

[2012] 8 S.C.R. 1193

MD. SAHABUDDIN & ANR.

v.

STATE OF ASSAM

(Criminal Appeal No. 1602 of 2012)

OCTOBER 05, 2012

**[T.S. THAKUR AND FAKKIR MOHAMED
IBRAHIM KALIFULLA, JJ.]**

Narcotic Drugs and Psychotropic Substances Act, 1985 – Transportation of huge quantity of cough syrup without valid documents – Cough syrup containing narcotic substance of codeine phosphate beyond the prescribed limit – Bail application of accused-appellants – Rejection of – Propriety – Held: When the appellants were not in a position to explain as to whom the supply was meant for, 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 could not be considered – 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 could not be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14.11.1985 and 29.1.1993 – In view of the conduct of the appellants, they cannot be heard to state that they were not expected to fulfill any of the statutory requirements either under the Drugs & Cosmetics Act or under the NDPS Act – Drugs & Cosmetics Act – s.27 – Drugs & Cosmetics Rules – Rules 65, 97, 61(1) and 61(2) – Central Government Notifications bearing S.O.826(E) dated 14.11.1985 and G.S.R.40(E) published on 29.1.1993 – Bail.

Words and Phrases – “Therapeutic practice” – Meaning.

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A According to the prosecution, the accused-
appellants were involved in the transportation of huge
quantity of cough syrup without valid documents and
further that the said quantity of cough syrup contained
the narcotic substance of codeine phosphate beyond the
B prescribed limit, and thus offence was made out under
the provisions of the Narcotic Drugs and Psychotropic
Substances Act, 1985. The appellants were produced
before the C.J.M. who remanded them to judicial custody.
The appellants moved the Court of Sessions Judge for
C grant of bail but the Sessions Judge rejected the bail
application. Thereafter, the appellants moved the High
Court, which having declined to grant bail, the present
appeal was filed.

D Dismissing the appeal, the Court

D HELD: 1.1. In view of 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
E containing 100 bottles of 100 ml. Recodex cough syrup
without valid documents for such transportation, they
cannot be heard to state that they were not expected to
fulfill any of the statutory requirements either under the
provisions of Drugs & Cosmetics Act or under the
F provisions of the Narcotic Drugs and Psychotropic
Substances Act, 1985. [Para 10] [1200-B-C]

G 1.2. 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
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be considered. The contention of 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. However, 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 practice. 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. [Paras 11, 12] [1200-D-H; 1201-A-B]

1.3. 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

A 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. [Para 13] [1201-C-F]

B 2. 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, there is no scope to interfere with the same. [Para 14] [1201-F-G]

C CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1602 of 2012.

D From the Judgment & Order dated 25.5.2012 of the Gauhati High Court at Guwahati in Bail Application No. 885 of 2012.

Manoj, Aparna Sinha, B.N. Mazamder, Abhijat P. Medh for the Appellants.

E Avijit Roy, Corporate Law Group for the Respondent.

The Judgment of the Court was delivered by

F **FAKKIR MOHAMED IBRAHIM KALIFULLA, J.** 1. Leave granted.

G 2. This appeal is directed against the common order passed by the Gauhati High Court in Bail Application Nos.885/2012 and 886/2012. The allegations against the appellants concerned, in Bail Application No.885/2012, were that on 16.2.2012 at about 8.30 p.m., based on a secret information, the police intercepted a truck bearing registration No.HR-61-A6641 at Chgolia, Boxirhat, on the National Highway 31 and the vehicle along with appellants was taken to the Golakganj Police Station and that due to lack of proper light facility, the search could not be conducted and, therefore, the vehicle and

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the appellants were kept in the police station on that night. On the next day i.e. on 17.2.2012 when a search was effected in the presence of the Deputy Superintendent of Police (HQ), Dhubri, Circle Inspector of Golakganj and local witnesses, it revealed that 347 cartons, each carton containing 100 bottles of 100 ml. Phensedyl cough syrup and 102 cartons, each carton containing 100 bottles of 100 ml. Recodex cough syrup were found concealed along with household articles. For transporting such a huge quantity of pharmaceutical products, the driver of the vehicle could not produce any valid documents. Further the chemical analysis of the contents of the cough syrup disclosed that it contained codeine phosphate beyond the prescribed quantity and, therefore, the articles were seized. The appellants were produced before the C.J.M., Dhubri on 18.2.2012 who remanded them to judicial custody.

3. As we are concerned with the Bail Application No.885/12, we do not deal with the details of seizure and arrest effected on accused concerned in Bail Application No.886/12.

4. The appellants moved the Court of Sessions Judge, Dhubri for grant of bail and learned Sessions Judge, by order dated 30.3.2012 rejected the bail application. Thereafter, the appellants moved the High Court, who by the order impugned in this appeal having declined to grant bail; the present appeal has been filed.

5. The learned counsel for the appellants, apart from making his submissions also filed written submissions on behalf of the appellants. The learned counsel submitted 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

A 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
B 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 Cr.P.C.

C 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
D 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,
E 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.

F 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
G 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:

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"B.A. No.885/2012

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Recodex 10200*182.73 milligrams =1863 grams =1.863 kilograms

Phensedyl 34700*183.15 milligrams = 6355 grams =6.355 kilograms

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Total = 8.218 kilograms

i.e. Total 8 kilograms 219 grams"

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.

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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

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A a transporter, in particular, the driver and a khalasi was under
no obligation to hold a licence under the Drugs & Cosmetics
Act.

B 10. At the very outset, the abovesaid 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
C he was not expected to fulfill any of the statutory requirements
either under the provisions of Drugs & Cosmetics Act or under
the provisions of the N.D.P.S. Act.

D 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
E 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
F considered based on the above submissions made on behalf
of the appellants.

G 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
H 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 practice. 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.

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 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.

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

A 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.

B 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.

D 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.

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Appeal dismissed.