

31.07.2026
Ct. No. 11
SL No.07
Cp

CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI

CRM (A) No. 434 of 2026

In Re: - An application for anticipatory bail under section 438 of the Code of Criminal Procedure, 1973/Section 482 of the B.N.S.S. 2023, in connection with Sahebganj Police Station Case No. 595 of 2025, dated 09.10.2025, under Sections 21(c)/25/29 of the NDPS Act.

And

In the matter of: **Ersad Ali**

....Petitioner.

Mr. Sourav Ganguly
Mr. Gopal Roy
Ms. Rishita Chakraborty

...for the Petitioner.

Mr. Avrojoyti Das, Ld. APP
Mr. Debabrata Rai

... for the State.

1. The petitioners pray for pre-arrest bail. It is contended that random sampling of one out of 55 bottles of cough syrup was in violation of the sampling procedure. The contraband substance contained in one bottle, was of small quantity. Thus, the pre-arrest bail could be granted.
2. Mr. Ganguly, submits that the rigours of Section 37 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (NDPS Act) and the restriction therein, cannot be applied in this case. The quantum of contraband substance seized from the petitioner was of small quantity. To support such contention it is submitted by Mr. Ganguly that, as per the First Information Report and the description of the seized items therein, although 55 bottles of codeine based Eskuf

syrup had been seized, the bottle that was drawn as a sample, may not be representative of the other 54 bottles. Random sampling in this case was not permitted, for the simple reason that the composition of the syrup in each of the bottles may differ. Consequently, unless the quantity of codeine mixture in each of the bottles that were seized were measured, it could not be proved that commercial quantity of the contraband substance had been seized. It would be presumed that the petitioner has been able to rebut the restriction under Section 37 of the NDPS Act. At least, the bottles should have the same batch numbers, date of expiry etc. In support of his contention Mr. Ganguly relied upon several decisions. First of such decisions is **Gaunter Edwin Kircher vs. State of Goa, reported in (1993) 3 SCC 145**. The Hon'ble Supreme Court held that, unless both the pieces of charas which were seized from the accused were sent for chemical analysis, it would be presumed that the quantum of charas in one of the pieces which was sent for chemical analysis would be the quantity of contraband substance which was recovered from the accused. The next decision relied on by him is in the matter of **Rajesh Kumar Patel vs. State of U.P., reported in 2018 SCC Online All 7196**, which followed the decision of the Supreme Court in Gaunter Edwin Kircher (supra). The said decision was rendered by the Allahabad High Court, inter alia, holding that the appellants before the court were carrying only 5 gms of contraband substance as only one box containing 10 stripes of the tablet was verified by the Forensic Lab and as per the chemical analysis report only 5 gm of Nitrazepam-10 was detected.

Mr. Ganguly submits that the decision of the Allahabad High Court was upheld by the Hon'ble Supreme Court.

3. Further reliance was placed on the decision of **Sami Ullaha vs. Superintendent, Narcotic Central Bureau, reported in (2008) 16 SCC 471**, in support of the contention that one of the factors to be taken into consideration by the court in the matter of grant or refusal of bail was the quantity of the contraband substance which was found in the possession of the accused. A decision of a Division Bench of this court in CRM (A) 2669 of 2022 has been relied upon in support of the contention that, in the event small quantity of contraband substance was seized from any person, the said person was entitled to grant of pre-arrest bail.
4. Learned APP opposes the prayer and submits that the First Information Report would clearly indicate that 55 bottles (100 ml each) of codeine based Eskuf cough syrup had been seized, packed and sealed in a yellow plastic bag and marked as Exhibit A. The value was of Rs.11616/- (55x211.20). Thus, this was not a case where different brands of cough syrup containing contraband substance had been seized. 55 bottles of the same cough syrup had been seized which are sold in the market and each of the bottles was in a sealed condition. Further reference has been made to the Certificate of the Judicial Magistrate, 2nd Court, Dinhata which mentioned that sealed bag containing of 55 bottles of Eskuf syrup weighing 7.529 kg had been marked as Exhibit A. Two representative samples each containing 100 ml was randomly drawn out of the two bags consisting of the seized contraband item by the I.O., in the presence of the Judicial Magistrate and marked as Exhibit A1 and A2. The

inventory of the seized contraband substance has been produced before this court. Exhibit A was the total batch of 55 Eskuf syrup bottles. Exhibit A1 was one sealed and labelled yellow colour envelop containing one bottle drawn from Exhibit A as test sample and Exhibit A2 was another bottle drawn from Exhibit A as security sample.

5. It is contended by Mr. Das, learned APP that, at the stage of pre-arrest bail, the fact that seizure of the contraband substance was made from the petitioner would be sufficient to attract Section 37 of the NDPS Act. The issue with regard to improper drawing of sample should be raised at the trial. Moreover, all the cough syrup bottles were the same. They were packed in one sealed bag, from which two bottles had been drawn for the purpose of chemical analysis and sampling. He relies on the decision of Delhi High Court in the matter of ***Mohammed Yakooob – versus – Narcotics Control Bureau*** reported in ***2021 SCC OnLine Del 3808***.
6. Considered the rival contentions of the parties, and the materials on record. According to the prosecution, the petitioner was in possession of 55 bottles of Eskuf syrup. All the bottles were seized, sealed and sampling was done. The brand name is Eskuf Cough Syrup. The quantity was commercial. Under such circumstances, in my, prima facie, view the sampling procedure cannot be held to be contrary to law at this stage. Prima facie, it appears that the bottles belonged to a homogeneous lot. The contention of Mr. Ganguly can be relevant at the appropriate stage. The decision in Gaunter Edwin Kircher (supra) was rendered at a stage when the accused was convicted and his appeal was dismissed by the High Court. The

Hon'ble Apex Court passed the order in the criminal appeal. The chemical analysis report was examined and it was held that when two pieces of charas had been seized from the accused, both the pieces should have been sent simultaneously for chemical examination in order to prove that the accused was in possession of commercial quantity and not of small quantity. Here, the defence set up by the accused was that, the quantity of charas which was found in his possession was for personal use. Only 5 gms had been sent for chemical analysis and there was no scientific analysis of the remaining amount of charas which the prosecution had seized.

7. Mr. Ganguly relied upon a judgment in the matter of ***State of Punjab – versus – Adarsh Rathour*** passed in ***CRM-A-155-2023***, in support of the contention that drawing a sample of one bottle from a batch of few bottles, could not be taken as a proof that the bottle which was picked up or selected as a sample, would contain the same quantity of contraband substance as in other bottles, in the absence of batch numbers.
8. At the time of grant of anticipatory bail, the Court is not expected to conduct a mini trial. All that the Court is required to see is whether materials exist against the petitioner. The issue revolves around whether all 55 bottles constituted one homogeneous lot or whether the sampling procedure complied with applicable standing orders and the provisions of the NDPS Act. The law contemplates representative sampling. In this case, one bottle as a representative sample from the 55 bottles of cough syrup of the same brand was taken, as per the prosecution case.

9. The contention of the petitioner that the sampling was not representative and that the prosecution had failed to establish that all the 55 bottles contained the same nature of contraband substance, is a matter of evidence. The sample sent to the FSL must fairly represent the entire seized contraband. The effect of any irregularity in such sampling will depend on the facts of each case. The law requires preparation of inventory, drawing of representative sample, sealing and certification by the Magistrate in order to preserve the evidentiary value of the seized materials. The materials have been considered.
10. This is not the appropriate stage for grant of pre-arrest bail upon holding that the sample drawn did not represent the homogeneous lot of 55 bottles of Eskuf syrup, and as such, only small quantity of contraband substance was seized.
11. Under such circumstances, the sampling procedure and the alleged irregularity can be questioned by the petitioner at the appropriate stage.
12. There is no quarrel with the proposition laid down in the matter ***Sami Ullah – versus – Superintendent, Narcotic Central Bureau*** reported in ***(2008) 16 Supreme Court Cases 471***.
13. It is informed to this Court that the charge-sheet has been filed and the investigation is over.
14. Under such circumstances, the prayer for pre-arrest bail is refused.
15. All parties shall act on the server copies of this order duly downloaded from the official *website* of this Court.

(Shampa Sarkar, J.)