

1. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

Miscellaneous Criminal Case No.26515 of 2018

Ranjan

Vs.

The State of M.P.

&

Miscellaneous Criminal Case No.46229 of 2018

Sandeep

Vs.

The State of M.P.

Shri C.L.Yadav, learned Senior counsel with Shri N. Dave, learned counsel for the petitioner - Ranjan.

Shri A.K. Saraswat, learned counsel for the petitioner -Sandeep.

Shri Mukesh Kumawat, learned Public Prosecutor for the respondent/State.

Both these bail petitions have arisen out of the same crime number of the same police station, therefore, they are heard analogously and are being decided with this common order.

O R D E R

1. Both these petitions are the **first** bail applications of Ranjan and Sandeep under Section 439 of Cr.P.C. in **Crime No.08/2018 under Sections 8/21 of the NDPS Act, 1985 registered at Police Station-Narcotics Cell, District-Indore.**

2. In short, the case of the prosecution is that on 09.04.2018, Police Station, Narcotics Cell, Indore received information that last night i.e. 08.04.2018, Eskuf cough syrup having Codeine Phosphate is loaded in a truck bearing registration No. M.P.-09-HH-1996 from a godown near Center Point shrouded among bags of potatoes and onions. The truck is parked at a petrol pump on A.B. Road before

2. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

Dakachya and driver Mohanlal will take it to Siliguri (West Bangal) to sell that Eskuf cough Syrup to the druggies/addicts. The truck will depart about 5-5:30 P.M. If the action is taken without delay, the contraband can be recovered. Immediately a team headed by Inspector B.D. Tripathi sent to the place indicated by the informer and a trap was laid near Bridge of *Kshipra* River. After a while, the team saw the truck coming from Dakachya side and got it stopped. Following due process, when the truck was searched, 400 boxes containing 64000 bottles of 100 ml each of Eskuf Cough Syrup kept concealed amidst 145 bags of onions and 7 bags of potatoes were recovered. Driver Mohanlal was having no document regarding transport of the same, while at the same time; he was having all relevant documents regarding transportation of onion and potatoes.

3. Mohanlal was taken into custody. On interrogation, he disclosed that owner Kaushal Singh has taken the truck to the godown of Gopal Mittal situated near Central Point, Mangliai, Indore and from that godown, Ranjan Shukla (the petitioner) has loaded the syrup.

4. The police went to the godown on next day i.e. 10.04.2018, searched for Ranjan Shukla but he could not be traced. The police sealed the godown. Next day on 11.04.2018, the Police traced Ranjan Shukla and inquired regarding cough syrup, who revealed that the godown belongs to Gopal Mittal and is taken on rent by proprietor of Anmol Medical, Manish Bhaskar, who operates his drugs business from this godown and he works for Manish

3. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

Bhaskar. He also revealed that 223 boxes of Eskuf Cough Syrup are still lying in the godown. The godown was unlocked and searched in his presence. 223 boxes of Eskuf Syrup containing 35680 bottles of 100 ML each were recovered from the godown. No documents regarding storage of this cough syrup were produced by Ranjan Shukla. 13 ATM cards and 5 cheque books of several banks and a note book, a challan book and two plastic seals were also recovered from his possession.

5. The police approached Gopal Mittal, who revealed that the godown, from where the contraband was recovered, belongs to his elder brother Biharilal. Biharilal disclosed that his godown was taken on rent by Sandeep Kale (petitioner) for vegetable business. The Police seized the rent agreement.

6. The Police took out the samples from the seized articles and sent them to the FSL for chemical analyses, who confirmed existence of Codeine Phosphate and chlorpheniramine maleate.

7. Submissions of the petitioner Sandeep Kale are that he is a transporter and accepts goods to be transported in usual course of his business after verification of tax invoice and bills, keep them in his godown and got them loaded in the trucks to deliver them at the destination. In the present case also, the cartons were booked by one Anmol Medical stating that they contain some medicines. He accepted the goods to transport the same after verification of tax invoice and bills. He or any of his employees was not concerned nor was aware about the legality or illegality of the goods. He is not

4. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

named in the FIR. Nothing is recovered from his possession. He is in jail since 2/05/2018. The investigation is over and charge-sheet is filed. Trial is likely to take time. He will cooperate with the trial. There is no possibility of his absconding. Therefore, he be released on bail.

8. Almost similar grounds have been taken by the petitioner Ranjan Shukla.

9. In the arguments, much emphasis is been given by the learned senior counsel that Section 21 of the NDPS Act prescribes punishment for dealing in “manufactured drug” in contravention of any provision of The Act, 1985 or any Rule or Order made or condition of license granted there under. “Manufactured Drug” is defined in Section 2(xi) of The Act, 1985. Clause (b) of Section 2(xi) of The Act provides that “Manufactured Drug” means any psychotropic 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, declared to be a “manufactured drug”.

10. In exercise of powers conferred under The Act, 1985, the Central Government issued notification S.O.826 (E) dated 14.11.1985 and S.O.40 (E) dated 29.01.1993. Entry No.35 of this notification defined specifications of Codeine, which reads as under:-

“35. 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

5. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

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.”

11. It is averred that in the seizure memo of psychotropic substance itself it is mentioned that each dose of 5 ML contains 10 mg Codeine Phosphate against permissive limit of 100 Mg. Similarly, its concentration is mentioned 1% against permissive limit of 2.5% in undivided preparations. Thus, the substance seized by the police does not fall within the definition of “manufactured drug” and is not punishable under Section 21 of NDPS Act, 1985.

12. It is further asserted by the learned Senior counsel that at the most, the case of the applicants falls under the Drugs and Cosmetics Act, for which, appropriate action can be taken by the competent authority, but in any case, they cannot be punished under the NDPS Act, 1985.

13. To bolster his arguments, learned Senior counsel has placed reliance on two orders of co-ordinate Bench of this Court passed in the case of *Shiv Kumar Gupta vs. The State of Madhya Pradesh dated 16.09.2015 passed in CRR No.200/2015* and *Rohit Chanda vs. The State of Madhya Pradesh dated 15.10.2015 passed in CRR No.1621/2015* where charges were quashed when the 5 ML of Cough Syrup was containing 10 mg of codeine phosphate in the case of **Shiv Kumar** (supra) and 9.825 mg codeine phosphate in the case of **Rohit Chanda** (supra) holding that the quantity of psychotropic substance was within the permissible limit.

14. A judgement of Punjab and Haryana High Court passed

6. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

in *Rajeev Kumar vs. the State of Punjab reported in 1998 Cri.L.J. 1460* is also pressed into service, where the proceedings were quashed by the Court on the similar line that seized drug was containing contraband in the permissive limit.

15. Further reliance is placed by the learned Senior counsel on the judgement of *Binod Kumar @ Binod Kumar Bhagat vs. The State of Bihar reported in 2018 Cr.L.R (SC) 206* where Hon'ble the Supreme Court has granted bail on the ground that the applicant was only employee of the transport company which was engaged in the business of transportation of goods and both the consignee and the consignor were different companies/persons.

16. On the other hand, learned Public Prosecutor has controverted each and every contention of the learned senior counsel.

17. Earlier, there was some controversy as to how the quantity of psychotropic substance found in any preparation or composition shall be calculated, but this controversy is now set at rest. The Government of India has issued a notification No. S.O. 2941(E) dated 18/11/2009. As per note 4 appended at the end of this notification, it is made clear that for the purpose of determining the quantity, the gross weight of the drug recovered and not the pure content of the psychotropic substance shall be taken into consideration. Note 4 reads thus:

"(4) The quantities shown in column 5 and column 6 of the Table relating to the respective

7. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

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, ether 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."

18. The aforesaid notification is considered by the Hon'ble Supreme Court in *Harjit Singh Vs. State of Punjab reported in 2011 Cr.L.R. (SC) 355*. It is held that while considering the quantity of the psychotropic substance, the whole quantity is to be taken into consideration.

19. The Hon'ble Supreme Court in the case of *Union of India and Anr. Vs. Sanjeev V Deshpande, reported in 2014 Cr.L.R. SC 896 (2014) 13 SCC 1 : (AIR 2014 SC 3625)* considered the controversy as to whether the contents of psychotropic salt in the tablets could be separately counted for calculating the weight or volume of psychotropic substance in medicinal preparation. The Supreme Court turned down the contention and held that the gross weight of the drug is to be counted and not merely the net percentage/contents of the salt in the medicinal preparation for finding out the actual weight of the drugs in reference to the schedule under the NDPS Act.

20. Same view has earlier been taken by the Hon'ble Supreme Court in the case of *Shahabuddin and Ors. Vs. State of Assam, passed in Criminal Appeal No.629/2010 decided on 13/12/2012 reported in 2012(11) JT 310 : 2013 AIR SCW 817 : (2012) 13 SCC 491*. While considering the similar argument, the Court held that :

8. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

"10. At the very outset, the above said 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 he was not expected to fulfill any of the statutory requirements either under the provisions of Drugs and Cosmetics Act or under the provisions of the N.D.P.S. Act.

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 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.

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 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

9. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

codeine content on dosage basis can 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 two 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."

21. Time and again this Court has followed the law laid down by the Hon'ble Supreme Court in *Shahabuddin and Sanjeev Deshpande* cases (supra) in MCRC No. 11448/2016 order dated 13.12.2016, M.Cr.C.No.4310/2017 Gopal Gupta Vs. The State of M.P. & Another order dated 11.05.2017, MCRC No. 20360/2018 order dated 28.05.2018 and in MCRC 26037 Nilesh @ Nilkamal V/s State of MP order dated 10.07.2018. The Rajasthan High Court has also taken the same view in the case of *Ravi alias Ravikant Vs. State of Rajasthan* reported in *2016 CRI. L. J. 3309* that the gross weight has to be considered for calculation of commercial

10. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

quantity.

22. Thus, it is evident that the whole quantity of material recovered in the form of mixture is to be considered for the purpose of determining the quantity of psychotropic substance and when the psychotropic drug is kept in possession without any document to show that it was meant for therapeutic use and the gross weight of psychotropic substance is well above the commercial quantity, the restriction contained in Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) is directly applicable to the case of the petitioners. Nothing is on record to satisfy the conditions enunciated in this Section.

23. Further, in the year 2015, The Government of India, Ministry of Finance (Department of Revenue), issued a notification No.S.O.1181(E) dated 05.05.2015 and made Codeine as “essential narcotic drug”. Relevant paragraph no.1 of this notification reads thus:-

S.O.1181(E). - In exercise of powers conferred by clause (viii) of Section 2 of Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central government hereby notices for medical and scientific use, the following narcotic drugs to be essential narcotic drugs, namely:-

(1) 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; (2)..... (3)..... (4).....(5)..... and (6).....

24. In this regard, Rules are also amended and notified by the Government of India vide notification No.G.S.R.359(E)

11. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

dated 05.05.2015. A new Chapter "CHAPTER VA" is added in the Narcotic Drugs and Psychotropic Substances Rule, 1985 by this amendment. For the sake of convenience, relevant Rules of this Chapter-VA are being reproduced below:-

"CHAPTER VA"

POSSESSION, TRANSPORT, IMPORT INTER-STATE, EXPORT INTER-STATE, SALE, PURCHASE, CONSUMPTION AND USE OF ESSENTIAL NARCOTIC DRUGS

52A. Possession of essential narcotic drug.-(1) No person shall possess any essential narcotic drug otherwise than in accordance with the provisions of these rules.

(2) Any person may possess an essential narcotic drug in such quantity as has been at one time sold or dispensed for his use in accordance with the provisions of these rules.

(3) A registered medical practitioner may possess essential narcotic drug, for use in his practice, but not for sale or distribution, not more than the quantity mentioned in the Table below, namely:-

S.L. No.	Name of the essential narcotic drug	Quantity
1	2	3
1	Morphine and its salts and all preparations containing more than 0.2 percent of Morphine	500 Milligrammes
2	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	2000 Milligrammes

12. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

3	Dihydroxy Codeinone, (commonly known as Oxy-codone and Dihydroxycodone), its salts (such as Eucodal Boncodal Dinarcon Hydrolaudin, Nucodan, Percodan, Scophedal, Tebodol and the like), its esters and the salts of its ester and preparation, admixture, extracts or other substances containing any of those drugs	250 Milligrammes
4	Dihydrocodeinone (commonly known as Hydrocodone), its salts (such as Dicodide, Codinovo, diconone, Hycedan, Multacodin, Nyodide, Ydroced and the like) and its esters and salts of its ester, and preparation, admixture, extracts or other substances containing any of these drugs	320 Milligrammes
5	i-phenethyl-4-N – propionylanilino-piperidine (the international-non-proprietary name of which is Fentanyl) and its salts and preparations, admixture, extracts or other substances containing any of these drugs.	Two transdermal patches one each of 12.5 microgram per hour and 25 microgram per hour

Provided that the Controller of Drugs or any other officer authorised in this behalf by him may by special order authorise, in Form 3B, any such practitioner to possess the aforesaid drugs in quantity larger than the specified in the above Table.

Provided further that such authorisation may be granted or renewed, for a period not exceeding three years at a time.

Explanation.- The expression “for use in his practice” covers only the actual direct administration of the drugs to a patient under the care of the registered medical practitioner in accordance with established medical standards and practices

(4) For renewal of the authorisation referred to in the second proviso to sub-rule (3), application shall be made to the Controller of Drugs at least thirty days before the expiry of the previous authorisation.

(5) (a) The Controller of Drugs may, by order, prohibit any registered medical practitioner from possessing for use in his practice under sub-rule(3) any essential narcotic drug, where such practitioner

13. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

- (i) has violated any provision of these rules; or
 - (ii) has been convicted of any offence under the Act; or
 - (iii) has, in the opinion of the Controller of Drugs, abused such possession or otherwise been rendered unfit to possess such drug.
- (b) When any order is passed under clause (a) of this sub-rule, the registered medical practitioner concerned shall forthwith deliver to the Controller of Drugs the essential narcotic drug then in his possession and the Controller of Drugs shall issue orders for the disposal of such drugs.
- (6) The Controller of Drugs may, be a general or special order, authorise any person to possess essential narcotic drug as may be specified in that order.
- (7) A recognized medical institution may possess essential narcotic drug in such quantity and in such manner as specified in these rules.
- (8) A manufacturer may possess essential narcotic drug in such quantity as may be specified in the licence issued under rule 37 of these rules.
- (9) A licenced dealer or a licenced chemist may possess essential narcotic drug in such quantity an in such manner as may be specified in the licence issued under these rules.

52B. Provisions regarding licenced dealer and licenced chemist- (1) A licenced dealer or a licenced chemist shall apply for a licence to possess, sell, exhibit or offer for sale or distribution by retail or wholesale, essential narcotic drug, to the authority competent to issue licence to possess, sell, exhibit or offer for sale or distribution by retail or wholesale, manufactured drugs under the rules framed under Section 10 of the Act by State Government of the State in which he has his place of business.

(2) Every application for issue of licence referred to in sub-rule (1) shall be in such form and manner as may by specified by the authority referred to in the said sub-rule.

(3) The licence to possess, sell, exhibit or offer for sale or distribution by retail or wholesale, essential narcotic drugs shall have the same conditions as are applicable to a licence to possess, sell exhibit or offer for sale or distribution by retail or wholesale, manufactured drugs under the rules framed under section 10 of the Act by the State Government.

(4) The licence under this rule shall be obtained within a period of one hundred and eighty days from the date of commencement of these rules.”

25. Thus, after May, 2015 licence to keep the composition

14. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

containing psychotropic substance is made compulsory and for the convenience of the persons/traders already dealing in such psychotropic substance, six months time was granted to obtain such licence. The incident in the present case is of the year 2018, but nothing is there to show that the petitioners have ever obtained or possessed any licence required by these Rules.

26. It is submitted by learned senior counsel that this Court is bound by earlier decision taken by a Bench of similar strength. As earlier, different Single Benches of this Court has taken a particular view; this Court is bound by that view and cannot take a different view. If this Court is of any different view, in that case, at the most, the matter can be referred to a Larger Bench; therefore, their application cannot be thrown away.

27. But, on the facts, the orders passed in *Shiv Kumar* (supra) and *Rohit Chanda* (supra) are distinguishable, as while quashing the charges on both the occasions, the learned Single Bench of this Court has not considered the note appended to the notification No. S.O. 2941(E) dated 18/11/2009 and also the judgement passed by Hon'ble the apex Court in the case of *Mohd. Shahabuddin and Sanjeev Deshpande* (supra) and the notification No.S.O.1181(E) dated 05.05.2015 and Rules made thereunder, therefore, the plea of the learned senior counsel is not tenable.

28. In any case, if we consider that the syrup containing psychotropic substance was in the permissive limit even then Section 8 of the Act, 1985 provides that no person shall

15. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

possess narcotic drugs or psychotropic substance except for medical or scientific purposes or in the manner and to the extent provided by the provisions of the Act or Rules or Orders made thereunder. Nothing is shown before this Court that the seized contraband was stored or possessed for any therapeutic purposes. No documents, whatsoever, are produced by the petitioners. On the contrary the contraband was concealed among the bags of potatoes and onion. The godown was taken for storage of vegetables, but under the guise of vegetables, a huge quantity of psychotropic substance was stored and being transported stealthily. All this is sufficient to *Prima facie* show that the intention of the petitioners was not bonafide.

29. In *Mohd. Shahabuddin* (supra) case Hon'ble the Supreme Court has also discussed this issue and has held that apart from the other condition, it is mandatory that the contraband should be only for therapeutic practice. Therapeutic practice means it should be for medicinal purposes only or should be exclusively meant for its usage for curing a disease and as an action of remedial agent.

30. At the cost of repetition I can refer para 13 of the judgement, which says that "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

16. High Court of M.P. Bench At Indore

MCRC No.26515/2018
Ranjan vs. The State of M.P.
&
MCRC Nos.46229/2018
Sandeep vs. The State of M.P.

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 two 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."

31. The observation of the Hon'ble Supreme Court reproduced herein above leaves no scope for this Court to entertain the contention canvassed by the learned counsel for the petitioners particularly, looking to the quantity of bottles seized in the present case without any valid documents to justify the possession of such huge quantity of bottles.

32. If, in view of the contention of the petitioners, we consider only the net quantity of 20 mg of psychotropic substance, which each bottle seized contains and multiply this with the total number of bottles (99680) seized, then the total quantity of Codeine comes to 1993600 mg, which is equal to 1.993 kg and it certainly is commercial quantity. Considering this aspect also, the petitioners are not entitle for bail.

33. In view of the foregoing discussions, in my considered

17. High Court of M.P. Bench At Indore

MCRC No.26515/2018

Ranjan vs. The State of M.P.

&

MCRC Nos.46229/2018

Sandeep vs. The State of M.P.

opinion, no case for bail is made out. Therefore, both the petitions are dismissed hereby.

**(Virender Singh)
Judge**

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