products were meant for supply to any dealer or shop to be sold by way of medicine under the prescription of approved medical practitioner and having regard to total quantity content of the prohibited substance, the plea of the Appellants that provisions of the N.D.P.S. Act are not attracted, cannot be accepted.

According to Learned Counsel for the State, the submission based on the number of days spent by the Appellants in the prison was not raised before the High Court and, therefore, the same cannot be a ground for consideration in this appeal.

(19 of 23) [CRLMB-3790/2017]

7. Having heard respective counsels and having perused the order of the Sessions Court as well as the High Court, at the very outset, we feel that to appreciate the gravity of the offence alleged against the Appellants, it is worthwhile to refer to the nature of materials seized, the total quantity and the extent of codeine phosphate contained therein which has been noted by the High Court in paragraph 34 of its order which can be usefully extracted hereunder:

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 the 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 (20 of 23) [CRLMB-3790/2017] 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 the 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 (21 of 23) [CRLMB-3790/2017] 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.

14. As far as the grievance raised on the ground that the Appellants were illegally detained beyond 24 hours by the police is concerned, the conclusion of the High Court having been based on the satisfaction reached by it, we do not find any scope to interfere with the same.

15. As far as the submission now made for the first time that the Appellants had been in jail for more than the minimum required period is concerned, since neither the Sessions Judge nor the High Court had the opportunity to (22 of 23) [CRLMB-3790/2017] examine the said claim made by the Appellants, we do not propose to deal with the same in this appeal.

16. When we refer to the decisions relied upon by the Learned Counsel for the Appellants, we find that none of the facts relating to those decisions are parallel to the facts of the present case. Those are all cases which were related to the persons who had valid licences and in the course of their regular business transaction when they were dealing with the pharmaceutical products which contained the prescribed permitted content of narcotic substance and when they were proceeded against for violations, the relief came to be granted in their case. We do not, therefore, find any scope to apply any of the ratios of those decisions to the facts of this case.

17. We do not find any merit in this appeal. The appeal fails and the same is dismissed. We, however, make it clear that whatever stated in this order is only for the purpose of dealing with the Appellants' application for grant of bail and we have not stated anything on the merits of the allegations levelled against the Appellants."

Considered in light of the above Supreme Court judgment, this Court has no hesitation in holding that the coordinate Bench of this Court in Mahesh (supra) appears to have passed the order without considering the above two Supreme Court judgments, particularly, the judgment in the case of Union of India. vs. Sanjeev V. Deshpande, which was delivered by a Larger Bench overruling the earlier judgment in Rajesh Kumar Gupta's case (supra). Therefore, Single Bench order dated 16.9.2015 in the case of Mahesh (supra) which runs contrary to the Supreme Court judgments on the very same issue cannot be accepted to be laying down a correct proposition of law.

As a consequence of the above discussion, this Court is of the firm opinion that as the quantity of the psychotropic drug recovered from the petitioner is well above the commercial quantity prescribed in the Schedule, the restrictions contained in Section 37 of the N.D.P.S. Act clearly operate against him and hence, he does not deserve to be released on bail.

(23 of 23) [CRLMB-3790/2017] Resultantly, the instant second bail application, being devoid of any merit, is hereby dismissed."

19. Learned Public Prosecutor also informs this Court that petitioner-Mahendra Singh has been involved in similar offence earlier also.

20. After hearing the learned counsel for the parties as well as perusing the record of the case, this Court is of the opinion that the law laid down by the Hon'ble Apex Court in Mohd. Sahabuddin & Anr. Vs. State of Assam (supra) is amply clear, whereby the recovery of cough syrup containing Codeine Phosphate in bail matter was found to be sufficient ground to reject the bail application. The said precedent law has been followed by the coordinate Bench of this Court in the aforequoted judgment, after considering at length, the judgments cited by the learned counsel for the petitioner. Merely because the recovery is of small quantity, as defined in the Schedule, the benefit of bail cannot be granted to the present petitioners.

21. In light of the aforesaid discussion, this Court is of the opinion that since Codeine Phosphate has been defined as manufactured drugs under the NDPS Act and falls within the purview of the said Act and the investigation in the present case is still continuing, no case for grant of bail to the present petitioners is made out.

22. Consequently, the present bail applications are dismissed.

(DR. PUSHPENDRA SINGH BHATI)J. Skant/-