

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **BAIL APPLN. 1136/2021**

Date of decision: 25th June, 2021

IN THE MATTER OF:

MOHD AHSAN

..... Petitioner

Through Mr. Amjad Khan, Advocate

versus

CUSTOMS

....Respondent

Through Mr. Vishal Chadha, SPP

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This is a petition under Section 439 CrPC for grant of regular bail in Complaint Case No.62/2020 registered at Police Station Customs (IGI Airport, Delhi) under Section 21(c) and 23 (c) of the Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act).

2. The facts in brief leading to the present petition are as follows:-

a) The petitioner was to travel Saudi Arabia by flight No.SV761/04. On suspicion of the security staff, he was handed over to Saudi Arab Airlines Staff and was further handed over with his baggage to the Customs Authorities by the Airlines Staff for further investigation.

b) Notice under Section 50 of the NDPS Act was served on the petitioner and the personal search was conducted but nothing incriminating was recovered.

c) The baggage of the petitioner was opened and examined. On opening

it was found that the baggage was containing two big packets wrapped with brown tape. The first packet was opened and it was found that it contained 55 bottles of Phensedyl. The second packet was found containing 55 bottles of Phensedyl.

d) The bottles recovered from the first packet and second packet were tagged separately in corrugated boxes and given mark P-1 and P-2. All the recovered bottles were found containing Codeine Phosphate which is a manufactured drug under the NDPS Act.

e) The samples which were drawn were sent to the laboratory and vide report dated 01.10.2019 all the samples were opined positive for Codeine Phosphate.

f) The investigation reveals that each bottle weighing 100 grams and each of the bottle had Codeine concentration of 0.17% which translates to about 18.7 grams of concentrated codeine in total 110 bottles.

g) A Complaint Case No.62/2020 was filed before the learned Special Judge (NDPS) Dwarka Courts. Charges have been framed against the petitioner for offences under Section 21 (c) and 23 (c) of the NDPS Act for possession of narcotics substances.

3. Heard Mr. Amjad Khan, learned counsel appearing for the petitioner and Mr. Vishal Chadha, learned SPP for Customs and perused the material on record.

4. Mr. Amjad Khan, learned counsel for the petitioner states that the petitioner is illiterate and does not know either Hindi or English and was carrying cough syrup. He also contended that when the pack was searched, it was in pre-opened condition and it was not opened before the petitioner

and he suggests that the pack could have been tampered with. He therefore contends that the petitioner is not in conscious possession of the drug.

5. The petitioner filed an application for bail before the learned Special Judge (NDPS) and it was contended that each bottle contained only 0.17% of Codeine concentration and cannot be called as commercial quantity. The learned Special Judge vide order dated 15.03.2021 held that the petitioner was having 11,000 ml of cough syrup and therefore held that it was a commercial quantity and since the petitioner has committed an offence involving commercial quantity, the bail application was rejected. The petitioner therefore approached this Court by filing instant bail application.

6. Mr. Vishal Chadha, learned SPP for Customs relied on the judgment of the Supreme Court in Md. Sahabuddin v. State of Assam reported as **(2012) 13 SCC 491**.

7. Mr. Amjad Khan, learned counsel for the petitioner contends that the judgment of Md. Sahabuddin (supra) does not apply for the reason that the total quantity in the said case was 34,700 bottles of Phensedyl cough syrup and 10200 bottles of Recodex cough syrup unlike the present case where only 110 bottles were recovered. He places reliance on the judgment of this Court in BAIL APPLN.645/2020 dated 31.07.2020 titled as Iqbal Singh v. State wherein this Court has granted bail in similar circumstances.

8. *Per contra*, Mr. Vishal Chadha, learned SPP for Customs places reliance on the judgment of the Supreme Court in Md. Sahabuddin (supra) and Hira Singh v. Union of India reported as **(2020) SCC OnLine SC 382**. He contends that the judgment of Hira Singh (supra) squarely covers the issue and the Supreme Court has held that the total weight of the manufactured drug or preparation including the neutral material is required

to be considered while determining small quantity or commercial quantity.

9. The short question which arises for this case is as to whether the rigour of Section 37 of the NDPS Act which regulates the grant of bail for offence involving commercial quantity of drugs is attracted or not. Section 37 of the NDPS Act reads as under:-

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

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 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 on 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.

(2) The limitations on granting of bail specified in clause (b) of subsection (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.

10. To determine as to whether the petitioner was in actual possession of commercial quantity of Codeine, it is relevant to refer to the notification specifying small and commercial quantity for the purposes of the Act. S.O. 1055 (E) dated 19th October, 2001 published in the Gazette of India, Extra., Pt.II, Sec3 (ii) dated 19th October 2001, as amended on 18.11.2009. As per entry 28 of this list, small quantity of Codeine is defined as 10 grams, and a commercial quantity of Codeine is 1000 grams. The question for consideration is whether for the purposes of the NDPS Act, 1985 a

commercial quantity of Codeine has been recovered from the petitioner.

11. This issue arose directly in the case of E. Michael Raj v. Intelligence Officer, Narcotic Bureau (2008) 5 SCC 161. The Supreme Court held that only the portion of illicit substance in the entire mixture for deciding whether the recovery is of commercial quantity of the narcotic drug or psychotropic substance would be considered. The weight of the neutral substance, in any mixture containing a narcotic substance would be ignored was to be excluded. After the judgment of the Supreme Court in E. Michael Raj (supra) Note 4 was inserted in the S.O. 1055 (E) dated 19th October, 2001. Note 4 is extracted below:

Note 4: The quantities shown in column 5 and 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substance of the particular drug in dosage form or isomers, esters, ethers and salts or these drugs, including salts or esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.

12. Prima facie this note seems to suggest that the weight of the neutral material must also be taken into account while determining whether a person is in possession of a commercial quantity of a narcotic substance. The Supreme Court in Hira Singh v. Union of India reported as **(2017) 8 SCC 162** referred the following questions to be considered by a larger Bench:-

"The three-Judge Bench may have to consider, amongst others, the following questions:

12.1. Whether the decision of this Court in E. Micheal Raj [E. Micheal Raj v. Narcotic Control Bureau, (2008) 5 SCC 161 : (2008) 2 SCC

(Cri) 558] requires reconsideration having omitted to take note of Entry 239 and Note 2 (two) of the Notification dated 19-10-2001 as also the interplay of the other provisions of the Act with Section 21?

12.2. Does the impugned notification issued by the Central Government entail in redefining the parameters for constituting an offence and more particularly for awarding punishment?

12.3. Does the Act permit the Central Government to resort to such dispensation?

12.4. Does the Act envisage that the mixture of narcotic drug and seized material/substance should be considered as a preparation in totality or on the basis of the actual drug content of the specified narcotic drug?

12.5. Whether Section 21 of the Act is a stand-alone provision or intrinsically linked to the other provisions dealing with “manufactured drug” and “preparation” containing any manufactured drug?”

13. The three Judge Bench was constituted and the Supreme Court in Hira Singh v. Union of India reported as (2020) SCC OnLine SC 382 has observed as under:-

"8.4. Even considering the definition of “manufacture”, “manufactured drug” and the “preparation” conjointly, the total weight of such “manufactured drug” or “preparation”, including the neutral material is required to be considered while determining small quantity or commercial quantity. If it is interpreted in such a manner, then and then only, the objects and purpose of NDPS Act would be achieved. Any other intention to defeat the object and purpose of enactment of NDPS Act viz. to Act is deterrent".

"10. In view of the above and for the reasons stated above, Reference is answered as under:

(I) The decision of this Court in the case of E. Micheal Raj (supra) taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law;

(II) In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the “small or commercial quantity” of the Narcotic Drugs or Psychotropic Substances;

(III) Section 21 of the NDPS Act is not stand-alone provision and must be construed along with other provisions in the statute including provisions in the NDPS Act including Notification No.S.O.2942(E) dated 18.11.2009 and Notification S.O 1055(E) dated 19.10.2001;

(IV) Challenge to Notification dated 18.11.2009 adding “Note 4” to the Notification dated 19.10.2001, fails and it is observed and held that the same is not ultra vires to the Scheme and the relevant provisions of the NDPS Act. Consequently, writ petitions and Civil Appeal No. 5218/2017 challenging the aforesaid notification stand dismissed. (emphasis supplied)

14. This decision was considered by this Court in the case of Iqbal Singh v. State in BAIL APPLN.645/2020 decided on 31.07.2020. The facts of Iqbal Singh(supra) are similar to the present petition. In the facts of Iqbal

Singh(supra), the petitioner therein was found with 55 bottles of Codeine based cough syrup, which must be equal to roughly 5.5 kg in weight. The amount of pure Codeine present in those bottles was a little less than 10 grams, which is below the upper limit for small quantity. This Court held that the petitioner therein therefore only had a small quantity of Codeine. The decision of the Supreme Court in Hira Singh (supra) was cited and considered by this Court in Iqbal Singh(supra) and was distinguished. This Court held that in the context of Codeine used in cough syrup i.e. formulations which have a miniscule percentage/quantity of an offending substance cannot be treated at par with other illicit substances like heroin.

15. For this purpose, para 21 to 25 of the said judgment as reproduced as under:-

"21. It is relevant to refer to paragraph 8.3 of the said judgment, which indicates the rationale for doing so and the same is set out below:

"8.3 At this stage, it is required to be noted that illicit drugs are seldom sold in a pure form. They are almost always adulterated or cut with other substance. Caffeine is mixed with heroin, it causes that heroin to vaporize at a lower rate. That could allow users to take the drug faster and get a big punch sooner. Aspirin, crushed tablets, they could have enough powder to amend reversal doses of drugs. Take example of heroin. It is known as powerful and illegal street drug and opiate derived from morphine. This drug can easily be "cut" with a variety of different substances. This means that drug dealer will add other drugs or non -intoxicating substances to the drug so that they can sell more of it at a lesser expense to themselves. Brown-sugar/smack is usually made available in power form. The substances is only about 20% heroin. The heroin is mixed with other substances like chalk powder, zinc oxide, because of these,

impurities in the drug, brown-sugar is cheaper but more dangerous. These are only few examples to show and demonstrate that even mixture of narcotic drugs or psychotropic substance is more dangerous. Therefore, what is harmful or injurious is the entire mixture/tablets with neutral substance and Narcotic Drugs or Psychotropic Substances. Therefore, if it is accepted that it is only the actual content by weight of offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, in that case, the object and purpose of enactment of NDPS Act would be frustrated. There may be few punishment for “commercial quantity”. Certainly that would not have been the intention of the legislature.

22. It is apparent from the above that the court was considering a case where illicit substances are sold in mixtures containing neutral substances or substances which may have the effect of enhancing the effect of the offending substance or facilitate its abuse. The court was not concerned with a non-offending substance or preparation with bifacial qualities, which may have miniscule quantities of any offending substance. The litmus test would be as to how the substance is known in common parlance and dealt with by persons in trade. Is it manufactured, distributed, purchased and sold as an illicit substance, which is one of the ingredients of it, or is it known and dealt with as a separate product.

23. It is important to note that one of the Indian Drug Manufacturers' Association had filed an application to intervene in Hira Singh (supra). One of the contentions advanced on their behalf was that the quantity of the narcotic drug is also relevant for the purposes of determining whether the provisions of NDPS Act are applicable. The said contention, as recorded by the Supreme Court in its judgment, is set out below:

“5.3 The quantity of the narcotic drug is also relevant for the purposes of determining whether a particular preparation is subject to the provisions of the NDPS Act or not. This is borne out by clause (xi) of section 2 of the NDPS Act which empowers

the Central Government to notify a narcotic substance or preparation either to be a manufactured drug or to not be a manufactured drug;

5.4 By making the percentage content of the drug irrelevant, the impugned notification has the effect of bringing pharmaceutical preparations that are exempt from the NDPS Act, under the fold of the law through the backdoor.

i) E.g.: Entry 35 'Codeine' in the list of manufactured drugs vide Notification S.O. 826(E) dated 14/11/1985, Notification S.O. 40(E) dated 29/02/1993 and Notification S.O. 1431(E) dated 21.6.2011 (hereinafter collectively referred to as "notification on manufactured drugs").

ii) Similar exemptions are contained at Entries at SI. No. 35, 36, 37, 48, 70, 76, 83 and 87 of the notification on manufactured drugs."

24. In the aforesaid context, it is relevant to refer to paragraph 8.4 of the judgment, where the court clarified as under:

"8.4. Even considering the definition of "manufacture", "manufactured drug" and the "preparation" conjointly, the total weight of such "manufactured drug" or "preparation", including the neutral material is required to be considered while determining small quantity or commercial quantity. If it is interpreted in such a manner, then and then only, the objects and purpose of NDPS would be achieved. Any other intention to defeat the object and purpose of enactment of NDPS Act viz. to Act is deterrent."

*25. Plainly, the quantity of the mixture of a manufactured drug and a neutral substance would require to be considered for the purposes of determining whether the quantity is a commercial quantity or a small quantity for the purposes of the NDPS Act. **However, a drug which is manufactured but falls outside the scope of the definition of a 'manufactured drug' under the NDPS Act on account of the***

component of offending material being below the prescribed threshold, cannot be construed as a manufactured drug by dissecting its ingredients and considering them in isolation.”

(emphasis supplied)

16. A reading of the judgment in Iqbal Singh (supra) therefore shows that this Court has created a distinction between illicit substances which are sold in mixtures containing neutral substances or which may have the effect of enhancing the effect of the offending substance or facilitate its abuse and a non offending substance or preparation with bifacial qualities which may have the miniscule quantities of a substance which are also used for medicinal purposes and are available in medical shops across country.

17. Codeine is a Schedule H-1 Drug, under the Drugs and Cosmetics Act, 1940, and is not to be sold without a valid prescription. Any Codeine based cough syrup ideally should not be available without a prescription. The reality however is different. This Court can take judicial notice of the fact that any person desirous of obtaining a Codeine based cough syrup can do so without much difficulty.

18. If the argument of the prosecution based on Hira Singh (supra) is accepted, any person who purchases or obtains a bottle of cough syrup without a valid prescription from a doctor would be in possession of an intermediate quantity of Codeine as he would be in possession of 100 grams of a manufactured drug and would face punishment under Section 21 (b) of the NDPS Act. A dealer of ganja caught with a quantity less than 20 kilograms, would face the same punishment as a person possessing a single bottle of Codeine based cough syrup.

19. A person who is in habit of dealing ganja and is caught with slightly less than 1 kg of ganja (which obviously cannot be for self use) will face

significantly lesser punishment.

20. Even if the person is using a codeine cough syrup for illicit reasons, of obtaining a 'high', possessing a single bottle of codeine cough syrup will ensure that such user is treated on par with a person who possesses even 19 kilograms of ganja. Hypothetically, a family where there are a number of people having chronic cough problem procures 10 bottles of cough syrup before embarking on a trip to ensure adequate supply of the cough syrup, would be deemed to be in possession of a commercial quantity of Codeine, and would face a minimum of 10 years imprisonment. This obviously was not and could not be the intention of the legislature or the true meaning of the judgment of the Supreme Court in Hira Singh's case.

21. Be that as it may, para 8.4 and para 10(II) of the judgment of the Supreme Court in Hira Singh v. Union of India reported as **(2020) SCC OnLine SC 382** does not make any distinction between manufactured drugs with a miniscule percentage of narcotic substance and other mixture of narcotic drugs or psychotropic substance out of a neutral substance. The judgment of Iqbal Singh (supra) is therefore contrary to a plain reading of the judgment of the Supreme Court. Since cases of this nature are common there is a strong possibility that different Single Judge Benches of this Court may take different opinions while deciding as to whether the rigour of Section 37 would be attracted or not in such cases. It would therefore be in the interest of justice that an authoritative and final pronouncement is made by a larger Bench of this Court.

22. The following questions therefore are required to be considered by a larger Bench of this Court :

a) whether in cases specifically related to manufactured drug with a

miniscule percentage of a narcotic substance, the weight of the neutral substance ought to be ignored while determining the nature of the quantity seized i.e. small, commercial or in between?

b) whether Note 4 of the S.O. 1055 (E) dated 19th October, 2001 published in the Gazette of India, Extra., Pt.II, Sec3 (ii) dated 19th October 2001, as amended on 18.11.2009, should be held inapplicable to manufactured drug which contain a **miniscule percentage** of a narcotic drug?

c) whether Note 4 of the S.O. 1055 (E) dated 19th October, 2001 published in the Gazette of India, Extra., Pt.II, Sec3 (ii) dated 19th October 2001, as amended on 18.11.2009, should be made applicable to cough syrups containing **miniscule percentage** of Codeine since it has medicinal value and is also easily available?

23. Since the question is referred to a larger Bench, this Court is inclined to grant the petitioner interim bail for 90 days on the petitioner furnishing a personal bond in the sum of Rs.35,000/- with surety in the like amount to the satisfaction of the Trial Court subject to the following conditions:

- a) The petitioner is directed to stay in Delhi during the period of bail.
- b) Memo of parties shows that the petitioner is a resident of Village Sapla Khatri, Devband, U.P. The petitioner is directed to provide his residential address in Delhi to the Investigating Officer before he is released on bail.
- c) The petitioner is directed to intimate the Investigating Officer of any change in the given address.
- d) The petitioner is directed to report to the concerned Police Station every alternate day from the date of his release.

e) The petitioner is directed to provide his mobile number to the Investigating Officer and keep the same operational at all times.

f) The petitioner is directed to surrender after a period of 90 days from the date of his release.

24. The Registry is directed to place the matter before Hon'ble the Chief Justice for constituting an appropriate larger Bench to consider the issue.

JUNE 25, 2021

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SUBRAMONIUM PRASAD, J.

