

Devilal

v.

State Of Rajasthan

(High Court Of Rajasthan)

S.B. Criminal Misc. II Bail Application No. 2638 of 2016 | 01-06-2016

Mr. Sandeep Mehta, J.—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.

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

3. 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 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 v. 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 submit 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.

4. 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.

5. 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.

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

7. Following drugs were recovered from the petitioner :-

(i) 1150 tablets Alprazolam gross weight 172.50 grams,

(ii) 1140 capsules Parvon spas.

8. 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 Honble Supreme Court, in the case of Union of India v. 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.

9. 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 v. State of Punjab reported in 2014 1 RCR(Criminal) 715 (P&H) and (2) Jasbir Singh v. 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 v. Rajesh Kumar Gupta. 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.

10. The Honble Supreme Court in the case of Mohd. Sahabuddin & Anr. v. State of Assam 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 :-

"5. The Learned Counsel for the Appellants, apart from making his submissions also filed written submissions on behalf of the Appellants. The Learned Counsel submit 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.

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 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 above said 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 fulfil 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 undivided preparation apart from the other condition, namely, that it should be only for therapeutic practise. Therapeutic practise 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 practise as mentioned in the Notifications dated 14.11.1985 and 29.1.1993. Therefore, if the said requirement meant for therapeutic practise 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 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."

11. 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 v. 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.

12. 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.

13. Resultantly, the instant second bail application, being devoid of any merit, is hereby dismissed.

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