*　IN THE HIGH COURT OF DELHI AT NEW DELHI

%　Judgment reserved on: 12th September, 2018
Judgment delivered on: 24th September, 2018

+　**BAIL APPLN.849/2016**

SURBIR SINGH ..... Petitioner

versus

CUSTOMS (PREVENTIVE) ..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr.H.S. Bhullar, Advocate with Ms.Bhawani Gupta, Ms.Sarabjeet Bhullar, Ms.Manya Pundhir & Ms. Snigdha Singh, Advocates.

For the Respondent : Mr. P.C. Aggarwal Special Public Prosecutor NCB.

CORAM:-
HON'BLE MR. JUSTICESANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J.

1. Petitioner seeks regular bail in Sessions Case No.1/3/14 pending in the Court of Special Judge, NDPS, Dwarka Courts, New Delhi under Section 20(c)/23/28 read with Section 29 of the NDPS Act, 1985 titled *Customs vs. Surbir Singh & Anr.*

2. A complaint was filed before the Court of the Special Judge, NDPS against the petitioner and co-accused Harmeet Singh. It is alleged that on 29.08.2013 during X ray of goods meant for export through DHL Courier Company, being done at New Courier Terminal Near IGI Airport, New Delhi, by Sh. Sachin Verma, X-Ray Screener

and Coordinator, one packet booked under AWB 3272012763 dated 24.08.2013, appeared to contain some suspicious material concealed therein. He informed Custom Inspector Yashpal. On suspicion, said packet was detained vide detention memo No.538885 dated 25.08.2013. Said packet was manifested for export by Flight NO.BA0142 dated 25.08.2013 from the Delhi to LHP and was listed at serial No.146 of Courier Shipping Bill CSB 11-15752 dated 25.08.2013.

3. It is further alleged in the complaint that two panch witnesses were called and customs preventive Inspector conducted the X-ray of the afore-mentioned box in their presence and was satisfied about the concealment in the items kept in the box. Photograph of the screen displaying the X-Ray image of the box showing concealment in the items kept in it was taken with the digital camera available with the staff of DHL in their X-Ray room and the print out of the same was taken and signed by the Panchas. Shipment along with detention memo No.538885 was taken to preventive room from DHL warehouse for detail examination.

4. It is further alleged that One AWB Jacket was affixed with the said shipment, which was found to contain AWB No.3272012763 and invoice. Said AWB was having details as follows:-

> *"From Mr. Rakesh Kumar, RECP, H.No.81/3270, Near Janta SR Secondary School, Rajpura, Patiala-110028, INDIA. Tel: 01130580324, to S.Pserli, RECP Strandweg. 41. Sutz 2572, Switzerland, Tel.41793824743*

Contents: Painting on wooden frame, weight 8.5 kgs.. Customs Value: 6026.00 INR Vol. Wt. 8.5, Imp/Exp. Type: Permanent, shipper account : 530666495, Insurance Value: Rs.00.00 date : 24.8.2013, Shipment No.3272012763 Sender's Reference: N94740017, AWB No.32720l2763."

5. The invoice recovered from the Jacket was having following details:-

"From Mr. Rakesh Kumar, RECP, H.No.81/3270, Near Janta SR Secondary School, Rajpura, Patiala-110028, INDIA. Tel.:01130580324, to S.Pserli, RECP Strandweg. 41. Sutz 2572, Switzerland, Tel.41793824743."

6. The invoice was also having No. and date as 24.08.2013 Name of the Exporter Reference N94740017, Port of Discharge India with the detail of nature and quantity of the contents of the parcel. The shipment was in the form of Card Board Box secured with DHL Yellow coloured tape. On opening the same, it was found to contain five wooden sceneries/frames. All of the five frames were individually wrapped with transparent plastic sheet. On close examination and X-Ray impression, it was revealed that there was some concealment in the frames. Firstly, one frame/wooden scenery was cut open and was found to contain two pouches wrapped with brown tape. Pouches were opened and were found to contain blackish brown hard shape substance suspected to be narcotics. Thereafter, rest four frames were also broken and found to contain two pouches concealed in each frame of similar type of substance. Entire recovered substance was kept in two self-locking transparent polythene pouches; on weighing,

it was found to be 3.395 kg. (Net Weight of the substance without polythene pouch).

7. Further, it is the case of the prosecution that as the drug test machine of DHL was not working, the recovered substance alongwith other contents of the shipment were taken to the Fed Ex Office for testing purpose. A small quantity like tip of matchstick was taken from the substance and tested with the Drug Test Kit which positive result for the presence of Charas/Hashish.

8. Three representative samples of 5 grams each, from the recovered substance were drawn, each sample substance was firstly kept in Plastic Pouch and then kept in yellow colour paper envelope separately and sealed with Custom Seal No.02-07 with the detail of the case. The samples were given Marks A-1, A-2 & A-3. The, remaining Substance, was kept in two transparent pouches converted into cloth *pulanda* and sealed with Custom Seal No.02.07 with the particulars of the case. Thereafter, the cloth pulanda containing remaining substances, concealing material were kept in the same Card Board Box of the shipment and converted into a cloth pulanda and sealed with the Custom Seal No.02-07 with the particulars of the case.

9. Shipping Bill, Invoice and AWB were resumed for the purpose of further enquiries. Since the recovered substance was a narcotic substance, it was seized vide *Panchnama* Dated 29.08.2013. Test Memo in triplicate was also prepared during the *Panchnama* proceedings. Seized goods and samples were handed over to Sh. Ajay

Hooda, Custodian of DHL for safe custody vide *Superdarinama* dated 29.04.2013.

10. It is alleged that the documents recovered from the consignment, revealed that the consigner of the shipment was Rakesh Kumar, therefore, summon U/s 67 of NDPS Act were issued to him. In compliance, of the summon Rakesh Kumar appeared before the complainant officer and tendered his voluntary statement U/s. 67 of NDPS Act dated 11.09.2013, wherein he is alleged to have disclosed that he was working as courier business and the franchisee of DTDC Courier Company. He further disclosed that the consignment booked with the DHL AWB No.3272012763 was not booked by him. He further disclosed that he himself enquired in this regard from Naresh, Stationary In-Charge of DTDC Courier Company and Mr. Naresh Kumar stated that the aforesaid consignment was originally booked by the franchises of DTDC Mr. Cheema SCO-38, sec-7 Chandigarh under the DTDC airway bill reference No N94740017 and said consignment was booked by one Surbir Singh.

11. In order to ascertain the correctness of the statement of Rakesh Kumar, Kailash Chandra Asst. Manager Operation international of M/s DTDC Courier company was summoned and he tendered his statement U/s 67 of NDPS Act dated 12.09.2013, wherein he is alleged to have disclosed that the consignment booked under DHL Airway bill no. 3272012763, was initially booked by their franchises Mr. Cheema under DTDC Airway bill No. N94761749 but due to

inadvertence reference of Rakesh Kumar came on the DHL Airway bill in place of actual consigner Surbir Singh. He is alleged to have disclosed that it was done inadvertently by their employee Anurag Mehta who used to prepare the final Airway bill and also fill up the final invoice etc.

12. That in order to ascertain the correctness of the statement of Kailash Chandra, Anurag Mehta Senior executive DTDC was summoned and he tendered his statement U/s 67 of NDPS Act dated 18.09.2013, wherein he is alleged to have disclosed that he had prepared DHL Airway bill no. 3272012763 dated 24.08.2013 and its invoice. He is further alleged to have disclosed that said DHL Airway-bill was issued to the consignment, which was originally booked by their franchises Mr. Cheema under DTDC Airway bill no. N 94740017. He further disclosed that while he was preparing the said DHL Airway bill, he was also preparing other Airway bills and during that time, he entered the name of Mr. Rakesh Kumar in the said Airway bill as consigner, inadvertently. He is further alleged to have disclosed that while he was preparing the documents, another consignment alongwith ID proofs etc. was also lying in his office (said other consignment was booked by Mr. Rakesh Kumar) and due to inadvertence the name of Mr. Rakesh Kumar was filled, up by him as consigner in the documents of the consignment in question.

13. Ms. Rajni the employee of Mr. Jagbeer Singh Cheema franchises of DTDC Chandigarh was summoned and she had tendered

her statement dated 18.09.2013 U/s 67 of-NDPS Act, wherein she disclosed that on 16.08.2013 one Surbir Singh came to her office and booked one consignment under Airway bill No.N 94740017 dated 16.08.2013 and Mr. Surbir Singh submitted his ID at the time of booking the consignment.

14. Mr.Jagbeer Singh Cheema the Franchises of DTDC, Sec-7, Chandigarh was summoned and he tendered his statement U/s 67 of NDPS Act wherein he allegedly disclosed that consignment booked under DTDC Airway bill No.N94740017 dated 16.08.2013 was booked by Mr; Surbir Singh with his ID proof through his company.

15. It is in these circumstances it was alleged in the complaint that consignment in question was originally booked by Mr. Surbir Singh- the petitioner with his ID from Chandigarh. He in his statements dated 18.09.2013 and 19.09.2013 U/s 67 of NDPS Act, is alleged to have disclosed that he was the consigner of the consignment booked under DTDC Airway bill No. N 94740017 dated 16.08.2013 and that said consignment was booked by him under the instruction of his employer Harmeet Singh. He is further alleged to have disclosed that he and his employer, Mr. Harmeet Singh were aware about the contents of the consignment. Petitioner is also alleged to have disclosed that besides him, Mr. Methew the friend of his employer is also involved in drug trafficking. Petitioner, is also alleged to have disclosed that he was involved in the booking of parcels containing drugs and he was doing this to earn more money.

16. That in view of the statement of the petitioner, his employer Harmeet Singh was summoned and he tendered his voluntary statements dated 18.09.2013 and 19.09.2013 U/s 67 of NDPS Act, wherein he is alleged to have disclosed that the consignment booked under DTDC Airway bill no. N 94740017 dated 16.08.2013 was booked by his servant Surbir Singh upon his instruction. He also disclosed that the said consignment containing drug was given to him by his friend Mathew and he indulged in drug trafficking at the advice of his friend.

17. Learned counsel for the petitioner submits that the petitioner has been falsely implicated and the case of the prosecution is replete with fatal investigative, factual and evidentiary discrepancies.

18. It is contended that the allegations that the petitioner in his statement recorded on 18.09.2013 and 19.09.2013 has admitted that he and his employer Mr. Harmeet Singh were aware about the contents of the consignment and that he was involved in the drug trafficking and that he was involved in the booking of parcels containing drugs is false as there are no such admission in the statements. It is further submitted that said statements have been retracted and cannot be relied upon by the prosecution.

19. It is submitted that the consignment containing the alleged contraband was recovered from a courier-parcel shipped by M/s DHL Express under DHL AWB No. 3272012763 dated 24.08.2013 and the DHL documentation shows it originated from Patiala. Further,

inspection of the DHL AWB No. 3272012763 and its accompanying invoice, and ID proof show that it was booked by one Rakesh Kumar from Rajpura (Patiala) being the consignor and that there has been an intentional error by vested interests in concluding that the courier/parcel allegedly containing contraband originated from Chandigarh and was booked by the Petitioner.

20. It is contended by learned counsel for the petitioner that there are several discrepancies in the Airway Bill. The DTDC Air Way Bill N94740017 dated 16.08.2013 bears no signatures of the consignor. The content description in the DTDC Air Way Bill refers to a single piece of 'hand-craft wooden painting' whereas the invoice attached to the incriminating to the Airway Bill refers to the contents as five pieces of 'Painting on Wooden Frame'. The accompanying bill further differs in description of billed content as 'Hand-Carved Wooden Painting'. The weight of the seized consignment is recorded as 8.5kg in the DHL Express Airway Bill, whereas it is shown as 8kg 200gm in the parent DTDC Air Way Bill. The seized courier parcel has been clearly and extensively re-packaged in DHL packing material indicating that the package had been opened and contents tampered / substituted as the original DTDC packing had been removed / replaced by DHL material.

21. It is contended that only three representative samples of 5 grams each were taken from the ten packets allegedly recovered as concealed narcotic content from the impugned courier which indicates

that there was just one packet and not ten as claimed by the prosecution, and that the drawing of 5 gram sample weight indicated that it was not a cannabis-based narcotic substance for which the mandated sample quantity is 23 grams per sample, laid down vide Section 1.6 and 1.7 of Narcotics Control Bureau Standing Order 1/88.

22. It is submitted that the physical properties and weight of the representative sample received by the Chemical Examiner, CRCL, New Delhi differ substantially from those recorded in the accompanying Test Memo. Whereas the Complaint, *Panchnama* and Test Memo refer to the alleged narcotic substance as *'blackish-brown hard shaped'*, the Chemical Examiner noted the said content to be *'greenish-brown coloured soft mass'*. The *Panchnama* and Test Memo record the weight of the representative sample (Sample -1) of the alleged narcotic substance recovered from the impugned courier parcel as "5 gms". Section II of the Test Memo filled-up by the Asst. Chemical Examiner on receipt of the said sample categorically records the weight of the said sample along with its packing as "3.4 gms". Thus, there is a gross discrepancy of 32% i.e. one third of the recorded sample weight, which indicates to tampering/substitution of the sample content.

23. It is contended that there are several factual omissions and discrepancies, which establish that the petitioner has been falsely implicated and there are reasonable grounds for believing that the petitioner is not guilty of the alleged offence.

24. It is alleged that though the Detention Memo Serial No 538885 dated 25.08.2013, records the sender of the detained parcel as Rakesh Kumar and his Rajpura/Patiala address, the Seizure Report initiated u/s 57 NDPS Act, 1985, on 29.08.2013 records the same Parcel as booked by Surbir Singh from Chandigarh for the same DHL Air Way Bill No 3272012763 dated 24.08.2013.

25. The Panchnama refers to a Detention Memo Serial No 558885 dated 25.08.2013, and a second Detention Memo Serial No 536848 dated 14.08.2013 vide which another detained shipment was taken for field test which shows that the shipment which was allegedly tested, was not the same that was detained by Detention Memo Serial No 558885 dated 25.08.2013. The *Panchnama* also specifically refers to the existence of two packages.

26. The *panchnama* identified the narcotic substance as THC+ based on test results from the unserviceable DHL machine, whereas, the Seizure Report dated 29.08.2013 refers to the alleged narcotic substance as charas and not as THC+.

27. As per the *Panchnama*, 10 concealed packages containing alleged narcotic substance were recovered from the contents of the impugned parcel. However, only one package, out of the 10 recovered packages, was allegedly field tested, and a single set of representative sample taken for chemical analysis. Field Test allegedly indicated THC+ (a cannabis-constituent) in the alleged concealed narcotic content, yet a single sample set of 5 gms, instead of 25 gms was

drawn. The alleged narcotic substance was not of commercial quantity, as 9 of the 10 recovered packages were neither tested nor sampled.

28. It is contended that the Petitioner has been in custody since 20.09.2013.

29. Per contra, Mr. Aggarwal, Special Public Prosecutor has further relied on the alleged confessional statement of the petitioner wherein he is alleged to have stated that whatever mistake he and his owner have committed, he apologises for the same and in future he shall not book any parcel in which there are drugs. As far as the discrepancies pointed out by the learned counsel for the petitioner in drawing of sample, custody, conveyance and forensic examination of the alleged narcotic substance, is concerned, learned Public Prosecutor has not been able to counter the same except to deny the allegations.

30. Section 37 of the NDPS Act reads as under:-

*"37. **Offences to be cognizable and non-bailable**.*

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

31. In the present case, Public Prosecutor has been given an opportunity and he has opposed grant of bail. Therefore, before petitioner is entitled to be released on bail, this Court has to be satisfied that there are reasonable grounds for believing that the accused is not guilty of such an offence and that he is not likely to commit the same while on bail.

32. The discrepancies pointed out in the drawing of sample, custody, conveyance and forensic examination inter-alia that three samples of 5 grams were drawn in place of the sample weight of 24 grams as is mandated by standing instruction No.1 of 88 issued by the Narcotics Control Bureau of the Government of India and only one packet out of 10 packets allegedly recovered, was field tested. The field test allegedly indicated THC+ and 9 out of 10 packets were neither tested nor sampled. The physical properties weight of the

suspected substance as recorded in the complaint panchnama, its memo are at variance with the one's recorded by the Chemical Examiner. *Panchnama* records the substance as 'blackish brown hard shaped' with weight of the sample being 5 grams. Chemical Examiner has noted the content to be *'greenish-brown coloured soft mass'* with weight of sample being 3.4 grams.

33. Further, it is observed that the parcel that is booked is not booked in the name of the petitioner but in the name of one Rakesh Kumar. Even the ID proof, which was submitted, was not of the petitioner but of Rakesh Kumar. Rakesh Kumar is alleged to be an employee of DHL, the courier agency. The article was recovered in the possession of the courier agency. The discrepancy that is being further pointed out is that the article was booked on 17.08.2013 and was allegedly dispatched from the Chandigarh branch on 17.08.2013 and reaches Delhi on 24.08.2013. For the period between 17.08.2013 and 23.08.2013, the article admittedly remained in the possession of DHL but there is no tracking report or status with regard to said period of seven days.

34. Further, it is pointed out that there is variance even in the weight of the article, which is booked by the petitioner, and the one, which is seized. The article weight booked by the petitioner was 8.200 Kgs and the weight of the article seized was 8.5 kgs. Even the description of the goods 'hand-craft wooden painting' is changed to 'painting on wooden frame'. Further, with the seized article there was

an invoice attached which was in the name of Rakesh Kumar; which was different from the invoice that was annexed to the consignment.

35. Further, the statement under section 67 of NDPS Act, of the petitioner, relied on by the respondents, is not as incriminating as is sought to be projected. It only records that whatever mistake he and his owner have committed, he apologises for the same and in future, he shall not book any parcel in which there are drugs. Further as per the petitioners the statement was not voluntary and has been retracted immediately.

36. Having considered the facts and circumstances of the case, I am satisfied that there are reasonable grounds for believing that the present petitioner is not guilty of the offence for which he has been charged. With regard to the second aspect that the petitioner is not likely to commit any offence on bail, learned counsel for the petitioner has pointed out that there are no criminal antecedents and further that he had booked several parcels in the past and no complaint was received *qua* any of the parcels that he booked. This has not been controverted by the prosecution.

37. In view of the above, I am satisfied that the requirements of Section 37 NDPS Act, have been fulfilled and, therefore, it is a fit case in which the petitioner is to be released on bail.

38. Accordingly, on petitioner furnishing a bail bond in the sum of Rs. 25,000/- with one surety of the like amount to the satisfaction of

the Trial Court, petitioner shall be released on bail, if not required in any other case. Petitioner shall not do anything that may prejudice the trial or the prosecution witnesses. Petitioner shall furnish to the IO his permanent residential address and his active mobile number as well as that of his surety and shall mark his presence at the local police station of his residence on the first Saturday of each month. Petitioner shall not leave the country without the permission of the Trial Court

39. It is clarified that observations made in this order are only for the purposes of grant of bail and shall not be considered at the time of the trial of the case.

40. Petition is disposed of in the above terms.

41. Order *dasti* under signatures of the Court Master.

SANJEEV SACHDEVA, J

September 24, 2018
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