

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

Bail App No.138/2022

Reserved on: 09.03.2023
Pronounced on: 05.04.2023

Azhar Javaid Rather ... Applicant(s)

Through: - Mr. J. H. Reshi, Advocate.

vs.

UT OF J&K ... Respondent(s)

Through: - Mr. Sajad Ashraf, GA.

CORAM: HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

1) The applicant has invoked Section 439 of the Code of Criminal Procedure, 1973 ('Cr.P.C' for short), for his emancipation on bail in FIR No.79/2022 of Police Station, Batamaloo, for offences under Sections 8/21 of Narcotic Drugs and Psychotropic Substances Act (for short 'NDPS Act') primarily on the conventional grounds that he has been involved in a false and frivolous case and rider of Section 37 of NDPS Act is not attracted.

2) Countervailing the stand taken by the applicant, respondent is affront with the contention that the activities attributed to the applicant pose a serious threat to the health and welfare of the people of the area and since he indulged and motivated youth of the area for consumption of drugs, therefore, he does not deserve the concession of bail. It is also contended that Chlorpheniramine Maleate and Codeine Phosphate recovered from the possession of the applicant falls within

the scales of commercial quantity, therefore, present application is liable to be dismissed.

3) Before a closer look at the grounds urged in the application, it shall be apt to have an overview of the background facts.

4) On 10.06.2022, Police Station, Batamaloo, received a written docket of Incharge Naka S.I. Bashir Ahmad stating that while they were performing the naka duty at Meerak Shah, Batamaloo, they spotted a person on way from Moominabad to Batamaloo, who, on seeing the police party, tried to change his way but he was apprehended. On personal search, 17 bottles of JETCOFF of 100 ml each (Chlorpheniramine Maleate and Codeine Phosphate) were recovered from his possession. During preliminary questioning, he disclosed his name as Azhar Javaid Rather, the applicant herein. It is allegation of the investigating agency that applicant was selling the contraband substance among the youth of the area. Accordingly, on the receipt of this docket, FIR came to be registered and investigation came into vogue. During investigating, the Investigating Agency, besides other legal formalities, sealed/re-sealed the contraband and sent the same to FSL, Srinagar, for expert opinion. The FSL opinion was obtained and offences under Section 8/21 of NDPS Act were proved against the applicant. On completion of the investigation, final report has been filed in the Court of 4th Additional Sessions Judge, Srinagar, on 07.11.2022 and applicant is presently lodged in Central Jail, Srinagar.

5) Heard arguments and perused the file.

6) In addition to reiteration of the grounds of bail urged in the application, Mr. Reshi, learned counsel appearing for the applicant has urged that the contraband,

alleged to have been recovered from the possession of the applicant, does not fall in the definition of “manufactured drug” within the meaning of NDPS Act because as per Notification-S.O. 826(E) of 1985 issued by the Government of India in exercise of powers conferred by sub-clause (b) of Clause (xi) of Section 2 of the NDPS Act, the concentration of Methyl Morphine (commonly known as ‘Codeine’) is not more than 2.5% in undivided preparations. Therefore, according to learned counsel for the applicant, the contraband alleged to have been recovered from the possession of the applicant in the present case, is excluded from the parameters of “manufactured drug” and the applicant, at the most, can be tried under Drugs and Cosmetics Act, 1940 (Drug and Cosmetics Act, in short). He has relied upon **Aijaz Ahmad Wani vs. UT of J&K** reported as **2022(5) JKJ 278 [HC]**, **Nissar Ahmad Yattoo vs. UT of J&K** reported as **2022 (5) JKJ 267 [HC]** and judgments rendered by High Court of Delhi in **Mohd. Ahsan vs. Customs (Bail Application No.1136/2021 dated 25.06.2021)** and **Iqbal Singh vs. State [Bail Appl. No. 645/2020 dated 31.07.2020]**.

7) Learned counsel for the applicant also seeks enlargement of the applicant on bail on the ground of violation of mandatory provisions of Sections 42 and 50 of the NDPS Act. He has relied upon **Suresh and others vs. State of Madhya Pradesh** reported in **(2013) 1 SCC 550** and **Vijaysinh Chandubha Jadeja vs. State of Gujarat** reported in **(2011) 1 SCC 609**.

8) Mr. Sajad Ashraf, learned GA, appearing on the rival side, has argued that since provisions of Drugs and Cosmetics Act, 1940, are not in derogation of the provisions of NDPS Act in view of Section 80 of the NDPS Act, therefore, contraband alleged to have been recovered from the possession of the applicant, being a Scheduled Drug, Drugs and Cosmetics Act has no application in the

present case. According to learned Government Advocate, since the concentration of the Scheduled Drug i.e. Methyl Morphine or Codeine Phosphate is more than 2.5% in undivided preparations and since applicant has failed to show that it was being used for any therapeutic purpose, therefore, the aforesaid Notification-S.O. 826(E) issued by the Central Government would not come to the rescue of the applicant. Learned counsel for the respondent further contended that since the contraband recovered from the applicant falls within the definition of “manufactured drug”, the whole quantity of the mixture is to be taken into consideration and if the entire quantity of the mixture is taken into consideration, the contraband alleged to have been recovered from the applicant falls within the purview of “commercial quantity” and the bar created under Section 37 of the NDPS Act is attracted, therefore, present application is liable to be dismissed. He has relied upon **Hira Singh and another vs. Union of India and another**, reported as (2020) 20 SCC 272, **Union of India and another vs. Sanjeev vs. Deshpande** reported in (2014) 13 SCC 1, **Mohd. Sahabuddin and another vs. State of Assam** reported as (2012) 13 SCC 49 and **Vibhor Rana vs. Union of India** reported in 2021 SCC Online All 908.

9) Learned counsel appearing for the applicant has primarily relied upon notification titled ‘Manufactured Narcotics Drug’, contained in Government of India notification No. S.O. 826(E) dated 14.01.1985 read with S.O. No. 40(E) dated 21.09.1993 read with S.O. No. 1431(E) dated 21.06.2011 issued under Sub Clause (b) of Clause (xi) of Section 2 of NDPS Act to draw attention of this Court to Entry No. 35 which pertains to Methyl Morphine (commonly known as Codeine) to argue that present case is covered under the exception provided in the said entry. According to learned counsel for the applicant, the alleged recovery of

17 bottles of JETCOFF of 100 ml each containing Codeine concentration is below 2.5% in undivided preparations and the said cough syrup being easily available in the market as established in therapeutic practice cannot be treated as a 'manufactured drug' under the NDPS Act. He has heavily relied upon **Iqbal Singh, Aijaz Ahmad Wani, Nissar Ahmad Yatoo and Mohd. Ahsan** (supra).

10) Since the entire controversy revolves around Entry 35 of notifications referred in the preceding para pertaining to Methyl Morphine (commonly known as Codeine), it shall be apt, at the outset, to reproduce the said entry as a ready reference. It reads thus:

“S.O. 826(E). – In exercise of the powers conferred by sub-clause (b) of clause (xi) of section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby declares the following narcotic substances and preparations to be manufactured drugs, namely:-

xxx

35. Methyl morphine (commonly known as “Codeine”) and Ethyle 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 of not more than 2.5% in undivided preparations and which have been established in Therapeutic practice.

xxx”

11) Now, before adverting to the merits of the case, it is pertinent to mention that Hon'ble Supreme Court in **E. Micheal Raj vs. Intelligence Officer Narcotic Control Bureau, [(2008) 5 SCC 161]** had observed that in the mixture of Narcotic drugs or psychotropic substances with one or more neutral substance(s), quantity of the neutral substance(s) is not to be taken into consideration for determination of the small quantity or commercial quantity of a narcotic drug or psychotropic substance. Significantly, after **E. Micheal Raj** (supra), the Government of India, as a matter of abundant precaution, came up with notification dated 18.11.2009, which added “Note 4” to the earlier notification dated 19.10.2001, thereby

specifying the “small quantity and commercial quantity” of the narcotic drugs and psychotropic substances under the NDPS Act. “Note 4” reads as follows:

“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) Later, a larger Bench of Hon’ble Supreme Court in **Hira Singh and another vs. Union of India and another**, [(2020) 20 SCC 272] overruled the aforesaid decision of **E. Micheal Raj** (supra) and held as below:

“12.1 The decision of this Court in E. Micheal Raj taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity or 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.

12.2 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.

xxx”

13) Learned High Court of Delhi in **Iqbal Singh** (supra) distinguished **Hira Singh** (supra) on the ground that Supreme Court in the said case was considering a case where illicit substances are sold in mixtures containing neutral substances or substances which may enhance the effect of offending substance or facilitate their abuse and Supreme Court was not concerned with the non offending substance or preparation with bifacial qualities, having miniscule quantities of any offending substance.

14) **Iqbal Singh** (supra) came up for discussion before a Co-ordinate Bench of learned High Court of Delhi in **Mohd. Ahsan** (supra). The said court clearly

observed that para 8.4 and para 10(II) of the judgment of Supreme Court in **Hira Singh** (supra) 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 and that judgment of the Co-ordinate Bench in **Iqbal Singh** (supra) is contrary to a plain reading of the judgment of the Supreme Court. However, in order to obviate different opinions of different Single Benches, learned High Court of Delhi in **Mohd. Ahsan** formulated certain questions for an authoritative and final pronouncement by a larger Bench of the said Court. Accordingly, learned Division Bench of High Court of Delhi in **Mohd. Ashan vs. Customs on 16.09.2022**, referring to various provisions of the NDPS Act and the rules framed thereunder, answered the reference in the following terms:

“Question - "(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?"

Ans: If the contraband recovered in a particular case is covered by Rule 52A of the NDPS Rules made under Section 9(1)(a)(va) of the NDPS Act, then violation of the said Rules would be punishable under the NDPS Act. In that situation, Note 4 of the S.O. 1055 (E) dated 19th October, 2001 would be applicable to such substances including cough syrup.

47. As far as the questions (a) and (b) referred to us by the learned Single Judge are concerned, the same are squarely covered by the judgment of the Hon'ble Supreme Court in Hira Singh (supra) wherein the Hon'ble Supreme Court was disposing of a reference as well as a challenge to the validity of notification bearing no. S.O. 2941(E) dated 18.11.2009, adding 'Note 4' to the notification bearing no. S.O. 1055(E) dated 19.10.2001. The Hon'ble Supreme Court in Hira Singh (supra) has clearly held as under:

"12.2. 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."

48. In view of the aforesaid decision, the questions (a) and (b) referred to us are answered as follows:

Question - "(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?"

Ans: If the contraband seized falls within the provisions of NDPS Act, the weight of the neutral substance would not be ignored while determining the nature of the quantity seized, whether small quantity, commercial quantity or in between.

Question - "(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?"

Ans: If the alleged contraband seized falls within the definition of 'manufactured drug' under Section 2(xi) of the NDPS Act, then the entire notification including the aforesaid 'Note 4' will be applicable."

15) It is evident from the reference answered by learned Division Bench of High Court of Delhi in **Mohd. Ahsan** (supra) that if the contraband recovered in a particular case is covered by Rule 52A of the Narcotic Drugs and Psychotropic Substances Rules, 1985 (NDPS Rules, for short) made under Section 9(1)(a)(va) of the NDPS Act, then the violation of the said rules is punishable under the NDPS Act even with respect to the cough syrups containing miniscule percentage of codeine having medicinal value and easily available in the market, as argued in the present case, and in cases related to 'manufactured drug' even with a miniscule percentage of a narcotic substance, the weight of the neutral substance would not be ignored while determining the nature of the quantity seized i.e. small, commercial or intermediate. It was also observed that if the alleged contraband falls within the definition of 'manufactured drug' under Section 2(xi) of NDPS Act, then the entire notification i.e. S.O. 1055(E) dated 19th October, 2001 including "Note 4" will be applicable.

16) It appears that the reference made by learned Single Judge of High Court of Delhi in **Mohd. Ahsan** (supra) was not brought to the notice of learned Co-ordinate Bench of this Court in **Aijaz Ahmad Wani** (supra) and pertinently the said reference has been answered by Division Bench of High Court of Delhi on

16.09.2022 after decision rendered by Co-ordinate Bench of this Court in **Aijaz Ahmad Wani** on 02.09.2022.

17) As a matter of fact, the reference answered by learned Division Bench of High Court of Delhi in **Mohd. Ahsan**, relied by Mr. Reshi, provides a complete answer to all the question raised in the present case. The main plank of the argument of learned counsel for the applicant is that since JETCOFF a cough syrup, alleged to have been recovered from the possession of the applicant being easily available in the market, is established in therapeutic practice, the entire mixture of the cough syrup cannot be taken into consideration.

18) However, Mr. Ashraf, learned GA has argued that Central Government retains the power to permit, control and regulate manufacture, possession, transport etc. of the 'essential narcotic drugs' and since the applicant at the relevant point of time failed to produce any document for the possession of the offending material recovered from him, therefore, benefit of exception of Entry No. 35 of the afore-quoted notification is not available to him.

19) I find legal force in the argument of Mr. Ashraf for the following reasons.

20) The question of transportation, manufacture, use etc. of codeine phosphate came up for discussion before Hon'ble Supreme Court in **Mohd. Sahabuddin and another vs. State of Assam** reported as (2012) 13 SCC 491 and it has been clearly held by Hon'ble Supreme Court as below:

"10. 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.

11.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."

12. 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 NDPS 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 two 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."

(Underlined for emphasis)

21) It is evident from the above quotation that Hon'ble Supreme Court has made it clear that the twin conditions provided in exception of Entry 35 would be satisfied only if the offending substance was being used for therapeutic purpose.

22) Section 9 of the NDPS Act confers power on the Central Government to permit, control and regulate the manufacture, possession etc. of a Narcotic drug , which reads as below:

"9. Power of Central Government to permit, control and regulate.-

(1) Subject to the provisions of Section 8, the Central Government may, by rules--

(a) permit and regulate—

xxx

(va) the manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption and use of essential narcotic drugs:

Provided that where, in respect of an essential narcotic drug, the State Government has granted licence or permit under the provisions of Section 10 prior to the commencement of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2014, such licence or permit shall continue to be valid till the date of its expiry or for a period of twelve months from such commencement, whichever is earlier.

xxx"

23) It is pertinent to mention that sub clause (va) of the NDPS Act providing power of the Central Government to permit, control and regulate the possession, use etc. of the narcotic drugs and psychotropic substances was introduced by the Narcotic Drugs And Psychotropic Substance (Amendment) Act, 2014 w.e.f. 01.05.2014, after the judgment of Hon'ble Supreme Court in **Mohd. Sahabbudin** (supra).

24) In exercise of the aforesaid powers vested with the Central Government under Section 9(1)(a)(va) of the NDPS Act, notification dated 05.05.2015, which added Chapter-VA to the NDPS Rules came to be issued and Rule 52A of the said Chapter provides as under:

"52A. Possession of essential narcotic drug.-(1) No person shall possess any essential narcotic drug otherwise than in accordance with the provisions of these rules.

(2) Any person may possess an essential narcotic drug in such quantity as has been at one time sold or dispensed for his use in accordance with the provisions of these rules.

(3) A registered medical practitioner may possess essential narcotic drug, for use in his practice but not for sale or distribution, not more than the quantity mentioned in the Table below, namely—

TABLE

S. No.	Name of the essential. narcotic drug	Quantity
(1)	(2)	(3)
1.	Morphine and its salts and all preparations containing more Milligrammes than 0.2 per cent of Morphine	500 milligrammes
2.	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% in undivided preparations and which have been established in therapeutic practice.	2000 milligrammes
Xxx	Xxx	xxx

25) Similarly Rule 66 of the NDPS Rules provides as under:

“66. Possession, etc., of psychotropic substances.—

(1) No person shall possess any psychotropic substance for any of the purposes covered under 1945 rules, unless he is lawfully authorized to possess such substance for any of the said purposes under these rules: Provided that possession of a psychotropic substance specified in Schedule I shall be only for the purposes mentioned in Chapter VII-A.

(2) xxx.....xxx. Provided that where such psychotropic substance is in possession of an individual for his personal medical use the quantity thereof shall not exceed one hundred dosage units at a time:

Provided further that an individual may possess the quantity of exceeding one hundred dosage units at a time but not exceeding three hundred dosage units at a time] for his personal long term medical use if specifically prescribed by a Registered Medical Practitioner.

(3) xxx”

26) Rule 52A of the NDPS Rules deals with ‘essential narcotic drugs’, which is neither defined under the NDPS Act nor NDPS Rules. However, the table below sub Rule (3) of Rule 52A *inter alia* provides the ‘names of essential narcotic drugs’ and methyl morphine (Commonly known as codeine) figures at Serial No. 2, which is nothing but verbatim of Entry 35 of the notification of 1985, titled ‘manufactured narcotic drug’ read with S.O.s of 1993 and 2011. Rules 52A and 66 of NDPS Rules regulate the manner of possession and related activities enumerated therein, with respect to substances/preparations mentioned in Entry No. 35 of the notification titled ‘manufactured narcotic drugs’, contained in Government of India notifications of 1985, 1993 and 2011.

27) It is pertinent to mention that Section 21 of the NDPS Act provides for prosecution for contravention of any of the provision of the NDPS Act or any rule made thereunder.

28) A conjoint reading of both these rules 52A and 66 are sufficient to indicate that no person can possess an essential narcotic drug or psychotropic substance, unless he is lawfully authorized to possess such drug or substance.

29) Hon'ble Supreme Court in **Union of India and another vs. Sanjeev Deshpande**, reported as **(2014) 13 SCC 1**, dealing with the interpretation of the aforesaid rules as also Section 9 of the Central Government to make rules permitting and regulating, the possession, etc. of narcotic drugs and psychotropic substances has observed in the following words:

“25. In other words, DEALING IN narcotic drugs and psychotropic substances is permissible only when such DEALING is for medical purposes or scientific purposes. Further, the mere fact that the DEALING IN narcotic drugs and psychotropic substances is for a medical or scientific purpose does not by itself lift the embargo created under Section 8(c). Such a dealing must be in the manner and extent provided by the provisions of the Act, Rules or Orders made thereunder. Sections 9 and 10 enable the Central and the State Governments respectively to make rules permitting and regulating various aspects (contemplated under Section 8(c), of DEALING IN narcotic drugs and psychotropic substances.

26. The Act does not contemplate framing of rules for prohibiting the various activities of DEALING IN narcotic drugs and psychotropic substances. Such prohibition is already contained in Section 8(c). It only contemplates of the framing of Rules for permitting and regulating any activity of DEALING IN narcotic drugs or psychotropic substances.”

(Emphasis Supplied)

30) Here the following observation of Hon'ble Supreme Court in para 10.3 of **Hira Singh** (supra) is worth being underlined:

“10.3 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 the 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 the NDPS Act would be frustrated. There may be few punishment for “commercial quantity”. Certainly that would not have been the intention of the legislature.”

31) In view of the above, it must be borne in mind that in order to avail the benefit of exception carved out in Entry 35 of the afore-quoted notifications, the accused is obliged to prove that both the conditions of the said entry co-exist. In other words, the accused is not only obliged to prove that the concentration of the offending contraband was below 2.5%, a per dosage unit, but also that he was carrying the said preparation for a therapeutic use.

32) Reverting to the present case, since the applicant has failed to justify the possession of 17 bottles of cough syrup, containing the offending drug of codeine phosphate, therefore, exception of Entry 35 of the aforesaid notification is not available to him, even if, the quantity of the offending contraband in the cough syrup is less than 2.5% per dosage unit. The contraband recovered in the present case, as such, is a ‘manufactured drug’ within the meaning of NDPS Act and the rules framed thereunder. Therefore, the quantity of neutral substance cannot be excluded and the entire mixture of the ‘manufactured drug’ including neutral substances is to be considered for the purpose of determining whether the quantity is commercial, small or intermediate under the NDPS Act and if the entire mixture i.e. 100 ml per bottle is taken into consideration, the applicant is found in possession of 1700 ml of contraband (100ml x 17), which would be categorized as a commercial quantity as per Entry 28 of the notification specifying small quantity and commercial quantity of Codeine as 10 gm and 01 kg respectively and

therefore, rigors of section 37 of the NDPS Act would apply and the application is liable to be dismissed.

33) Since **Hira Singh** (supra) and **Mohd. Sahabuddin** (supra) does not make any distinction between the ‘manufactured drugs’ with a miniscule percentage of narcotic substance and other mixture of narcotic drugs or psychotropic substance out of a neutral substance, therefore, any observation, contrary to **Hira Singh** (supra) and **Sahabuddin** (supra) is *per incuriam*.

34) In view of the above, the argument of learned counsel for the applicant that Codeine being Schedule H drug, the applicant, at the most, can be prosecuted under Drugs and Cosmetics Act, 1940, has been made to be rejected. It is evident from **Mohd. Sahabuddin** (supra), that if Codeine Phosphate was being used without proper permission and applicant fails to justify its possession, it cannot be presumed that he was in possession of the drug for therapeutic purpose. Moreover, Section 80 of the NDPS Act, inter alia, provides that the provisions of the said Act shall be in addition to Drugs and Cosmetics Act, 1940 and the Rules framed thereunder. Section 80 of the NDPS Act reads thus:

“80. Application of the Drugs and Cosmetics Act, 1940 not barred.-

The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Drugs and Cosmetics Act, 1940 (23 of 1940) or the rules made thereunder.”

35) It is evident from the above that provisions of the NDPS Act are applicable in addition to the provisions of the Drugs and Cosmetics Act, meaning thereby is that provisions of both the legislations are to be read harmoniously. It means that if Codeine or its preparations including salts, which fall within the ambit of Schedule H drug is used or possessed without valid permission or prescription, it can be presumed that it is not for therapeutic purpose and NDPS Act can be invoked.

36) In so far as violations of Section 42 and 50 of the NDPS Act are concerned, in all the cases relied upon by learned counsel for the applicant, the applicant was enlarged on bail in peculiar facts of the cases and particularly during or after the trial or at the appellate stage and this position has been clarified by Hon'ble Supreme Court in **Karnail Singh vs. State of Haryana** reported as (2009) 8 SCC 539, the relevant extract whereof is reproduced below:

“29. xxx

35.[...](c)xxx

(d).....Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”

37) Similar view has been expressed by Hon'ble Supreme Court in **Union of India vs. Mohd. Nawab Khan** reported as (2021) SCC Online SE 782 and **Buta Singh vs. State of Haryana** reported as (2021) SCC online SE 324.

38) In view of the trite position of law, violation of mandatory provisions of Sections 42 and 50 of the NDPS Act, being a question of fact, can be decided during the trial only and is not available to the applicant in a bail application.

39) Having regard to what has been observed and discussed above, the present application being bereft of merit is dismissed.

(RAJESH SEKHRI)
JUDGE

Srinagar
05.04.2023
Paramjeet

Whether the order is speaking?
Whether the order is reportable?

Yes
Yes