

IN THE HIGH COURT OF JHARKHAND AT RANCHI
B.A. No.1616 of 2021

Sandeep Kumar @ Sandeep Kumar Diwakar
... Petitioner
Versus
The State of Jharkhand ... Opposite Party

Coram: HON'BLE MR. JUSTICE ANIL KUMAR CHOUDHARY

For the Petitioner : Mr. Awnish Shankar, Adv.
For the State : Mr. Ravi Prakash, Spl. P.P.

02/23.02.2021 Heard the parties through video conferencing.

Learned counsel for the petitioner undertakes to remove the defects pointed out by the stamp reporter within two weeks after the lockdown is over.

In view of personal undertaking given by the learned counsel for the petitioner, the defects pointed out by the stamp reporter are ignored for the present.

The petitioner has been made accused in connection with Barkagaon P.S. Case No. 244 of 2020 registered under sections 272, 273, 290 of the Indian Penal Code and Section 47(a) of Excise Act, Sections 18(c)/27(b)(ii) of Drugs and Cosmetics Act and Section 22 (b) of the NDPS Act.

Learned counsel for the petitioner submits that the allegation against the petitioner is that the petitioner was in illegal possession of Chlorpheniramine Maleate and codeine phosphate syrup Onerex-100 ml-11 pieces and kufedeine-100 ml-5 pieces as well as wine and liquor. It is submitted that the allegation against the petitioner is false. Learned counsel for the petitioner relying upon the order passed by the learned single Judge of the High Court of Madhya Pradesh in the case of **Kamlesh Mali Vs. The State of Madhya Pradesh** reported in **MCRC-19693-2018** dated 10.08.2018, wherein the learned single Judge relying upon the Central Government notifications bearing S.O.826(E) dated 14.11.1985 and G.S.R.40(E) published on 29.01.1993, has observed as under

"if the syrup contains not more than 100mg 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 and the same has been exempted from the application of section 21 of the Act and the prosecution can be made under the provisions of Drug and Cosmetics Act, 1940".

submitted that no offence has been committed by the petitioner under Section 22(b) of the N.D.P.S. Act, 1985 and the wine and beer recovered is not much in quantity. It is lastly submitted that the petitioner has been in custody for a considerable period of time. Hence it is submitted that the petitioner be released on bail.

Learned Spl. P.P. appearing for the State vehemently opposes the prayer for bail and submitted that order of **Hon'ble High Court of Madhya Pradesh** is *per incuriam* order as the judgment of the **Hon'ble Supreme Court of India** in the case of **Md. Sahabuddin & Anr. Vs. State of Assam** reported in **Criminal Appeal No.1602 of 2012 arising out of SLP(CRL) No.5503 of 2012** dated 05th October, 2012, has not been considered by the single Judge of High Court of Madhya Pradesh. Para Nos.-12 and 13 of the case of **Md. Sahabuddin & Anr. Vs. State of Assam** (*supra*) read as under:-

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, 5ml. 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 100mg. of codeine per does 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 practice. Therapeutic practice as per dictionary meaning means 'contributing to cure of disease'. In other words, the assessment of codeine content of 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 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. (Emphasis supplied)*

It is then submitted by the learned Special Public Prosecutor that the said 2nd condition that it should only be for

therapeutic practice in other words it should be used for curing a disease and as an action remedial agent; escaped the notice of the learned single judge of the High Court of Madhya Pradesh.

It is also submitted by the Learned Special Public Prosecutor that as held by the Hon'ble Supreme Court of India in the case of **Hira Singh Vs. Union of India** in Cr. Appeal. 722 of 2017 that Sl.no. 239 (4) of the Table under Clause (viiia) and (xxiiia) of sub clause 2 of N.D.P.S. Act, 1985, which reads as under:

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

envisages that the quantities shown in column 5 and column 6 of the said Table relating to the respective drugs shown in column 2 shall apply to the entire mixture of the quantity of the Codeine seized. Thus Chlorpheniramine Maleate and codeine phosphate syrup Onerex-100 ml-11 bottles and kufedeine-100 ml-5 bottles each of hundred millilitres in volume comes out in total to 1600 millilitres which is much more than commercial quantity for codeine as mentioned in Sl.no. 28 of the said Table as the quantity seized under 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, hence, the rigors of Section 37 of the N.D.P.S. Act, 1985 is attracted in this case and in the absence of any material to suggest that the petitioner is not guilty of the allegations and that there is no chance of the petitioner being not involved in any offence while on bail, the petitioner ought not be released on bail.

In view of the settled principle of law as discussed above as held by the Hon'ble Supreme Court of India in the case of **Md. Sahabuddin & Anr. Vs. State of Assam** (supra) in order to get exemption from the application of section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 twin conditions are to be fulfilled; the first one is that the contents of the narcotic substance should not be more than 100mg. of codeine per does unit and with a concentration of not more than 2.5% in undivided preparation; and the second is it should be only for therapeutic practice. In the absence of any documents in possession

of the petitioner to disclose as to for what purpose such a huge quantity of Schedule 'H' drug containing narcotic substance was being transported, this court is of the considered view that the petitioner has failed to satisfy the said 2nd condition that the said Chlorpheniramine Maleate and codeine phosphate syrup Onerex-100 ml-11 bottles and kufedeine-100 ml-5 bottles were carried by the petitioner for therapeutic use, thus this court has no hesitation in holding that inter alia the offence punishable under section 22 (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 is attracted in this case. Considering the serious nature of the allegation against the petitioner and as Chlorpheniramine Maleate and codeine phosphate syrup Onerex-100 ml-11 bottles and kufedeine-100 ml-5 bottles comes under commercial quantity hence in the absence of any material to suggest that the petitioner was not guilty of the offence alleged or that there is no chance of the petitioner of indulging in any offence, if released on bail, this Court is of the considered view that this is not a fit case where the petitioner be admitted to bail. Accordingly, the prayer for bail of the above named petitioner is rejected.

Keeping in view the period of custody undergone by the petitioner and the serious nature of offences involved in this case, notwithstanding any order in administrative side of this court, the trial court is directed to take up the trial of the case expeditiously and to conclude the trial within six months from the date of receipt of this order by the trial court. It is made clear that the trial be conducted and the witnesses be examined by observing the precautions relating to COVID-19 pandemic.

AFR-Pappu/

(Anil Kumar Choudhary, J.)