

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.54100 of 2025**

Arising Out of PS. Case No.-64 Year-2025 Thana- HARLAKHI District- Madhubani

Nilendra Kumar Karan @ Nilendra S/o Rajbanshi Lal Karan, R/o Village-
Dudhali Ward No.10, PS- Sindhuli, District- Sindhuli (Janakpur, Nepal)

... .. Petitioner/s

Versus

The State of Bihar

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. Jitendra Kumar Bharti, Advocate Mr. Pankaj Kumar Jha, Advocate
For the State	:	Mr. Upendra Kumar, APP

**CORAM: HONOURABLE MR. JUSTICE JITENDRA KUMAR
CAV JUDGMENT**

Date : 27-08-2025

Introduction

The present Criminal Miscellaneous petition has been filed under Sections 483 and 484 of the B.N.S.S., 2023 for regular bail in connection with Harlakhi P.S. Case No. 64 of 2025, corresponding to G.R. No. 24 of 2025, dated 19.03.2025, registered for the offences punishable under Sections 20 and 22 of the N.D.P.S., Act, pending in the Court of learned Principal Sessions Judge-cum-Special Court, N.D.P.S. Act, Madhubani.

Prosecution Case

2. The prosecution case, as emerging from the written report of the SSB personnel, is that the informant along with five S.S.B, personnel were on check-post duty. They got information that some intoxicating medicine is being carried by



a four wheeler of silver colour. Subsequently, they intercepted one such vehicle going from India to Nepal and in the presence of the driver and one person sitting in the car, the vehicle was searched, and hence, the intoxicating medicine was recovered from below the seat of the car, the medicine comprising forty bottles of 100 ml each containing codeine phosphate & Triprolidine Hydrochloride cough syrup, oxerex, bearing B. NO ONTS-1663. The persons who were present in the car were the Petitioner and co-accused, Giban Patal. The vehicle Tata Indigo Manza (Four wheeler)-01 bearing Reg No. BaE 2295, Eng. No. 101A20000557474, CH NO-MAT613421FPA04429, and the recovered one mobile phone OPPO RAENO-8 5G along with two sim cards bearing IMEI-86539206416654, IMEI-2-865392064126647 were also seized. The two persons, including the Petitioner and the co-accused, Giban Patal, who were found in the car were also arrested and FIR was lodged against them.

Rejection of Anticipatory Bail Petition of the petitioner by learned Special Court NDPS, Madhubani

3. Prior to moving this Court, the petitioner had preferred anticipatory bail petition before the Special Court, NDPS, Madhubani. However, his anticipatory bail application was rejected by learned Special Court, holding that 40 bottles of cough syrup have been recovered from the vehicle of the



petitioner and the amount of the contraband constitutes commercial quantity in the light of **Hira Singh v. Union of India**, as reported in **(2020) 20 SCC 272**. It has been also found by learned Special Court that in the case diary, the witnesses who have been examined, have supported the prosecution case against the petitioner and hence, in the light of Section 37 of the NDPS Act, his anticipatory bail petition was rejected.

4. I heard learned counsel for the petitioner and learned APP for the State.

Submission on behalf of the Petitioner

5. Learned counsel for the Petitioner submits that the Petitioner is innocent and has falsely been implicated in this case. He further submits that the prosecution against the Petitioner is vitiated in view of the non-compliance of the mandatory provisions of Section 42 of the N.D.P.S., Act at the time of making search and seizure.

6. He further submits that the alleged contraband recovered from the Petitioner is not a narcotic drug and psychotropic substance punishable under the N.D.P.S., Act. It is cough syrup containing less than 2.5 per cent codeine of the total preparation. Hence, it is an essential drug, not punishable under the N.D.P.S., Act. At the most, the Petitioner may be



prosecuted under the Drugs and Cosmetics Act, 1940. In this context, he refers to and relies upon **Vibhor Rana v. Union of India, 2021 SCC OnLine All 908**.

7. In **Vibhor Rana case** (supra), Allahabad High Court was seized with the writ petition, involving question whether “New Fancy Deal Linctus Cough Syrup” is a narcotic drug and it comes within the purview of N.D.P.S., Act. Here, Allahabad High Court has held as follows:

“23. Thus, as per the aforesaid Notification, if any drug contains not more than 100 milligrams of Methyl Morphine, which is commonly known as Codeine, per dosage unit, and in that drug Codeine is compounded with one or more other ingredients and if in the drug the concentration of Codeine is not more than 2.5% in undivided preparations and the drug has been established in Therapeutic practice, will not be a “Manufactured Drug” and, therefore, it will not be a “Narcotic Drug”.

24. The prohibition contained in Section 8 of the Act is applicable to “Narcotic Drugs” and since Phensedyl New Cough Linctus contains Codeine compounded with one other ingredient, namely Chlorpheniramine Maleate and since Phensedyl New Cough Linctus contains merely 10 milligrams per dosage unit of 5 ml, which is not more than 100 milligrams of the drug per dosage unit in undivided preparations and the concentration of Codeine in Phensedyl New Cough Linctus is merely 0.2%, which obviously is not more than 2.5% and which has been established in Therapeutic practice, it is not a “Manufactured Drug” and, therefore, it is not a “Narcotic Drug”, the prohibition contained in Section 8 of the Act does not apply to it.

25. Phensedyl New Cough Linctus contains Codeine which is mentioned at Serial Number 20 in Schedule H1 appended to the Drugs Rules, 1945 and a note appended to Schedule H1 provides that “Preparations containing the above drug substances and their sales excluding those intended for topical or external use (except opthalmic and ear or nose preparations) containing above substances are



also covered by this Schedule”. Therefore, Phensedyl New Cough Linctus is a drug covered by the Drugs and Cosmetics Act, 1940.

26. To clarify this position, on 26.10.2005 the Drug Controller General of India had written letter to all the State Drugs Controllers stating as follows:—

“As you are aware there are number of Cough preparations like Corex of M/s Pfizer Ltd. 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 10 mg as one of the ingredients. By virtue of the fact that these preparations contain Codeine and its 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. Though stocking and sale of these drugs do not attract the provisions of NDPS Act and Rules 1985 however these formulations are prescription drugs and are to be dispensed on the prescription of a registered Medical Practitioner only. Further you may be already aware that under notification number S.O. 826(E) dated 14th Nov. 1985 under the Narcotic Drugs and Psychotropic Substances Act and Rules 1985 certain preparations are exempted as manufactured drugs provided the preparations contain the Narcotic 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 containing not more than 100 milligrams 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.”

27. In March 2009 the Drugs Controller General (India) had issued a letter to the Associated Chambers of Commerce and Industry of India in response to a request for clarification of drug substance Cough Linctus containing codeine Phosphate stating that:—

“In this connection this Directorate had already issued a circular letter vide our letter number X-11029/27/05-D dated 26/10/2005 to all State Drugs Controllers with a copy to various associations and a



copy Narcotic Control Bureau New Delhi (copy enclosed). The above circular inter alia stated that these preparations (Cough Linctus containing Codeine Phosphate) contains among other drugs Codeine Phosphate 10 mg as one of the ingredients. By virtue of the fact that these preparations contain Codeine and its salts they do not fall under the provisions of NDPS Act and the Rules of 1985 but they fall under Schedule H of the Drugs and Cosmetic 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 prescriptions of a registered Medical Practitioner only.

Further you may be aware that under notification number S.O.826(E) dated 14th November, 1985 under the Narcotic Drugs and Psychotropic Substances Act and Rules 1985 certain preparations are exempted as manufactured drugs provided the preparations contain the Narcotic 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 containing not more than 100 milligrams 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.”

8. He also submits that if the quantity of the neutral substance of the cough syrup is excluded, the quantity of codeine in the total seized cough syrup is much less than the commercial quantity, and hence, the rigors of Section 37 of the N.D.P.S., Act would not apply and the Petitioner would be entitled to get bail.

9. Learned counsel for the Petitioner also submits that the Petitioner has no criminal antecedents and he has been in custody since 20.03.2025 without any fault.



Submission on behalf of the State

10. However, learned APP for the State submits that 40 bottles of cough syrup of 100 ml each, containing codeine has been recovered from the Petitioner, and hence, narcotic drugs of commercial quantity is seized from the vehicle in which the Petitioner and the accused were sitting, and hence, rigors of Section 37 of the N.D.P.S., Act comes into play and the Petitioner is not entitled to get regular bail, in view of the material in support of the prosecution case.

11. He further submits that even if codeine constitutes less than 2.5 per cent of the total preparation of cough syrup, it comes in the category of manufactured narcotic drugs, though, it has been categorized as essential drugs. But even possession of such essential drug is regulated by the N.D.P.S., Act and in violation of such regulations, the Petitioner is liable to be prosecuted under the N.D.P.S., Act because it is not the case of the Petitioner that the Petitioner has permit or license to possess such cough syrup in the quantity as recovered from him. In this regard, he refers to and relies upon the following judicial precedents:

- (i) Mohd. Ahsan Vs. Customs,
2022 SCC OnLine Del 2910
- (ii) Azhar Javad Rather Vs. UT of J and K,
AIR OnLine 2023 J & K 270



12. In **Mohd. Ahsan case** (supra), there was recovery of 110 bottles of cough syrup “New Fancy Drug Linctus Cough Syrup” containing a minuscule quantity of codeine i.e 0.17 per cent in each bottles. Here, Delhi High Court referred to all relevant statutory provisions of the N.D.P.S., Act and the relevant judicial precedents including the **Vibhor Rana case** (supra) and held that even in case of cough syrup, the N.D.P.S. Act and the Rules as made thereunder are applicable. It has further held that in the **Vibhor Rana Case** (supra), Section 9 of the N.D.P.S. Act, providing for power to the Central Government to control and regulate and consequent Central Government Notifications were not considered.

13. Jammu and Kashmir High Court has also taken similar view in **Azhar Javad Rather case** (supra).

Legal Provisions

14. Before I consider the rival submissions of the parties, it is imperative to discuss the relevant statutory provisions and binding judicial precedents.

15. The NDPS Act and the Rules made thereunder are in addition to and not in derogation of the Drugs and Cosmetics Act, 1940 of the Rules made thereunder as has been clearly provided under Section 80 of NDPS Act. Hence, the NDPS Act



should not be read in exclusion of the Drugs and Cosmetics Act, 1940. **Section 80 of the N.D.P.S., Act** reads as follows:

“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.”

16. The Drugs and Cosmetics Act, 1940 deals with the drugs which are intended to be used for therapeutic or medical uses. The NDPS Act, on the other hand, is a special law and it intends to curb and penalize the use of narcotic drugs which are used for intoxication or for getting stimulant effect.

17. The Drugs and Cosmetics Act is intended to prevent sub-standard drugs and to maintain high standards of medical treatment and curtail the menace of adulteration of drugs and also of the production, manufacture, distribution and sale of spurious and sub-standard drugs. However, the NDPS Act, on the other hand, intends to control and regulate the operation relating to Narcotic Drugs and Psychotropic Substances. In this context, one may refer to the following judicial precedents:-

(i) Directorate of Revenue Intelligence vs. Raj Kumar Arora, 2025 SCC OnLine SC 819

(ii) State of Punjab vs. Rakesh Kumar, (2019) 2 SCC 466



(iii) Union of India vs. Sanjeev V. Deshpande,
(2014) 13 SCC 1

18. Now coming to the statutory provisions of the NDPS Act, one may find that **Section 8** prohibits certain operations. **Section 8** reads as follows:-

“8. Prohibition of certain operations.- No person shall-

(a) cultivate any coca plant or gather any portion of coca plant; or

(b) cultivate the opium poppy or any cannabis plant; or

(c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance,

except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation:

Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes.”

(Emphasis supplied)

19. However, **Section 9 of the NDPS Act** gives power to the Central Government to permit, control and regulate certain operations. It reads as follows:-



“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—

.....
.....
(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.

(vi) the manufacture, possession, transport import inter-State, export inter-State, sale, purchase, consumption or use of psychotropic substances;

.....
.....
(ha) prescribe the forms and conditions of licences or permits for the manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption or use of essential narcotic drugs, the authorities by which such licence or permit may be granted and the fees that may be charged therefore;

(i) prescribe the forms and conditions of licences or permits for the manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption or use of psychotropic substances, the authorities by which such licences or permits may be granted and the fees that may be charged therefore;

.....
.....”

(Emphasis Supplied)

20. Section 21 of the NDPS Act provides for punishment for contravention in relation to manufactured drugs and preparations. It reads as follows:-



“21. Punishment for contravention in relation to manufactured drugs and preparations.- Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable,--

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.”

(Emphasis Supplied)

21. Section 2 (xi) of the NDPS Act defines the word “manufactured drug”. It reads as follows:-

“2 (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 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 to be a manufactured drug;”

(Emphasis Supplied)

22. Section 22 of the NDPS Act provides for punishment for contravention in relation to psychotropic substances. It reads as follows:-

“22. Punishment for contravention in relation to psychotropic substances.—Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any psychotropic substance shall be punishable,—

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to 5[one year], or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees:”

(Emphasis Supplied)

23. Section 2 (xxiii) of the NDPS Act defines the word “**psychotropic substance**”. It reads as follows:-

“2 (xxiii). "psychotropic substance" means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule;”

(Emphasis Supplied)



24. In the **Schedule to the NDPS Act, 1985**, there are 111 entries. Up to entry No. 110, specific names have been provided and as per entry No. 111, salts and preparations of above has been also categorized as psychotropic substances.

25. The word “**Preparation**” has been defined by **Section 2 (xx) of the NDPS Act**. It reads as follows:-

“**2 (xx). "preparation"**, in relation to a narcotic drug or psychotropic substance, means any one or more such drugs or substances in dosage form or any solution or mixture, in whatever physical state, containing one or more such drugs or substances;”

26. In exercise of the powers conferred by **Section 9 read with Section 76 of NDPS Act**, Central Government has made **NDPS Rules, 1985**. In the year, 2015, **Chapter VA** has been added to the Rules dealing with possession, transport, import inter-State, export inter-State, sale, purchase, consumption and use of **essential narcotic drug**.

27. Section 2 (viiiia) defines **essential narcotic drug**, as per which, essential narcotic drug means a narcotic drug which has been notified by Central Government for medical and scientific use. In the table provided under the Rule 52A(3) of the NDPS Rules, 1985, the names of essential narcotic drugs have been given and there are five entries in this table. 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, has been provided in entry No. 2 of the Table.

28. Sub-Rule 1 of Rule 52A provides that no person shall possess any essential narcotic drug otherwise than in accordance with the provisions of these Rules. As per Sub-Rule 2 of Rule 52A, even quantity of such essential narcotic drug in possession must be in permitted limit. The Controller of drugs or his authorized officer has been given power to give such licence/permit for medical practitioner, medical institutions, manufacturer, licenced dealer or a licenced chemist. Other detailed provisions in regard to control of essential narcotic drugs have been also given in Chapter VA of the NDPS Rules, 1985.

29. The **commercial quantity** of contraband has been defined by **Section 2 (viia)** as per which it means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette, whereas **Section 2(xxiia)** defines **small quantity** as per which it means any quantity



lesser than the quantity specified by the Central Government by notification in the Official Gazette. In pursuance of these sub-Sections viia and xxiiia of Section 2 of NDPS Act, Central Government had issued a notification in the year, 1996 and thereafter, the same was replaced by notification dated 19.10.2001, specifying the small and commercial quantity of narcotic drugs and psychotropic substances by way of providing a table of such narcotic drugs and psychotropic substances. There were three Notes to this Table. However, on 18.11.2009, Note no. 4 was added, as per which the quantity of the neutral substances of any mixture or other preparations of narcotic drugs or psychotropic substances has to be taken into consideration while determining the “small or commercial” quantity of the Narcotic Drugs or Psychotropic Substances.

30. This addition of Note 4 was made subsequent to judgment of Hon’ble Supreme Court in **E. Micheal Raj vs. Narcotic Control Bureau** as reported in **(2008) 5 SCC 161**, in which Hon’ble Supreme Court has taken view that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance(s), for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration.



31. The notification dated 18.11.2009 adding Note 4 to the notification dated 19.10.2001, was challenged. However, Hon'ble Full Bench of Supreme Court in **Hira Singh case** (supra) held that the notification is not ultra vires to the Scheme, Rules and provisions of the NDPS Act, and hence, the writ petitions challenging the notification was dismissed. It was further held by Hon'ble Supreme Court in **Hira Singh Case** (supra) that 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 it has 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.

32. As such, it clearly emerges from the statutory provisions of the NDPS Act and Rules made thereunder, that even the cough syrup containing codeine with concentration of less than 2.5% of total preparation is controlled and regulated for its possession, sale, purchase, transport, export, import etc. In this regard, Chapter-VA of the NDPS rules, 1985, containing Rules 52A to 52M provide detailed provisions, as it has been discussed above. Hence, the violation of such Rules in regard to



Control and Regulation of the Essential Drugs is punishable under the NDPS Act. As such, if someone is found to be in possession of such drugs without authorization, he is liable to be prosecuted under the NDPS Act and not under the Drugs and Cosmetic Act, 1940.

33. Similar view has been taken by Delhi High Court in **Mohd. Ahsan Vs. Customs case** (supra) and Jammu & Kashmir High Court in **Azhar Javed Rather Case** (supra). In **Vibhor Rana Case** (supra), Allahabad High Court has reached different conclusion, because Section 9 of the NDPS Act and Chapter VA of the NDPS Rules, 1985 made thereunder, was not brought to the notice of the Court and hence, the same was not considered and, therefore, there was different conclusion.

34. The aforesaid view of this Court gets reinforced also in view of the decision of **Union of India and Anr. Vs. Sanjeev V. Deshpande, (2014) 13 SCC 1**, wherein Hon'ble Supreme Court has held as follows:

“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.”

(Emphasis supplied)

35. Hon’ble Apex Court in Mohd. Sahabuddin and Anr. Vs. State of Assam, (2012) 13 SCC 491, has again held as follows:

“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.”

(Emphasis supplied)

Present Case

36. Coming to the case on hand, I find that the petitioner was found to be in possession of forty bottles of 100 ml each containing codeine phosphate & Triprolidine Hydrochloride cough syrup, oxerex, bearing B. NO ONTS-1663. However, it is not a case of the petitioner that he has any authorization to possess such cough syrup in such a huge quantity. As such, Sections 21 and 22 read with Section 8 of the NDPS Act get applicable in the alleged facts and circumstances of the case on hand.



37. Moreover, when weight of the codeine along with the weight of neutral substance is taken into consideration, the weight of the seized cough syrup constitutes “commercial quantity” in the light of Note-4 to the Notification specifying small quantity and commercial quantity, dated 19.10.2001 and in the light of **Hira Singh Case** (supra). Hence, Section 37 of the NDPS Act also comes into play against grant of bail to the petitioner, as per which not only Public Prosecutor is required to be heard at the time of consideration of the bail petition of the accused, even twin conditions as provided in Section 37 of the NDPS Act have to be fulfilled to grant bail to the accused. Moreover, these conditions are cumulative and not alternative ones. Here, negation of bail is a rule and grant of it is an exception.

38. The twin conditions as provided in Section 37 of the NDPS Act are as follows:

(a) The satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence, and that

(b) He is not likely to commit any offence while on bail.

39. While considering the scope of Section 37 of the



N.D.P.S., Act in the light of the scheme of the act, Hon'ble
Supreme Court in **State of M.P. Vs. Kajad, 2001 7 SCC 673**
has held as follows:

“5. ... A perusal of Section 37 of the Act leaves no doubt in the mind of the court that a person accused of an offence, punishable for a term of imprisonment of five years or more, shall generally be not released on bail. Negation of bail is the rule and its grant an exception under sub-clause (ii) of clause (b) of Section 37(1). For granting the bail the court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of Section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for.”

(Emphasis supplied)

40. Similarly, in **Narcotics Control Bureau Vs. Mohit Aggarwal, (2022) 18 SCC 374**, Hon'ble Supreme Court
has again held as follows:

“11. It is evident from a plain reading of the non obstante clause inserted in sub-section (1) and the conditions imposed in sub-section (2) of Section 37 that there are certain restrictions placed on the power of the court when granting bail to a person accused of having committed an offence under the NDPS Act. Not only are the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973 to be kept in mind, the restrictions placed under clause (b) of sub-section (1) of Section 37 are also to be factored in. The conditions imposed in sub-section (1) of Section 37 is that : (i) the Public Prosecutor ought to be given an opportunity to oppose the application moved by an accused person for release and (ii) if such an application is opposed, then the court must be satisfied



that there are reasonable grounds for believing that the person accused is not guilty of such an offence. Additionally, the court must be satisfied that the accused person is unlikely to commit any offence while on bail.

.....
15. We may clarify that at the stage of examining an application for bail in the context of Section 37 of the Act, the court is not required to record a finding that the accused person is not guilty. The court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the NDPS Act or not. The entire exercise that the court is expected to undertake at this stage is for the limited purpose of releasing him on bail. Thus, the focus is on the availability of reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with and he is unlikely to commit an offence under the Act while on bail.

.....
19. In our opinion the narrow parameters of bail available under Section 37 of the Act, have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him, for him to have been admitted to bail. The length of the period of his custody or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act.”

(Emphasis supplied)

41. In a recent judgment of **Narcotics Control Bureau Vs. Kashif, (2024) 11 SCC 372**, Hon’ble Supreme Court has again held as follows:

“9. There has been consistent and persistent view of this Court that in the NDPS cases, where the offence is punishable with minimum sentence of ten years, the accused shall generally be not released on bail. Negation of bail is the rule and its grant is an exception. While considering the application for bail, the court has to bear in mind the provisions of Section 37 of the



NDPS Act, which are mandatory in nature. The recording of finding as mandated in Section 37 is a sine qua non for granting bail to the accused involved in the offences under the said Act.

10. Apart from granting the opportunity of hearing to the Public Prosecutor, the other two conditions i.e. (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence, and that (ii) he is not likely to commit any offence while on bail, are the cumulative and not alternative conditions.”

(Emphasis supplied)

42. In the alleged facts and circumstances of the case on hand, there are no reasonable grounds to believe that the petitioner is not guilty of the alleged offence and he is unlikely to commit an offence under the NDPS Act while on bail.

43. As far as the claim of the petitioner that the mandatory provisions of Section 42 of the NDPS Act have not been complied with at the time of search and seizure of the contraband, it would be relevant to point out that in **Karnail Singh Vs. State of Haryana, (2009) 8 SCC 539**, Hon’ble Apex Court has clearly held in para-35 of the judgment whether there is adequate or substantial compliance with Section 42 of the NDPS act or not is a question of fact to be decided in each case. Similar view has been taken by Hon’ble Apex Court in **Union of India Vs. Mohd. Nawab Khan (AIR 2021 SC 4476)**, and **Buta Singh Vs. State of Haryana (AIR 2021 SC 1913)**.

44. Hence, violation of Section 42 of the NDPS Act



being a question of fact can be decided during the trial only and is not available to the petitioner in a Bail proceeding.

45. Considering the aforesaid facts and circumstances, the petitioner is not entitled to be enlarged on bail at this stage.

46. Accordingly, the present petition stands rejected.

(Jitendra Kumar, J.)

Ravishankar/
Shoaib/chandan/
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