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HIGH COURT OF CHHATTISGARH, BILASPUR**MCRC No. 5181 of 2016**Judgment reserved on : 20.10.2016Judgment delivered on : 09.12.2016

Sudip Agarwal, S/o. Premchand Agarwal, Aged About 35 Years, R/o. Durpa Road, Korba, P.S. - Korba, Distt. - Korba, Chhattisgarh.

---- Applicant

Versus

State Of Chhattisgarh, Through Police Station- Kusmunda, District. Korba, Chhattisgarh

---- Respondent

For Applicant : Mr. H.S.Ahluwalia, Advocate

For Respondent : Mr. Anant Bajpai, Panel Lawyer

MCRC No. 5843 of 2016Judgment reserved on : 20.10.2016Judgment delivered on : 09.12.2016

Mohd. Ashfaq Alam, S/o. Mustaq Alam, Aged About 26 Years, Occupation Labour, R/o. Mahmaya Road, Police Station & Tehsil Ambikapur, Civil & Revenue Distt. Surguja, Chhattisgarh.

---- Applicant

Versus

State Of Chhattisgarh, Through Station House Officer, Police Station-Ambikapur, Distt. Surguja, Chhattisgarh.

---- Respondent

For Applicant : Mr. Shakti Raj Sinha, Advocate

For Respondent : Mr. Anant Bajpai, Panel Lawyer

MCRC No. 5859 of 2016Judgment reserved on : 20.10.2016Judgment delivered on : 09.12.2016

Pawan Jaiswal, S/o. Phool Chand Jaiswal, Aged About 50 Years, (wrongly mentioned as 20 Years), R/o. Takhatpur, District – Bilaspur, Chhattisgarh.

---- Applicant

Versus

State Of Chhattisgarh, Through Station House Officer, Police Station - Jarhagaon, District Mungeli, Chhattisgarh.

---- Respondent



 For Applicant : Mr. Malay Shrivastava, Advocate
 For Respondent : Mr. Anant Bajpai, Panel Lawyer

MCRC No. 6083 of 2016

Judgment reserved on : 20.10.2016
Judgment delivered on : 09.12.2016

1. Pintu @ Vinay Ahuja, S/o. Shri Chhedi Lal Ahuja, Aged About 22 Years, R/o. Village- Belsari, Police Station- Jarhagoan, Revenue District- Mungeli & Civil District- Bilaspur, Chhattisgarh.
2. Golu @ Sanjeev Mohale, S/o. Shri Mithai Ram, Aged About 24 Years, R/o. Village- Belsari, Police Station- Jarhagoan, Revenue District- Mungeli & Civil District- Bilaspur, Chhattisgarh.

---- Applicants

Versus

State Of Chhattisgarh, Through The Station House Officer, Police Station- Jarhagoan, Revenue District- Mungeli & Civil District- Bilaspur, Chhattisgarh.

---- Respondent

 For Applicants : Mr. Parasmani Shriwas, Advocate
 For Respondent : Mr. Anant Bajpai, Panel Lawyer

&

MCRC No. 6588 of 2016

Judgment reserved on : 28.11.2016
Judgment delivered on : 09.12.2016

Naveen Gupta @ Karfu, S/o. Bhanuprakash Gupta, Aged About 29 Years, R/o. Mahamaya Road, Ambikapur, Police Station Ambikapur, District Sarguja, Chhattisgarh.

---- Applicant

Versus

State Of Chhattisgarh, Through The Station House Officer, Police Station Kotwali (Chowki Manipur), Ambikapur, District Sarguja, Chhattisgarh.

---- Respondent

 For Applicant : Mr. Jitendra Shrivastava, Advocate
 For Respondent : Mr. Anant Bajpai, Panel Lawyer

Hon'ble Shri Justice Goutam Bhaduri

C.A.V. Judgment



09.12.2016

These bail applications are being decided together as the common question of law is involved in this case.

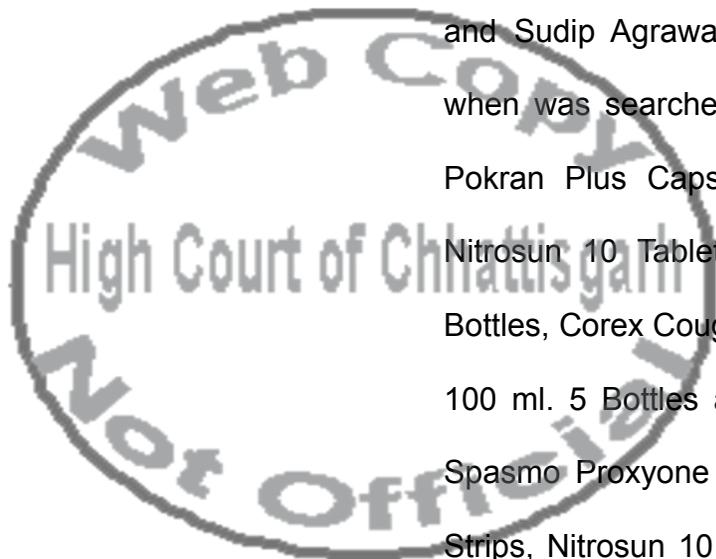
1. MCRC No.5181 of 2016 (Sudip Agarwal v. State of C.G.)

(i). This is the first bail application filed under Section 439 of the Code of Criminal Procedure for grant of regular bail to the applicant who has been arrested in connection with Crime No. 113 of 2016 registered at Police Station- Kusmunda, District Korba (C.G.) for the offence punishable under Section 22 of NDPS Act.

(ii). As per the prosecution case, on 26.07.2016 on information received by the police, the police reached near the Railway Station and Sudip Agrawal and his Scooty bearing No.CG 12 AJ 8257 when was searched, Spasma Proxgone Capsule 20 Strips, Spas Pokran Plus Capsule 35 pieces, Almax 0.5 Tablets 20 Strips, Nitrosun 10 Tablets 8 Strips, Cyrex Cough Syrup 100 ml. 10 Bottles, Corex Cought Syrup 100 ml. 8 Bottles, Biorex Cough Syrup 100 ml. 5 Bottles and on house being raided from the Bedroom Spasmo Proxyone Plus Capsule 10 Strips, Almax 0.5 Tablets 20 Strips, Nitrosun 10 Tablets 10 Strips, Cyrex Cough Syrup 100 ml. 100 Bottles, Corex Cough Syrup 100 ml. 45 Bottles were seized. Therefore, he was arrested on 26.07.2016 for committing the offence under Section 22 of NDPS Act.

2. MCRC Nos.5843 & 6588 of 2016 (Mohd. Ashfaq Alam & Naveen Gupta @ Karfu v. State of C.G.)

(i). These are the first bail application filed under Section 439 of the Code of Criminal Procedure for grant of regular bail to the applicants who have been arrested in connection with Crime No. 502 of 2016 registered at Police Station- Ambikapur/ Kotwali



Ambikapur, District Sarguja (C.G.) for the offence punishable under Section 21(B) of NDPS Act.

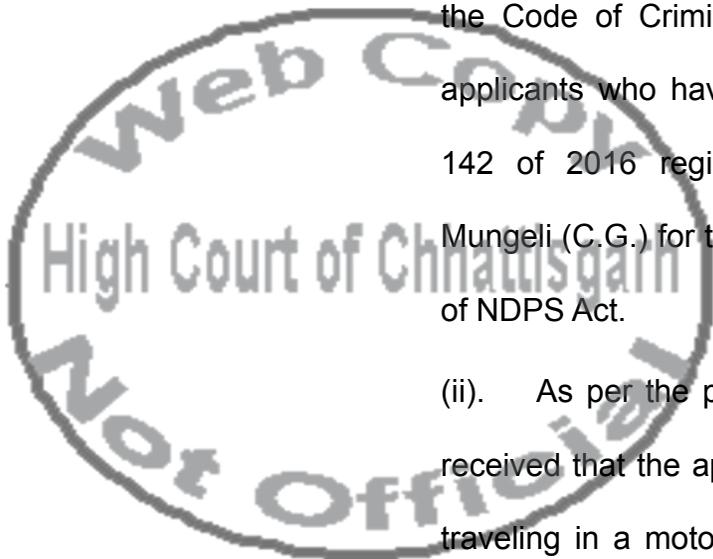
(ii). As per the prosecution case, on 21.07.2016 during patrolling, the vehicle bearing No.MP 09 CP 9461 was stopped and after having checked in four cartoons 100 ml of Biorax Syrup total 400 Bottles were found and the applicants failed to produce any licence or documents; thereby the offence is alleged to have been committed.

3. MCRC Nos. 5859 & 6083 of 2016 (Pawan Jaiswal & Pintu @ Vinay Ahuja & Anr. v. State of C.G.)

(i). These are the first bail application filed under Section 439 of the Code of Criminal Procedure for grant of regular bail to the applicants who have been arrested in connection with Crime No. 142 of 2016 registered at Police Station- Jarhagaon, District Mungeli (C.G.) for the offence punishable under Section 22(B) & 29 of NDPS Act.

(ii). As per the prosecution case, on 30.06.2016 on information received that the applicants are selling the narcotic drugs and was traveling in a motorcycle, they were intercepted and a bag which they were carrying was searched and from them 400 Tablets of Nitrosun 100 mg, 50 Tablets of Alfazolam each of 0.50 mg., Corax Cough Syrup of 100 ml. 7 Bottles were found and they failed to produce any document or licence; thereby the offence is said to have been committed.

4. Learned counsel for the applicants would submit that the medicines so seized if are separated and the narcotic drugs contained in such goods are evaluated separately then in such case, the quantity of the narcotic drugs would fall within the small quantity as enumerated in the Schedule of the Narcotic Drugs & Psychotropic



Substances Act, 1985 (*for short "NDPS Act"*). It is further contended that in the Spasmo Proxyon E Plus Capsule and Spasm Pokran Plus Capsule, it doesn't show presence of narcotic drugs as per the Schedule, whereas in the Almax Tablet presence of Alprazolam is shown. In the Nitrosun Tablet, Nitrazepam has been shown and in Corax Cough Syrup presence of Codeine is shown and if the contents of these drugs are calculated separately, it would fall below the commercial quantity and in cases it will also fall within the quantity below the small quantity. It is further submitted by referring to the law in case of ***Union of India & Another v. Sanjeev V. Deshpande***¹ that the applicants cannot be prosecuted for prohibition of narcotic under Section 22 of the NDPS Act. It was contended that the drugs contained was inseparable and was in the medicine and the medicines have been prepared by the Company and if the applicants were in possession of these drugs, it can maximum be held to be violative of the provisions of Drugs & Cosmetics Act, 1940 (*for short "D&C Act, 1940"*). Further, referring to Section 8(c) of the NDPS Act, it is contended that the bar of Section 8 of the NDPS Act would not apply as it exempts the presence of the narcotic substance for medicinal and scientific purpose and the applicants were holding the medicine would show that the applicants at the most liable to be prosecuted under the D&C Act, 1940 and the Rules made thereunder. In view of this, the entire prosecution is bad and therefore, the applicants may be released on bail.

5. Per contra, learned State counsel opposes the prayer for grant of bail.
6. Perused the case diary, relevant documents and rival submission of the parties. The common stand of the applicants are two fold. First

¹ (2014) 13 SCC 1

is that the presence of narcotic drugs or psychotropic substance in medicinal drug are exempted in view of Section 8 of the NDPS Act and offence can be tried only for default under D&C Act, 1940. Second is that if presence of narcotic drugs if are calculated separately and exclusively, the presence of psychotropic substance cannot be stated to be exorbitant in the total contents of medicine and therefore is within the small quantity.

7. In order to appreciate the argument, relevant Sections of NDPS Act, 1985 were examined. Perusal of the NDPS Act would indicate that Chapter-III of NDPS Act deals with prohibition, control and regulation of narcotic drugs & psychotropic substances. For the sake of brevity, Section 8 is reproduced herein below :

“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 transship any narcotic drug or psychotropic substance,

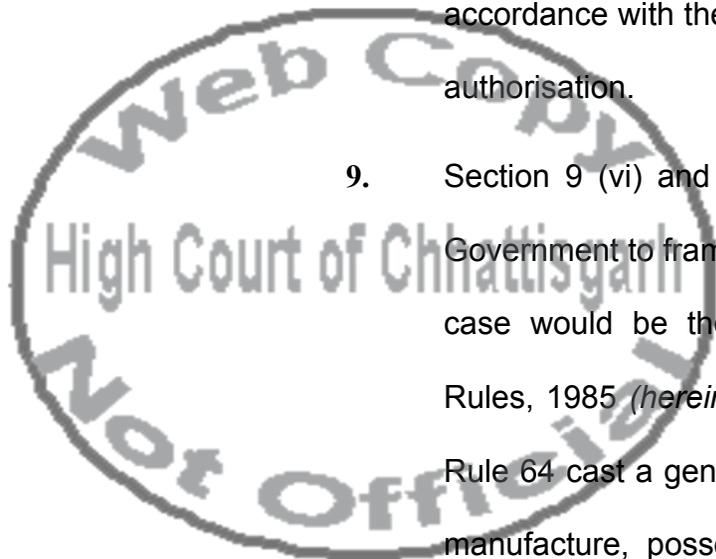
except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and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

8. Reading of Section 8 of NDPS Act would show that Section 8(c) postulates that no person shall 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.

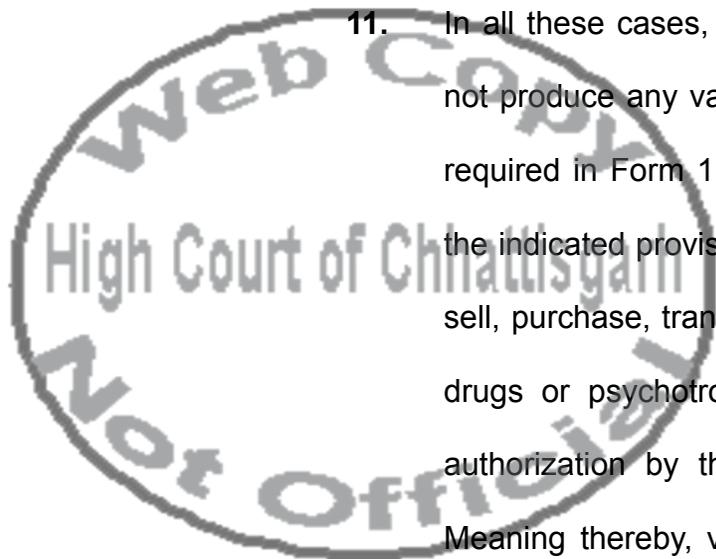
9. Section 9 (vi) and Section 76 of NDPS Act empowers the State Government to frame rules in various fields. The relevant rule in this case would be the Narcotic Drugs & Psychotropic Substances Rules, 1985 (*hereinafter referred to as “Rules, 1985”*). Chapter-VII Rule 64 cast a general prohibition and speaks that 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. Whereas, Rule 65-A mandates that no person shall sell, purchase, consume or use any psychotropic substance except in accordance with the Drugs and Cosmetics Rules, 1945. Therefore, Rule 65A refers to applications to the psychotropic substances otherwise than those specified in Schedule I of the Rules. The exception in Section 8(c) covers the dealing in narcotic drugs or psychotropic substances or is permitted only when such dealing is for medical purposes or scientific purposes but the dealing in the narcotic drugs and psychotropic



substances if it is done for medicinal and scientific purpose completely do not lift the bar created under Section 8(c) of NDPS Act.

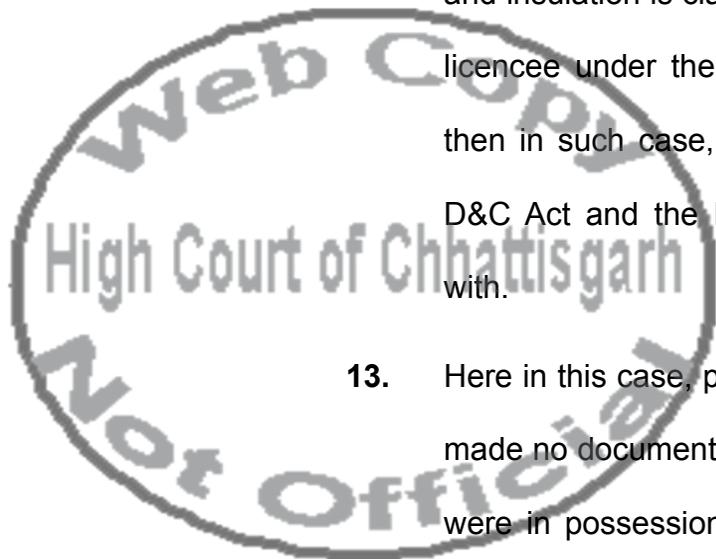
10. Similarly, Order 3 of the NDPS (Regulation of Controlled Substances) Order, 1993 provides that every person who manufactures or distributes or sells or imports or exports or consumes any controlled substance shall maintain daily accounts of his activities in Form 1 or Form 2, prescribed under the NDPS Act, which will be preserved for a period of two years from the date of last entry in the register and shall report to the Director General of Narcotics Control Bureau in this relevant connection.

11. In all these cases, when the search was made, the applicants did not produce any valid licence or daily account of their activities as required in Form 1 and Form 2 above. The meaningful reading of the indicated provisions would reveal that no person shall possess, sell, purchase, transport or warehouse, use, consume any narcotic drugs or psychotropic substance without any permit, licence or authorization by the competent authority under the NDPS Act. Meaning thereby, valid permit has to be obtained to possess the narcotic drugs or psychotropic substances. Thereby, a person should be in possession of the valid licence and authorization while dealing in the narcotic drugs and psychotropic substances and also to maintain the record accordingly. Therefore, if the entire legal provisions of NDPS Act and Rules are read together then it leads to point out that possess, sell and purchase etc. of narcotic drugs and psychotropic substances which finds place in the Schedule appended thereto in violation of the provisions of NDPS Act will expose a person for the penalty and punishment as contemplated under Section 21 & 22 of NDPS Act, Rules & Order.



12. The issue can be looked into from other angle that in these cases even if it is admitted that the person is in hold of a licence under D&C Act, 1940, whether he is insulated from the application of the provisions of NDPS Act and the Rules framed therein. In the instant case, prima facie as appears the medicinal drug contains the Codeine, Alprazolam & Nitrazepam which are scheduled as psychotropic substances. Then in such case even if a person is holding licence under D&C Act, 1940 then placing it parallel to Section 80 of the NDPS Act would indicate that the Act & Rules made therein are in addition to and not in derogation of D&C Act, 1940 or the Rules made therein. Therefore, even if an immunity and insulation is claimed by a person projecting that the person is a licensee under the D&C Act, 1940 and the Rules framed therein then in such case, the condition imposed under the provisions of D&C Act and the Rules framed thereunder have to be complied with.

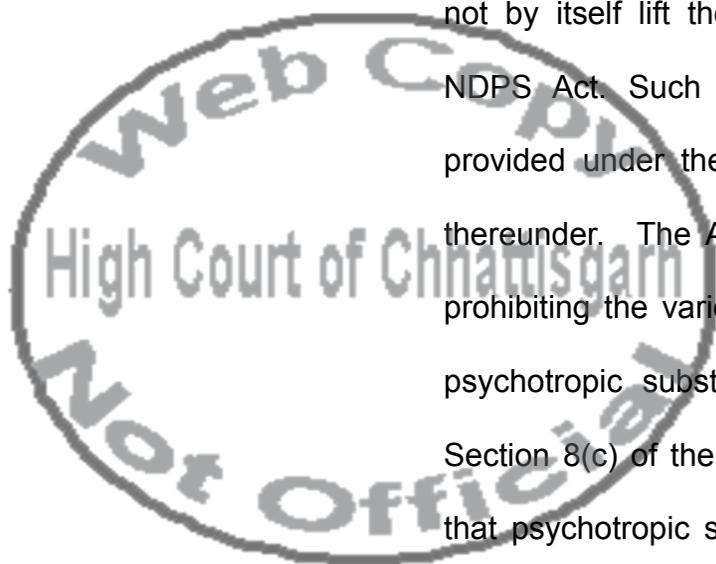
13. Here in this case, prima facie, it appears that while the seizure was made no document was produced so as to show that the applicants were in possession of the valid licence under the D&C Act, 1940 and had complied the conditions enumerated therein. Therefore, it would be absolutely necessary to demonstrate prima facie that the medicinal drugs which contained the psychotropic substances, the applicants were in possession of same under the valid licence of D&C Act, 1940 after due compliance of the conditions thereof. The protection and immunity granted from the applicability of the NDPS Act and the Rules framed thereunder becomes porous the moment it comes to fore that licence has not complied with the licence conditions of the D&C Act, 1940 and Rules made thereunder. Prima facie, it shows that the applicants have failed to produce the record of purchase of drugs intended for sale or sold by retail, which is a



mandatory requirement while dealing with the narcotic drugs and psychotropic substances. The licence is also mandated to maintain the purchase bills including cash or credit memos.

14. As observed, prima facie the case diary do not contain fact of compliance of D&C Act, 1940 and Rules thereunder as no purchase bills nor any explanation was given how this drugs came in their possession. The law cited by the applicants in case of *Union of India & Another v. Sanjeev V. Deshpande* (supra) rather hold the sway in favour of the prosecution and the Supreme Court in this case held that mere fact that dealing a narcotic drugs and psychotropic substances is for medicinal or scientific purpose does not by itself lift the embargo created under Section 8(c) of the NDPS Act. Such dealing must be in the manner and extent provided under the provisions of the Act, Rules or Order made thereunder. The Act does not contemplate framing of Rules for prohibiting the various activities in dealing the narcotic drugs and psychotropic substances. Such prohibition already contained in Section 8(c) of the NDPS Act. Therefore, conclusively it was held that psychotropic substances which finds mention in Schedule of the Act cannot be separated with the Schedule-I of the Rules by virtue of application of Section 8(c) of the NDPS Act.

15. Now turning to the second argument that the composition of salt, presence of narcotic or psychotropic substance if are calculated separately, it would fall within the ambit of small quantity and in cases it below the commercial quantity. At the very outset, one cannot loose sight of the fact that NDPS Act was legislated to amend the existing law relating to narcotic drug and psychotropic substance and to control the menace of the drug, as it was adversely affecting the social fabric including the young children of



the schools and colleges. In order to carry out the purpose, further the Central Government has issued the notification on 18.11.2009 with respect to the presence of drug which reads as under :

Notification dated 18.11.2009 has replaced the part of the Notification dated 19.10.2001 and reads as under :

“In the Table at the end after Note 3, the following Note shall be inserted, namely :

(4) 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 any one 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.”

16. Therefore, if the language of statute is clear, the only duty of the Court is to give effect to it and the Court has no business to look into consequences of such interpretation. The Court is under an obligation to expound the law as it exists and leave the remedy to the legislature, even if harsh conclusions result from such exposition.

17. Admittedly, in this case, if the total mass of the mixed mixture of Salt and Syrup are taken into account, the total mass of goods recovered from the applicants will have to be taken into account without calculating the percentage of narcotic drug and psychotropic substance separately to calculate the small and commercial quantity limit. Therefore, by application of the aforesaid notification, the percentage of narcotic drug and psychotropic substance shall be inseparable and the whole contraband seized has to be taken into consideration that whether the same falls within the small quantity or commercial quantity or an intermediate

quantity. The said notification was further upheld by their Lordship in case of *Harjit Singh v. State of Punjab*² wherein it is held that under the notification the whole quantity of material recovered in form of mixture has to be considered for the purpose of imposition of punishment. Therefore, the percentage of narcotic drugs i.e. Codeine, Alprazolam and Nitrazepam would be immaterial to calculate the presence of psychotropic substances from the goods seized at mass.

18. In view of the foregoing discussions, I am not inclined to allow this bail applications and accordingly they are hereby dismissed.

19. It is further needless to mention that anything observed herein before would not reflect on the merit of the main case in any manner during the course of trial, as the same has been so recorded for limited purpose of deciding the present applications for regular bail.

Sd/-
(Goutam Bhaduri)
Judge

