

* **THE HIGH COURT OF DELHI AT NEW DELHI**

+ **BAIL APPLN. 810/2011**

Date of Decision: 29.03.2012

RIZWAN AHMED

.... Petitioner

Through: Mr. Rahul Tyagi, Mr. VVP Singh,
Mr. Sudeepraj Saini, Advocates

Versus

(DIRECTORATE OF REVENUE INTELLIGENCE) Respondent

Through: Mr. Satish Aggarwala , Adv.

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J.

1. Vide this petition under section 439 Cr. P.C. the petitioner is seeking bail in complaint case S.C. No. 27A/2010 under section 25A of the N.D.P.S. Act.

2. The allegations of Directorate of Revenue Intelligence (DRI) against the petitioner are that acting on a specific information that a consignment of ketamine was being attempted to be exported to Canada based consignee, concealed in misc. goods by a Delhi based exporter M/s. Rizwan Exports, 58/2, Street No. 6, Rashid Market, Delhi, a raid was conducted on 13.10.2010 in the presence of punch witnesses. During the raid copies of relevant documents reflecting the name of exporting firm, Shipping Bill etc. etc. were collected and based on the information revealed therefrom concerned persons

namely Mr. Pradeep Kumar and Narender of firm M/s. Exim Cargo Services., Sh. Sarabjeet Singh of M/s. Speed Cargo and the petitioner, proprietor of the said exporting firm were contacted and asked to appear for the examination of the goods. They arrived at the export shed with the copies of export documents of the said consignment. Mr. Rizwan acknowledged the said consignment being exported against Bill No. 1653146, Invoice No. 19, dated 06.10.2010. The consignment consisted of 263 packets of various sizes containing various pooja items like *Agarbatti, Gangajal-Pooja, MDH Methi Masala, Attar, Sari Ladies, Pooja Shawls, Artificial Flowers, Chunari, Cotton Wicks, Chandan powder, Roli, Sindur, Kapoor, Dhoop* and *Fog of mango wood-pooja etc* including 7 packets containing white power/granules suspected to be Ketamine concealed under sarees and old and used clothes. It was revealed that the consignment was being exported to M/s. Madhvi Musical & Pooja Centre INC24, 7955 Torbram Road, Bramton, Ontario, Canada and the total declared cost of the said consignment was Rs.14,84,126/-. On examination, it was found that seven packets from Serial No. 91 to 96 contained white colour polythene packets containing white power hidden beneath the old and used clothes and sarees. The packets were separated from the rest of consignment and on opening these packets were found to contain white coloured transparent polythene packets containing white powder to be “Ketamine” weighing 101.309 kgs. The samples were drawn as per the procedure and were sent for analysis. The petitioner gave his voluntary statement on 13.10.2010 and also on 14.10.2010 under section 108 of the Customs Act admitting the recovery and seizure of the said material and other incriminating facts. He also admitted of having sent three other consignments to one Prabha Karan Nair in Canada - one through ICD,

TKD, New Delhi and two through ICD, Patparganj, Delhi. He also stated he had been exporting various items to Ontario, Toronto, Canada. He stated that his buyer from Canada on his recent visit to India had also gone to Jalandhar and on returning from there he met and informed him that he had brought a consignment of 'ketamine' from Jalandhar and asked him to export the same through his firm M/s. Rizwan Exports, that he offered him Rs. 1,00,000/- for exporting ketamine through his firm. That on his request, he arranged to transport seven cartons containing ketamine to his godown situated at 58/2, Street No. 6, Rashid Market, Delhi. He had repacked the said seven cartons containing ketamine in other carton boxes and concealed them under old and used clothes and covered those with new sarees so that the same were not visible to avoid detection. He also stated that he purchased other goods which were to be exported under the shipping bill No. 1653146. He further stated that his buyer prepared the invoice and packing list on his laptop which was forwarded to M/s. Speed Cargo Movers. The statements of Pradeep Kumar and Sarabjeet Singh were also recorded under section 108 of Customs Act. They also materially substantiated the statement of the petitioner. Analysis report dated 7th December 2010 confirmed the contents seized to be Ephedrine Hydrochloride. Pursuant thereto the proceedings were initiated against the petitioner under NDPS Act on 9th December 2010.

3. The case of the prosecution is that Ephedrine Hydrochloride is a controlled substance in view of notification No. SO1296(E) dated 28.12.1999 and thus the petitioner has committed offence punishable under section 9A and 25A of NDPS Act.

4. The contention of the learned counsel for the petitioner are that – (a) there was no Control Order relating to export of Ephedrine Hydrochloride

from out of India and (b) the statement of petitioner recorded under section 108 of the Customs Act could not be read against him in the proceedings under the NDPS Act. Reliance was placed on the cases of (i) **K.T.M.S. Mohd. and Another Vs. Union of India**, (1992) 3 SCC 178, (ii) **Noor Aga Vs. State of Punjab & Another**, 2008 [3] JCC [Narcotics] 135, and (iii) **Ajay Aggarwal Vs. Narcotics Control Bureau, of this Court** (vide Bail Appln. 2036/2004, decided 20.01.2005).

5. Per contra, the contention of learned counsel for the Department is that Ephedrine Hydrochloride was a controlled substance under clause (viid) of section 2 of NDPS Act and that an order was also passed by the Central Government under section 9A of the NDPS Act. It was submitted that the petitioner had violated all the clauses of the said order. It was submitted that the export of Ephedrine Hydrochloride out of India was prohibited as per the said order. Reliance was placed on the case of **Ved Prakash Goel Vs. Commissioner, Central Bureau of Narcotics** of this court (vide CrI. M(M) 2076/1999 decided on 26.5.2000). It was next submitted that the grant of bail to the petitioner in the instant case was barred as per Section 37(1) (i) of the Act. It was also submitted that the petitioner is involved in another case of similar kind where investigation is at advanced stage.

6. With regard to the plea of the petitioner that there was no Control Order relating to export of Ephedrine Hydrochloride from out of India, learned counsel for the Department referred to the Notification No. SO1296(E) dated 28.12.1999 issued by the Central Government under Clause (vii-a) Section 2 of NDPS Act, 1985 (61 of 1985) and the Order of 1993 issued under Section 9A of the Act.

7. The Notification dated 28.12.1999 was issued under clause (vii-a) which has been re-lettered as Clause (vii-d) by the Act of 2001. As per this notification, Ephedrine Hydrochloride has been declared as controlled substance.

8. Section 9(A) (1) empowers the Central Government to control and regulate the controlled substances. Since the contention that was raised by learned counsel for the petitioner that the Order did not apply to the export of controlled substances out of India, the interpretation of this Section would be relevant for addressing this contention. Section 9 (A) reads thus:

“[9A. Power to control and regulate controlled substances.-

(1) If the Central Government is of the opinion that, having regard to the use of any controlled substance in the production or manufacture of any narcotic drug or psychotropic substance, it is necessary or expedient so to do in the public interest, it may, by order, provide for regulating or prohibiting the production, manufacture, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the power conferred by sub-section (1), an order made thereunder may provide for regulating by licences, permits or otherwise, the production, manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption, use, storage, distribution, disposal or acquisition of any controlled substance.]”

9. It was the contention of learned counsel for the petitioner that this Section 9 (A) (2) mentions about the interstate import and export, and there being no mention of export out of India, the aforesaid Order of 1999 does not apply in the instant case. In my view, this interpretation of learned counsel for the petitioner is apparently misconceived. From the plain reading of Section 9(A), it would be seen that sub section (1) was general whereunder the

Central Government was empowered to regulate or prohibit the production, manufacture, supply and distribution of the controlled substances and trade and commerce therein. Sub section (2) was without prejudice to the general power of the Central Government under sub section (1) and expanded the powers of Central Government in the order made under sub section (1) may also provide for regulating by licenses, permits or otherwise, production, manufacture, possession, transport, import interstate, export interstate etc. of any controlled substance. In other words, Sub section (2) stipulates that while controlling and regulating the controlled substances and passing an order in this regard under sub section (1), the Central Government may also regulate its production and manufacture etc. by licenses, permits or otherwise. Thus sub section (2) apparently does not deal with the export of controlled substances out of India, but that does not mean that the export out of India of controlled substances was not controlled or prohibited. While sub section (2) provides for additional powers of issuance of licenses, permits etc. to regulate the production, manufacture etc of controlled substances, sub section (1) provides general powers of controlling and regulating of controlled substances. Under sub section (1), the powers of the Central Government are general and it includes regulating or prohibiting the production, manufacture, supply, distribution as also trade and commerce of controlled substances. This would also include powers to regulate or prohibit the controlled substances for export out of India.

10. As per learned counsel for the department, the petitioner had violated all provisions of this Order of 1993. According to clause (3) of the said Order, every person who manufactures or distributes or sells or imports or exports or consumes any controlled substance, shall maintain daily account of his

activities in Form-1 or Form-2, as the case may be and the records of his activities shall be preserved for a period of two years from the date of last entry in the register. In addition to this, he was also to follow the requirements of Sub Clause (2) of Clause 3 of reporting any loss or disappearance of controlled substances to the Director General. Clause 4 of the said Order contained regulations regarding the transport of controlled substances. Clause 5 of the said order stipulates that every person who sells a controlled substance to a buyer in a transaction of 100 kg and above, shall sell so only after the buyer establishes his identity by production of document like industrial license or any registration certificate under any law or any other similar document which establishes his identity and upon a declaration being made of the purpose for which the controlled substance is being purchased. Clause 6 stipulates for labeling of consignment for export or import. It provides that every container or vessel containing a controlled substance in a consignment for export or in a consignment which is imported shall be labeled prominently giving details of the name and quantity of the controlled substance, name and address of the exporter and importer and the consignee, if any. Further the documents relating to import or export of the controlled substance such as invoice, cargo, manifests, customs, transport and shipping documents shall contain the details such as name of the controlled substance, quantity and name and address of the consignee, exporters and importer and the documents to be preserved for a period of two years.

11. Having regard to the facts as noted above, it would be seen that Ephedrine Hydrochloride was a controlled substance as per the notification dated 28.12.1999 of Central Government issued under clause (vii-a) of Section 2 of NDPS Act and further that in terms of the order of 1993 issued

under Section 9A of NDPS Act by the Central Government, the export of aforesaid controlled substance was not permissible without following the requirements of clauses (3), (4) and (6) of the aforesaid order. Apparently, there are violation of all these clauses by the petitioner in the instant case.

12. Submissions of learned counsel for the petitioner that the statement of the petitioner recorded under Section 108 of Customs Act could not be read against him in a proceeding under NDPS Act is apparently untenable. The reliance was placed on **K.T.M.S. Mohd.** (supra) and **Noor Aga** (supra) was misplaced. The case of **K.T.M.S. Mohd.** (supra) related to statement recorded under Section 40 of FERA. It was held that FERA and IT are separate and independent Acts and operating in different fields. It was held that no doubt there is difference in the manner of recording of statement under Section 40 of FERA and under Section 164 Cr.PC by the Magistrate, but nonetheless, before receiving that statement in evidence and making use of the same against the maker, it must be scrutinized to find out whether that statement was made or obtained under inducement, coercion, threat, promise or by any other improper means or whether it was a voluntarily made. It was held that there are catena of decisions of the Supreme Court that the statements obtained from persons under the provisions of FERA or Customs Act, should not be tainted with any illegality and they must be free from any vice. The Apex Court, referring to the various decisions as regards to the evidentiary value of the statements made before the Custom Officer under Section 108 of Customs Act, observed that the core of all the decisions is to the effect that the voluntary nature of any statement made either before the Custom authorities or the officer of enforcement is *sine quo non* to act on it for any purpose and if the statement appears to have been obtained by any inducemnt,

threat, coercion or by any other improper means that statement must be rejected *brevi manu*. However, at the same time, it is to be noted that merely because the statement is retracted, it cannot be recorded as involuntarily or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means has been adopted. To the same effect is the decision in **Noor Aga** (supra).

13. It would thus be noted that it was all a triable question as regards to the appreciation and wattage of the statement of the petitioner made under Section 108 of the Customs Act, particularly more so, in view of the fact that the same was not retracted. The case of **Ajay Aggarwal** (supra) wherein this Court had granted bail was entirely based on its own facts. In that case, there was no recovery from the accused and it was observed that the signatures of the accused were obtained on blank papers and there was interpolation in the dates and also the name of the *panch* witnesses.

14. In view of my above discussion, it comes out to be that Ephedrine Hydrochloride though was not a narcotic drug or psychotropic substance, but was a controlled substance and the export of the same was prohibited as per the Order of Central Government made under Section 9 of the NDPS Act. There is apparently violation of all the clauses i.e. (3), (4), (6) of the said Order of 1993.

15. Further, since the offence was apparently seen to have been committed under Section 25A which is punishable with rigorous imprisonment for a term which may extend to 10 years and also with fine which may extend to Rs.1 lac, the petitioner is also not entitled to be released on bail in view of Section 37 (1)(b) of NDPS Act. The provisions contained in this section are made applicable and operative “*notwithstanding anything contained in Cr.P.C.*”.

The limitation of granting bail specified in clause (b) of sub section (1) of Section 37 are in addition to the limitations under Cr.PC or any other law for the time being in force for grant of bail. Having regard to the entire factual matrix, it is not possible for this Court to record satisfaction that there are reasonable ground to believe that the petitioner is not guilty of the offences for which he has been charged and that he is not likely to commit any offences while on bail. Therefore, the petitioner cannot be granted bail in view of provisions of Section 37(i)(b) of NDPS Act also.

16. In view of above discussion, the petition for bail is accordingly dismissed.

M.L. MEHTA, J.

MARCH 29, 2012

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