

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CRIMINAL PROCEDURE

DATE OF RESERVE: February 10, 2009

DATE OF DECISION: February 16, 2009

BAIL APPLN. 187/2009

RACHAN SINGH

.....Petitioner

Through: Dr. Ashutosh and Mr. Manish Sharma,
Advocates

versus

DIRECTORATE OF REVENUE INTELLIGENCE Respondent

Through: Mr. Satish Aggarwala, Mr. Shirish Aggarwal
and Mr. Sushil Kaushik, Advocates

REVA KHETRAPAL, J.

1. By this application under Section 439 Cr.P.C., the petitioner seeks bail in a case registered against him under Sections 22, 23 and 29 of the NDPS Act.
2. The petitioner was arrested by the officers of DRI, Delhi Zonal Unit, Delhi on 13.06.2008 on the allegations that he was found to be in the possession of green colour tablets collectively weighing 66.510 kgs (approximately) net weight, which upon test, indicated the presence of Amphetamines from Endeavour SUV Car bearing registration No.PB08A V-5076 and Skoda Car bearing registration No.PB13S-2021. It is further alleged that Indian currency amounting to Rs.2,00,000/- (Rupees Two Lakhs Only) was also recovered and seized, alleging the same to be sale proceeds of Psychotropic substances. It is also alleged that on the search of the residence of the petitioner in District Singhra, Punjab, as a result of follow up action, some documents, one laptop, note book P.C., a floppy and Indian currency amounting to Rs.12,29,000/- (Rupees Twelve Lakhs Twenty Nine

Thousand Only) was also recovered. 3. The learned counsel for the petitioner submits that the petitioner has been falsely implicated as is apparent from the report dated 15.09.2008 of the Central Revenue Control Laboratory, New Delhi, which opines that on analysis the samples marked A-1, B-1, G-1 did not answer positive test for Amphetamines. However, the same answered positive test for Alprazolam. 4. The learned counsel for the petitioner submits that for the sake of argument, even if it is assumed that the goods recovered tested positive for Alprazolam, the petitioner is entitled to the grant of bail in view of the judgment of this Court in *Rajinder Gupta vs. NCT of Delhi* 2005 (3) JCC [Narcotics] 233. The said judgment was followed by this Court in *Bail Application No.2419/05 (Praveen Dua vs. The State (NCT of Delhi))* wherein the tablets recovered were Diazepam (12.450 Kgs.), Zolpidem (3.264 Kgs.), Alprazolam (1.816 Kgs.) and Codeine (1.8521 Kgs.), wherein this Court granted bail to the accused relying upon *Rajinder Gupta's case (supra)*. 5. Reliance is also placed by the learned counsel for the petitioner upon the judgment of the Hon'ble Supreme Court in *State of Uttaranchal vs. Rajesh Kumar Gupta* 2006 (3) JCC (Narcotics) 178 wherein the view of this Court in *Rajinder Gupta's case (supra)* was endorsed by holding that the provisions of the NDPS Act were prima facie not applicable in view of the fact that the drug in question in the said case (Phenobarbitone) was not listed in the First Schedule appended to the Narcotic Drugs and Psychotropic Substances Rules, 1985 (for short, the Rules), and the accused could not be stated to have committed any offence under Section 8 read with Section 22 of the 1985 Act. It was also held that the provisions of Section 37 of the Act were inapplicable. 6. Apart from the above, the learned counsel for the petitioner submits that the petitioner has absolutely clean antecedents and is permanently residing in Punjab along with his family, including his wife, minor children and ailing parents, and as such, there are no chances of his absconding. The complaint has already been filed and the petitioner is no more required for the purposes of investigation and no purpose would be served by keeping the petitioner in incarceration indefinitely, particularly when the trial is likely to take a sufficiently long time in view of the long list of 55 witnesses mentioned in the complaint. 7. There is no dispute to the fact that the recovered substance in the instant case, viz., Alprazolam is a prescription drug which figures at Entry No.15 in Schedule 'H' of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as the DandC Act) and, though it is a psychotropic substance under the NDPS Act by virtue of Entry No.30 in the Schedule to the NDPS Act containing the list of psychotropic substances, it is not a psychotropic substance mentioned in Schedule I of the Rules appended to

the said Act. Section 2 (xxiii) of the Act defines a 'psychotropic substance' as follows:- '(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.' 8. Schedule II to the Act contains a list of psychotropic substances in which, as already stated, Alprazolam figures at serial No.30. 9. Chapter VII of the NDPS Rules deals with psychotropic substances. Rule 64 is titled 'General Prohibition' and reads as follows:- '64. General prohibition.' No person shall manufacture, possess, transport, import inter-State, export inter-State, sell, purchase, consume or use any of the psychotropic substances specified in Schedule I.' 10. Rule 65 deals with the manufacture of psychotropic substances. Rule 66 is titled 'Possession, etc., of psychotropic substances' and reads as follows:- '66. Possession, etc., of psychotropic substances.' (1) No person shall possess any psychotropic substance for any of the purposes covered by the 1945 Rules, unless he is lawfully authorised to possess such substance for any of the said purposes under these Rules. (2) Notwithstanding anything contained in sub-rule (1), any research institution or a hospital or dispensary maintained or supported by Government or local body or by charity or voluntary subscription, which is not authorised to possess any psychotropic substance under the 1945 Rules, or any person who is not so authorised under the 1945 Rules, may possess a reasonable quantity of such substance as may be necessary for their genuine scientific requirements or genuine medical requirements, or both for such period as is deemed necessary by the said research institution or, as the case may be, the said hospital or dispensary or person: 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. (3) The research institution, hospital and dispensary referred to in sub- rule (2) shall maintain proper accounts and records in relation to the purchase and consumption of the psychotropic substance in their possession.' 11. The preceding Chapter viz. Chapter VI deals with the import, export and trans-shipment of psychotropic drugs and psychotropic substances. Rule 53 relates to general prohibition with regard to the aforesaid and is in the following terms:- '53. General prohibition.' Subject to the other provisions of this Chapter, the import into and export out of India of the narcotic drugs and psychotropic substances specified in Schedule I is prohibited. Provided that nothing in this rule shall apply in case the drug substance is imported into or exported out of India subject to an import certificate or export authorisation issued under the provision of this Chapter and for the purpose mentioned in Chapter VIIA. 53A. (1) Subject to

the provisions of sub-rule (2), no person shall export any of the narcotic drug or psychotropic substance or preparation containing any of such narcotic drug or psychotropic substance specified in Schedule II to the countries or to the region of such country specified therein. (2) Notwithstanding anything contained in sub-rule (1) above, the Narcotics Commissioner may authorise export of specified quantities of such narcotic drug or psychotropic substance or preparation containing such narcotic drug or psychotropic substance on the basis of special import licence issued by the Competent Authority of the country mentioned in Schedule II which intends such import by way of issuance of special import licence. The shipment of the consignment so allowed shall be accompanied by a copy of such special import licence duly endorsed by the Narcotics Commissioner. 12. Schedule I to the Rules contains a list of narcotics drugs and psychotropic substances for the purposes of Rules 53 and 64. A glance at the said Schedule shows that Alprazolam is not mentioned in the Schedule to the Rules. 13. Adverting to the submissions made on behalf of the petitioner that when a psychotropic substance does not find mention in the Schedule I to the Rules the prohibition with regard to its possession contained in Rule 64 does not apply, and his further submission that since the tablets involved in the present case find mention in Schedule 'H' of the DandC Act, as such the tablets will be covered under the DandC Act and not under the NDPS Act, there appears to be force in the said submissions. The question which arises for consideration is if the said tablets do not find place in Schedule I appended to the Rules, would the prohibition contained in Section 8 of the 1985 Act apply to the instant case. Section 8 provides for prohibition in respect of certain operations and 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.? 14. Section 8(c) of the Act thus clearly prohibits the production, manufacture, possession, sale, purchase, etc. of any psychotropic substance ?except for medical and scientific purposes and in the manner and to the extent provided by the provisions of this Act or the Rules or orders made thereunder?. In other words, if the recovered substance is a medicine and is to be used for medicinal purposes, then the manner and extent of its production, manufacture, possession, sale, purchase, use, etc. shall be as provided in the NDPS Act or the Rules or orders made thereunder. The prohibition as to possession, etc. contained in Rule 64 of the NDPS Rules applies only to those psychotropic substances which are specified in Schedule I to the NDPS Rules and is, therefore, by necessary implication not applicable to those psychotropic substances, as the one recorded in the instant case, which, though are listed in the Schedule to the NDPS Act, are not contained in Schedule I to the Rules framed thereunder. The recovered substance in the instant case is Alprazolam, which is a Schedule 'H' drug within the meaning of DandC Act and Rules and clearly, therefore, its manufacture, sale, etc. is regulated by the DandC Act and the Rules framed thereunder. 15. The reliance placed by the learned counsel for NCB in the course of arguments on the judgments of the Supreme Court in Sanjay Kumar Kedia vs. Narcotics Control Bureau and Anr. (2008) 2 SCC 294 and Ravindran @ John vs. The Superintendent of Customs 2007 (2) JCC (Narcotics) 89 is clearly misplaced. In Kedia's case, the tablets recovered were of phentermine and butalbital, which find mention in the list appended to the NDPS Act, but are not listed in the Schedule 'H' of the DandC Act. Significantly also, Phentermine w.e.f. 21.02.2003 figures at serial No.3 in Schedule III of the NDPS Act, which Schedule relates to Rule 65(1) proviso, which reads as under:- ?65. Manufacture of psychotropic substances.? (1) Subject to the provisions of sub-rule (2), the manufacture of any of the psychotropic substances other than those specified in Schedule I shall be in accordance with the conditions of a licence granted under the Drugs and Cosmetics Rules, 1945 (hereinafter referred to as the 1945 Rules) framed under the Drugs and Cosmetics Act, 1940 (23 of 1940), by an authority in charge of Drugs Control in a State appointed by the State Government in this behalf: Provided that the authority in charge of drug control in a State referred to above may issue a licence to manufacture a psychotropic substance specified in Schedule III for the purpose of export only.?. 16. Accordingly, the

Hon'ble Supreme Court held that the aforesaid case fell within the mischief of Section 24 of the Act. The said section deals with punishment for external dealings in narcotics drugs and psychotropic substances in contravention of Section 12 of the NDPS Act, while Section 12 thereof provides that no person shall engage in any trade in the aforesaid substances outside India save with the previous authorisation of the Central Government and subject to such conditions as the Central Government may impose.

17. In the case of Ravindran @ John, though the Supreme Court was dealing with a case for recovery of diazepam, a bare glance at the said judgment shows that the legal issues raised in the present case were not raised in the said case nor the earlier judgment of the Supreme Court in Rajesh Kumar Gupta (supra) was placed for consideration before that Bench. This judgment, therefore, cannot come to the assistance of the respondent/complainant.

18. As regards the submission made by the learned counsel for the respondent that an appeal has been filed against the judgment of Rajinder Gupta vs. State, which is pending before the Hon'ble Supreme Court, it is not the case of the respondent that the operation of the judgment in Rajinder Gupta's case is stayed by the Supreme Court. Further, Rajinder Gupta's decision has been considered and dealt with by the Hon'ble Supreme Court in Rajesh Kumar Gupta's case, wherein the Hon'ble Supreme Court has specifically approved of the same as follows:- 30. The views which we have taken appear also to have been taken by the High Court of Delhi in Rajinder Gupta vs. The State 2005 (3) JCC (Narcotics) 203 : [123 (2005) DLT 55] as also the Bombay High Court in Pradeep Dhond vs. Intelligence Officer, Narcotic and Control Bureau, Ballard Estate and Anr. [Criminal Application No.6787 of 2005] disposed of on 7th February, 2006 by the Bombay High Court.?

19. In the present case, the petitioner has been in custody ever since 13.06.2008. As held by the Hon'ble Supreme Court in Rajesh Kumar Gupta (supra), in a case of this nature when prima facie the provisions of the NDPS Act of 1985 are not found applicable, the petitioner must be held entitled to the grant of bail, as he cannot be denied the right of being released on bail unless a clear case of application of Section 37 of the 1985 Act is made out. The antecedents of the petitioner have also been verified and he is not stated to have any criminal antecedents.

20. The petitioner is accordingly admitted to bail on his furnishing personal bond in the sum of Rs.1,00,000/- (Rupees One Lakh Only) with one surety in the like amount to the satisfaction of the trial court. The petitioner shall surrender his passport, if any, to the Investigating Officer and shall not leave the country without the prior permission of this Court during the pendency of the trial. Needless to emphasize that the petitioner while on bail shall not in any manner misuse the liberty of bail granted to him by this Court including tampering with the evidence and intimidating the witnesses. The application stands disposed of in the above terms.

Crl. M.A.1286/2009

Since the bail application itself has been disposed of, this application does not call for any order, hence disposed of.

Sd/-
REVA KHETRAPAL, J.