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

% Date of Decision: 27th May, 2019

\+ BAIL APPLN. 202/2019

ANUJ GOSAIN ..... Petitioner

Through: Mr. S.C. Sagar, Advocate

versus

NARCOTIC CONTROL BUREAU THROUGH STATE (NCT OF DELHI) ..... Respondent

Through: Mr. Yatharth Singh, Advocate

CORAM:

HON'BLE MR. JUSTICE CHANDER SHEKHAR

<u>CHANDER SHEKHAR, J. (ORAL)</u>

1. This order shall dispose of the application filed by the petitioner under Section 439 read with Section 482 of the Code of Criminal Procedure, 1973, read with Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as 'the NDPS Act') for the grant of regular bail.

2. Briefly stated, the facts of the prosecution case are that, on 2.12.2015, on the basis of secret information, two parcels booked under Airways Bill No.4555208195 and 4555208206 were intercepted at the office of DHL Courier Company, Rama Road, Kirti Nagar, New Delhi and the same were found to contain 390 gms and 325 gms respectively of some substances which were sent to CFSL, Lodhi Road for chemical analysis. The said substances were found positive for Pseudoephedrine and Heroin respectively. During investigation, it was revealed that both the said parcels were booked by the accused

('petitioner' herein) with his own ID at the instance of the co-accused, Lokesh Chadha. It is further alleged by the prosecution that recovery of the said narcotic substances falls within the category of commercial quantity.

3. Learned counsel for the petitioner stated that the petitioner is in custody since 17.2.2016 and he has been falsely implicated in this case.

4. The respondent has already filed the status report/reply to the bail application, wherein it is stated that during the investigation, it was revealed that both the parcels were booked by the petitioner with his own ID. It is further stated in the status report that the petitioner had tendered his voluntary statement under Section 67 of the NDPS Act, wherein he disclosed that, on the instruction of the co-accused, Lokesh Chadha, he received the parcels in question from one foreigner. He also disclosed that the said foreigner customer provided one vague ID. The petitioner further disclosed that the contents of the parcels have been checked-up by the co-accused Lokesh Chadha and ultimately, on instructions of Lokesh Chadha, both the parcels were booked by the petitioner with his own ID.

5. It is also stated in the status report that the co-accused, Lokesh Chadha had also tendered his voluntary statement under Section 67 of the NDPS Act, wherein he disclosed that, on his instructions, the petitioner had received both the parcels and were booked by him with his own ID, as he had directed the petitioner to do so. From the statement of Lokesh Chadha, it was revealed that, before booking of the parcels, they used to check the contents of the parcels which show

that the accused knowingly and intentionally booked the parcels with the knowledge that the same were containing the recovered drugs. Further, from the investigation, it was revealed that the petitioner as well as the co-accused Lokesh Chadha are knowingly involved in the present case.

6. I have heard the learned counsel for the parties and have perused the record.

7. This Court, vide order dated 24.7.2017, had dismissed the bail application filed on behalf of co- accused Lokesh Chadha observing as under:

> "It appears that attempts are made to export the narcotic drugs out of India by the petitioner in criminal conspiracy with co accused Anuj Gosain. Admittedly, it is a case of commercial quantity of narcotic drugs and psychotropic substances. Section 37 of the NDPS Act is attracted which creates an embargo on the power of the Court to grant bail. At present there is no material on the record to suggest that in case the co accused is released on bail, he is not likely to commit any such offence while on bail."

8. In the order dated 14.12.2018, while dismissing the bail application of the petitioner, it was held by the Special Judge, NDPS, New Delhi (hereinafter to be referred as 'the Trial Court') as under:

> "In the present case, from the statements of both the accused, it has come up on record that earlier also, co accused Lokesh Chadha has sent parcels pertaining to foreigners on 5 to 6 occasions and the present applicant/accused has also sent such parcels on 3 occasions. From the perusal of statement of accused, it is revealed that he used to book the parcels pertaining to foreign nationals on his identity

> documents. During the course of arguments, Ld. SPP also stated that on a earlier occasion also one such parcel sent by accused on his identity was found containing contraband abroad. In view of the abovesaid, I am satisfied that the embargo of section 37 of NDPS Act is applicable. At this stage, there is no material to suggest that accused will not indulge in such activities again in case he is released on bail. The application under consideration stands dismissed. Order *dasti*, as requested."

9. Learned counsel for the petitioner has relied upon *Surbir Singh v. Customs (Preventive),* 2018 VIII AD (Delhi) 670 and submitted that the facts of the case in *Surbir Singh* [supra] are identical to the case of the petitioner, hence, the petitioner, in view of the aforesaid judgment, may be granted regular bail. However, the judgment relied upon by the learned counsel for the petitioner is not applicable to the facts of the present case.

10. There is no dispute that in this matter, the quantity involved is a commercial one and the rigours of Section 37 of the NDPS Act are applicable. 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.
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> (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."

11. In ***Saju v. State of Kerala**,* 2001(1) SCC 378, the Supreme Court observed as under:

> "8. ...It is a settled position of law that act or action of one of the accused cannot be used as evidence against other. However, an exception has been carved out under Section 10 of the Evidence Act in the case of conspiracy. To attract the applicability of Section 10 of the Evidence Act, the Court must have reasonable ground to believe that two or more persons had conspired together for committing an offence. It is only then that the evidence of action or statement made by one of the accused could be used as evidence against the other."

12. In ***Mir Nagvi Askari v. Central Bureau of Investigation**,* (2009) 15 SCC 643, it was ruled in the same vein that while drawing an inference from the materials brought on record to arrive at a finding as to whether the charges of the criminal conspiracy have been proved or not, it must always bear in mind that a conspiracy is hatched in secrecy and it is difficult, if not impossible, to obtain direct evidence to establish the same.

13. The Supreme Court in the case of ***Mohd. Amin v. CBI,*** (2008) 15 SCC 49 has held as under:

> "74. The principles which can be deduced from the above noted judgments are that for proving a charge of conspiracy, it is not necessary that all the conspirators know each and every details of the conspiracy so long as they are co-participators in the main object of conspiracy. It is also not necessary that all the conspirators should participate from the inception of conspiracy to its end. If there is unity of object or purpose, all participating at different stages of the crime will be guilty of conspiracy."

14. Further, in ***Union of India v. Ram Samujh and Anr.***,(1999) 9 SCC 429, the Supreme Court observed as under:

> "8. To check the menace of dangerous drugs flooding the market, the Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless mandatory conditions provided in Section 37, namely,
> (i) there are reasonable grounds for believing that accused is not guilty of such offence; and
> (ii) that he is not likely to commit while on bail,
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> are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in the dangerous drugs, the Court should implement the law in the spirit with which the Parliament, after due deliberation, has amended."

15. In ***Supdt., Narcotics Control Bureau, Chennai v. R. Paulsamy,*** (2000) 9 SCC 549, the Supreme Court has held as under:

> "6. In the light of Section 37 of the Act no accused can be released on bail when the application is opposed by the public prosecutor unless the Court is satisfied that there are reasonable grounds for believing that he is not

> guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matters which could be established only in offence regarding compliance with Sections 52and 57 have been pre-judged by the learned single Judge at the stage of consideration for bail. The minimum which learned single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the learned single Judge during bail stage regarding the compliance of the formalities mentioned in those two sections.
> 7. We may also observe that learned single Judge has not recorded a finding in terms of Section 37of the Act which is sine qua non for granting bail to an accused involved in the offence under the Act."

16. It is also a fact noticed by the courts that, generally, the conspiracy is hatched in secrecy and it may be difficult, if not impossible, to obtain direct evidence to establish the same. The acts of various parties to the conspiracy will infer that they were done with reference to common intention, hence, it is held, time and again, that the conspiracy can be proved by indirect circumstantial evidence, which is of an impeccable nature. It is also not necessary that all the conspirators should know each other and also every detail of the plot, so long as they are co-participators in the main object thereof and it is also not necessary that all of them should participate from the inception of the stratagem till the end, the determinative factor, being unity of object or purpose and their participation at different stages.

17. As per the provision of Section 37 of the NDPS Act, it is mandatory that before the petitioner is entitled to be released on bail,

the Court has to be satisfied that there are reasonable grounds for believing that the petitioner is not guilty of such an offence and that he is not likely to commit the same again while on bail.

18. Now reverting back to the facts of the case, it has come on record that the petitioner had sent parcels on three occasions. From the perusal of the statement of the petitioner, it is revealed that he used to book the parcels pertaining to foreign nationals on his identity documents. The statement of the petitioner under Section 67 of the NDPS Act also demonstrates that before booking of the parcels, the petitioner had the knowledge about the contents of the parcels, which means that the petitioner had knowingly and intentionally booked the parcels with the knowledge that the same were concealing recovered drugs. The petitioner had full conscious knowledge about the contraband while taking the contraband into his possession for consignment.

19. A bare perusal of the alleged statement of the petitioner recorded under Section 67 of the NDPS Act also demonstrates that, when the customer had brought the packets, he paid towards the packets a sum of Rs.10,000/- to the petitioner and told him that Lokesh Chadha had asked him to do so. Thereafter, Lokesh Chadha came in the evening and the petitioner handed over the said money to him. It is a fact that ordinarily, no one pays such an exorbitant sum of Rs.10,000/- for the purpose of booking an ordinary packet for consignment in the ordinary course of business to a transporter or the booking agent. The payment of such an exorbitant sum of Rs.10,000/- by the consignor to the petitioner, as stated in his statement, which

was received by the petitioner, without any objection or explanation, itself demonstrates, that the petitioner was having knowledge about the contents of the packets.

20. There is even otherwise nothing on the record which proves that the petitioner, at any point of time, told the consignor/customer what would be the amount for the consignment of these packets. It impliedly shows that when the petitioner received the packets, he had full knowledge about the contents of the packets and was also having knowledge that he has to receive a sum of Rs.10,000/-, hence, the petitioner was instrumental and part of the conspiracy in transportation and receiving of the contraband and all the accused persons acted hand-in-glove with each other.

21. Further, taking into consideration the material on record and the statement recorded under Section 67 of the NDPS Act, the petitioner and the other accused have already allegedly admitted their complicity and involvement in the commission of the offence.

22. In view of the aforesaid discussion, the conduct of the petitioner and the fact on record that the petitioner had earlier sent parcels on three occasions and taking into consideration the detailed order of the Trial Court as well as the status report, this Court is satisfied that at this stage, there are no reasonable grounds for believing that the petitioner is not guilty for such an offence and he is not likely to commit any offence again while on bail.

23. Accordingly, I do not find anything on record to satisfy this Court that there are grounds or more to say reasonable grounds believing that the petitioner is not likely to commit such an offence

again and is also not likely to commit the same while on bail, hence, this Court does not find any merit in the bail application of the petitioner and the same is, accordingly, dismissed. The Trial Court is directed to expedite the proceedings.

24. It is clarified that whatever is discussed or observed hereinabove is only a *prima facie* view of this Court, at this stage, and the same shall not tantamount to any expression or opinion on the merits of the case.

CHANDER SHEKHAR, J

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