

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

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CRL.L.P. No. 303 of 2013

NARCOTICS CONTROL BUREAU Petitioner
Through: Mr. Subhash Bansal, Advocate.

versus

PRAVEEN DUA & ORS. Respondents

CORAM: JUSTICE S.MURALIDHAR

ORDER

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26.02.2014

1. The Narcotics Control Bureau ('NCB') seeks leave to appeal against the judgment dated 3rd November 2012 passed by the Special Judge, NDPS, Patiala House Courts, New Delhi in SC No. 165 of 2008 acquitting the Respondents of the offences under Sections 21, 22, 23 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

2. The case of the prosecution was that information had been received from the DEA, United States of America that one Dr. Brij Bhushan Bansal (Respondent No.3 herein), resident of Kamla Nagar, Agra was indulging in large scale smuggling of prescription drugs falling under the category of Narcotic Drugs and Psychotropic Substances to US and other countries. On the basis of the said information, the Zonal Director, NCB

prepared a report and constituted teams from the Delhi Zonal Unit ('DZU') for searches at the residence/godown premises of Dr. Bansal at three locations in Agra and at one location in Delhi i.e. at the godown/premises of one Praveen Dua (Respondent No.1), an alleged associate of Dr. Bansal. For raiding the premises of Respondent No.1 at East of Kailash, New Delhi on 19th April 2005, Mr. R.R. Kumar, Superintendent, DZU issued a search authorisation in favour of the Investigating Officer ('IO') Mr. Manoj Kumar Aggarwal.

3. The team headed by the IO comprising of one senior official and two *panch* witnesses Mr. Vijay Kumar and Mr. Santosh Tiwari raided the premises of Respondent No.1 who was running a courier agency under the name and style of Renaissance Courier Pvt. Ltd. ('RCPL') at the said premises. After Respondent No.1 gave in writing that he did not require the presence of any Gazetted Officer/Magistrate, his premises were searched by the NCB team. The search resulted in the recovery of 57 cardboard boxes containing Diazepam 16,58,000 Nos. (12.405 Kg), Alprazolam 13,29,000 Nos. (1.816 Kg), Zolpidem 3,26,400 Nos. (3.264 Kg), Codeine 64,720 Nos. (1.8521 Kg). Since Respondent No.1 could not produce any documentary evidence for lawful possession of the said

drugs, they were seized.

4. Upon service of summons under Section 67 of NDPS Act, Respondent No.1 is supposed to have made a voluntary statement admitting the possession of the drugs. He is supposed to have disclosed that the seized material belongs to Respondent No.3 and that they were to be sent abroad through his courier agency. Further, he is supposed to have disclosed that Respondent No.3 used to send consignments of medicines in cartons to him through one Mr. Raj Kumar Chauhan of AV Xpress Courier of Agra, which he used to receive personally around midnight. Respondent No.1 admitted to receiving Rs.65 lakhs as his service charges from Dr. Bansal by way of 13 self-cheques out of which he got 8 cheques amounting to Rs.40 lakhs encashed and the remaining 5 cheques of Rs.25 lakhs were lying with his friend Punit Ahuja. On the basis of the above statement, Respondent No.1 was arrested.

5. On 28th April 2005, Mr. Raj Kumar Chauhan was summoned by the NCB. He, inter alia, supposedly gave a statement that he had been sending parcels from Agra to Delhi on behalf of Respondent No.3 for the last 8 to 10 months to the address of RCPL, 62, Sant Nagar, East of

Kailash but from the previous month, on the directions of Respondent No.1, the parcels, cardboard boxes consigned by Respondent No.3 were being delivered at 87, Kallu Mohalla, Garhi, East of Kailash, New Delhi. Since Respondent No.3 was in judicial custody in some other case under the NDPS Act in Agra, the said Court in Agra was approached for permission to examine Respondent No.3. However, he could not give a statement due to his physical and mental condition.

6. Since the seized drugs were tablets under the brand name PEACE (10,98,100 tablets) and ALP-1 (6,98,000 tablets) and shown as being manufactured by M/s. Smith and Kenner Pharmaceuticals Pvt. Ltd, one of its Directors Mr. S. Jaya Swami (Respondent No.2) was summoned under Section 67 NDPS Act. Apart from stating that he had started the said company, Respondent No.2 refused to answer further questions and was arrested.

7. Charges under Section 22(c), 23 read with Sections 28 & 29 of NDPS Act were framed against the accused on 16th July 2010. The NCB examined as many as 19 witnesses. When examined under Section 313 CrPC, the accused pleaded innocence. No evidence was led by any of the accused.

8. In the impugned judgment dated 3rd November 2012, the learned trial Court first observed that the four drugs recovered were Schedule H drugs under the Drugs and Cosmetics, Act, 1940 and Drugs and Cosmetics Rules, 1945. Except Codeine Sulphate, the other three drugs were also included in the Schedule to NDPS Act. The Special Public Prosecutor ('SPP') conceded in the trial Court that the Drug Controller General of India had given an opinion to the NCB in some other cases that Codeine Sulphate was not a narcotic drug but merely a prescription drug. Consequently, the case revolved around the fact that Respondent No.1 was found in possession of three other drugs i.e. Diazepam, Zolpidem and Alprazolam. These three drugs are found mentioned at entry Nos. 43, 109 and 30 respectively in the Schedule to NDPS Act. However, they are not included in the Schedule to the NDPS Rules. It was observed that in view of the judgment of the Supreme Court in ***D. Ramakrishnan v. NCB 2009 (3) JCC (Narcotics) 149 SC*** although the mere possession of the above three drugs may not be an offence under the NDPS Act, if a person is found to have exported the said drugs mentioned in Schedule I to the NDPS Act without export authorisation in terms of Rule 58 of the NDPS Rules, then he would be deemed to have committed an offence under Section 23 of the NDPS Act. Consequently,

the question that arose was whether the accused could be said to have exported the aforementioned three drugs without export authorisation. Para 33 of the impugned judgment of the trial Court notes that the learned SPP conceded that in case the prosecution was unable to prove that the accused persons had exported the said drugs, but was only able to show that they were in possession of the said drugs, then as per the law existing as on date, they could not be convicted under the NDPS Act. The entire focus of the trial Court was, therefore, on determining whether the prosecution had been able to prove beyond reasonable doubt that the accused persons had acted in conspiracy to export the above psychotropic substances outside India.

9. As far as Respondent No.2 was concerned, the trial Court found that there was not a shred of evidence produced by the prosecution that he had sold the said tablets illegally to Respondent No.3 with the knowledge that they were being exported illegally outside India. Respondent No.1 has not spoken a word against him in his purported statement under Section 67 NDPS Act. The so-called fax message purportedly sent by Respondent No.2 to his factory in Hyderabad for destruction of the evidence even while in custody of NCB was not proved in the trial Court.

10. As regards Respondent No.3, apart from the statement of Respondent No.1 under Section 67 of the NDPS Act, there was no evidence on record to show that Respondent No.3 had anything to do with the premises at Kallu Mohalla from where the recovery of drugs was made. In the absence of any corroboration of the so-called confessional statement of the co-accused i.e. Respondent No.1, the said confessional statement could not be used as substantive evidence. The trial Court referred to the judgment of the Supreme Court in ***Union of India v. Bal Mukund (2009) 12 SCC 161***.

11. The only other statements against Respondent No.3 were the statements of Mr. Raj Kumar Chauhan (PW-12) and Mr. Atul Pandey (PW-15) recorded under Section 67 of the NDPS Act. However, both of them turned hostile when they stepped into the witness box. While PW-12 stated that the statement made by him under Section 67 NDPS Act had been dictated by the NCB officials, he went on to say that NCB officials had asked him questions about Respondent No.1 but not about Respondent No.3. Further, although he admitted to sending parcels via courier from Agra to Delhi, he did not remember whether he had sent any parcel to Respondent No.1. As far as PW-15 was concerned, he

denied being an employee of Respondent No.3 and stated that he was forced to give the evidence at the behest of NCB officials and that they had threatened to destroy his career/business if he did not write as per their dictation. He was even threatened to leave Agra and was forced to shift to Menpuri thereafter where he stayed for 4-5 years. Although PWs-12 and 15 resiled from their statements, the trial Court proceeded to analyse their statements and concluded that they could not be said to be voluntary. As a result, apart from the statement of Respondent No.1 under Section 67 NDPS Act, there was no substantive evidence produced by the prosecution that it was Respondent No.3 who used to deliver the goods to Respondent No.1 after getting them manufactured from Respondent No.2 and that Respondent No.1 used to further export the said drugs outside India.

12. Once it was evident that the prosecution had been unable to prove the involvement of Respondent Nos. 2 and 3 in the conspiracy to illegally export drugs outside India, Respondent No.1 alone could not be held guilty for exporting the psychotropic substances outside India. The most crucial evidence that the drugs recovered from the premises of Respondent No.1 were meant for export purposes was missing. The IO who was examined as PW-3 admitted in his cross-examination that he

did not find any evidence in the raided premises to show that the recovered goods were stored there for export. There was no airway bills/shipping documents which would show that the drugs were kept there for export purposes. There was no evidence that earlier at any time Respondent No.1 had exported drugs outside India either on his own or through his courier agency.

13. It was also not shown by the prosecution as to how the premises from where the drugs were recovered were under the control and possession of Respondent No.1. The landlord of the premises had not stated a word against Respondent No.1. It was the cousin of Respondent No.1, one Mr. Vijay Kumar, to whom he had given the premises on rent. At the time the basement was raided, it was Mr. Vijay Kumar who was in possession and he had seen only Mr. Vijay Kumar bringing the boxes on a three wheeler and unloading the boxes therein. He further stated that he had never seen Respondent No.1 in the said premises and was not aware that it was sublet by Mr. Vijay Kumar to the courier agency of Respondent No.1. When *panch* witness Vijay Kumar was cross-examined by SPP, he stuck to his stand that the door of the basement was not opened by Respondent No.1. He further stated that the other *panch* witness Mr.

Santosh Tiwari had not accompanied the NCB officials to the basement of the premises. He stated that when he was called in the morning on 20th April 2005 in the NCB office, he found that Respondent No.1 had already been detained in the said office and that Respondent No.1 was also made to sign on the panchnamas in the NCB office.

14. Even the evidence of the IO (PW-3) did not inspire confidence since he could not give any explanation why he had not taken into possession the cardboard boxes at the time of the raid itself; although the raided premises consisted only of the ground floor and the basement and the owner resided in the ground floor, the IO did not remember how many storeys or how many basements were there in the said premises and whether the landlord was residing therein. He could not tell whether the gate of the basement was from the *gali* or from inside the house. The trial Court, therefore, concluded that the contention of the defence that the IO was not even present in Delhi on the date of the raid could not be brushed aside lightly. Even PW-1, the Zonal Director who had appointed the IO to conduct the raid at Delhi stated that he could not recall if the IO was present in Agra at the time of the search of the premises in Delhi. In other words, there was no evidence to conclude that the IO was in Delhi only. This probablised the defence of Respondent No.1 that the recovery

of the drugs had already been made at Agra and was planted upon Respondent No.1 to falsely implicate him.

15. The Court also found numerous discrepancies as regards actual date of the arrest of Respondent No.1 and the summoning of the other Director of the courier agency Sanjeev Bahl (PW-18). According to PW-18, Respondent No.1 had been picked up by the NCB officials on 19th April 2005 in his presence from the premises at 62, Sant Nagar. PW-18 stated that he too was asked by the NCB officials to accompany them to their office and was detained in the office for the entire night of 19th April 2005. Therefore, the case of the prosecution that Respondent No.1 was summoned to appear only on 20th April 2005 and PW-18 on 21st April 2005 stood falsified. The cutting of the date 20.4.2005 on Ex. PW-2/B and the statement given by PW-18 on that day to read as 21.4.2005 probablised the case of the defence that PW-18 had been confined during the night of 19th April 2005 and then allowed to go on 20th April 2005 after he wrote the statements dictated by the NCB officials.

16. It was argued before the trial Court, and it has been again urged before this Court by Mr. Subhash Bansal, learned counsel for the Petitioner, that the statement of Respondent No.1 recorded under Section

CRL.L.P. No. 303 of 2013 *Page 11 of 13*

67 NDPS Act was itself sufficient to convict all the three accused for the offences of exporting the narcotic substances that were seized from the basement of the courier agency of Respondent No.1 at 87, Kallu Mohalla. The trial Court noticed that Respondent No.1 had at the very first opportunity retracted from the said statement by contending that he has been coerced and threatened to write it as per the dictation of the NCB officials. The trial Court referred to the decisions of the Supreme Court in ***Bal Mukund*** and ***Noor Aga v. State of Punjab JT 2008 (7) SC 409*** and observed that the trial Court had to be satisfied that the statement made while in custody of the NCB officials was voluntary. In the present case, the evidence on record indicated that Respondent No.1 was in the custody of NCB officials not only on the 19th but also on 20th April 2005. He retracted the statement soon after he was remanded to judicial custody. He stuck to the version that he had written it as per the dictation of NCB officials who had threatened to kill him in an encounter if he did not do so. Further, the evidence discussed by the trial Court showed that the IO had indulged in manipulation of documents. The evidence of the *panch* witness Vijay Kumar wherein he stated that he had not signed the panchnamas and paper slips at the spot and where he did not acknowledge the presence of the other *panch* witness Santosh

Tiwari also made the entire prosecution case highly doubtful.

17. This Court has carefully examined the entire trial Court record with the help of Mr. Subhash Bansal, learned counsel for the NCB and perused the petition seeking leave to appeal. Apart from relying on the statement of Respondent No.1 under Section 67 NDPS Act, there is no other substantive and independent corroborative evidence to show that the Respondents conspired to export the seized drugs outside India. Consequently, there could be no conviction of the Respondents under the NDPS Act. The analysis of the evidence by the trial Court and its reasoning and conclusions suffer from no legal infirmity.

18. No grounds have been made out for grant of leave to appeal. The petition is dismissed.

19. The trial Court record be sent back forthwith.

S. MURALIDHAR, J

FEBRUARY 26, 2014
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