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

Reserved on: 29.07.2020

Pronounced on: 06.08.2020

+ BAIL APPLN. 1272/2020

BIRPAL

..... Petitioner

Through Mr. S. S. Das, Adv.

versus

N.C.B

..... Respondent

Through Mr. Rajesh Manchanda & Mr. Rajat Manchanda, Adv. for NCB.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T

1. Present petition has been filed under section 439 Cr.P.C. read with section 37 of NDPS Act for grant of bail.

2. The brief facts as per prosecution are that the officers of NCB, on the basis of secret information, on 19.01.2019, reached house No. 671, Sen Mohalla, Mahipalpur Bypass Road, New Delhi i.e. the office of Apex courier. On questioning by the officers of NCB, the manager of Apex courier informed with regard to receipt of a parcel containing medicines (5000 tablets each of Alprazolam and zolpidem) from Agra on the same day

and the said courier was collected by one Mr. Lallan, pickup boy of M/s S.M. Courier who was sent by the petitioner Birpal.

3. Learned counsel for the petitioner submitted that during interrogation, the name of petitioner was surfaced and arrested by the officers of NCB and a statement under section 67 of NDPS Act was taken forcibly under torture and inducement from the petitioner. However, said confessional statement was retracted by petitioner at the first available opportunity.

4. Further submitted that it is also case of the prosecution that no parcel containing any medicine or psychotropic substance was ever recovered either from the possession of the petitioner or at his instance. Moreover, neither any cash amount has been recovered from the petitioner nor any money transactions is on record and therefore, there is no iota of evidence against the petitioner in the present case to connect with the alleged recovery of the contraband. Thus, the embargo of section 37 is not attracted in the present case as nothing was recovered either from his possession or at his instance.

5. Further submitted that in addition to above alleged seizures were made at Apex Courier, Delhi and it is an admitted fact that the petitioner was

not present at the site where alleged raid and seizure was effected on 19.01.2019. Moreover, the petitioner neither had booked the said consignment nor he was recipient of the alleged consignment. Moreover, according to prosecution, the said parcel was meant for co-accused Mohan Kumar and the same was sent by Dr. Brij Bhushan Bansal, another co-accused in the present case, and the applicant has no role whatsoever with regard to the said consignment/seizure.

6. Also submitted that the petitioner as an employee of Mohan Kumar was duty bound to act as per directions of his master, during his employment, he had no knowledge whatsoever with regard to any act, if done by him. As per the charge sheet and panchnama, the alleged parcel which was allegedly sent from Agra, was seized by the officers of NCB from M/S Apex Courier, Delhi. Whereas, the consignment slip marked as Annexure 5 on page 70 of the Charge-sheet, shows the address of the Apex Courier Company, Delhi and thus, the same proves that it was never generated at Agra and was fabricated and manipulated after 19.01.2019 at Delhi by the officers of NCB to implicate the present accused person. From the record, it cannot be established as to how the petitioner is said to be connected with the consignment in question. There is no material to connect

the petitioner with the said offence and mere statement of co-accused even under section 67 is not sufficient to prima-facie show the involvement of the petitioner and there is no evidence to connect the petitioner with the offence. Moreover, this Court was pleased to release the alleged main accused i.e. Mr. Mohan Kumar on bail vide order dated 23.03.2020 and the role of the petitioner is having less gravity than that of the said accused. Thus, petitioner deserves to be released on bail even on parity.

7. Learned counsel further submitted that following points are very important to prove the innocence of the petitioner:

- a. It is admitted fact that the petitioner was an employee of co-accused.
- b. It is also admitted by the prosecution that the petitioner had sent Lallan to collect the parcel in question on behalf of co-accused Mohan Kumar and her sister-in-law Sandhya Sharma (the prosecution has knowingly and intentionally did not arrest Ms. Sandhya Sharma for reasons best known to them. When she was a director and actively participating in the business carried on by M/s S.M. Courier and Cargo Pvt. Ltd.). However, the petitioner

had no role either in sending Lallan to collect any parcel from Apex Courier or he has no knowledge whatsoever qua any parcel sent to Apex Courier from Agra.

- c. According to the statement of Ms. Sandhya Sharma, director of M/S S.M. Courier and Cargo Pvt. Ltd. recorded u/s 67 of NDPS act, she and her brother-in-law i.e. Mr. Mohan Kumar were personally looking after the affairs of M/s S.M. Courier and Cargo Pvt. Ltd. She had also stated in the said statement that the petitioner was working as billing manager, and looking after accounts and operation. She had also stated that the petitioner was doing the job under the supervision of herself and her brother in law i.e. Mr. Mohan Kumar. She had also admitted with regard to her knowledge of sending of Lallan, the pick boy to apex Courier to collect the prohibited medicines containing 50,000 Zolpidem and 5000 Alprazolam which were sent by one Dr. Brij Bhusan Bansal, Agra. She had also admitted in her statement that many clients of her company were asking about medicines.
- d. According to statement of Mr. Mohan Kumar, director of M/s S.M. Courier Pvt Ltd. recorded u/s 67 of NDPS Act, the petitioner

was one of the employees of his company looking after the work of pickups, company daily affair management and operational procedures. He had also inter-alia admitted with respect to his acquaintance with the other co-accused Dr. Brij Bhusan Bansal to whom he had met earlier at Agra and at other places. He had also admitted that he had received a message qua forwarding medicines namely, Alprax, K25 Phentermine, etc. Also admitted that he had received many queries on consignments which are required to be forwarded to foreign countries and persons keep coming to office and ask queries about medicines and products are checked at office and then packed and forwarded. From the statements, it is clear that the parcels were received by his company and after checking those were sent to foreign countries. When the consignment was allegedly sent by co-accused Dr. Brij Bhusan Bansal under the instructions of Mohan Kumar, then where is the role of the petitioner when he was neither the consignor nor the consignee or the beneficiary of any transaction done between co-accused Brij Bhusan Bansal and Mohan Kumar.

8. Lastly submitted that from the above, it is clear that the petitioner has

no role whatsoever with regard to the smuggling of drugs in question and the entire transaction was, if any, done between the co-accused Mohan Kumar and Dr. Brij Bhusan Bansal. Thus, the role of the petitioner cannot be more serious than the role of co-accused Mohan Kumar who was released on bail by this Court by any stretch of imagination.

9. On the other hand, learned counsel for the respondent submitted that the contention of the petitioner that he was not in conscious possession of the drugs recovered and entitled to get bail on the ground of parity, whereas the role of petitioner and co-accused Mohan Kumar are not identical in its nature and from the relied upon documents, the petitioner was on the forefront of the commission of the offence and a major link for commission of the offences of present case. As per the case of the prosecution, petitioner is involved in the abatement/criminal conspiracy of the seized psychotropic substance/ contraband in this case. The role of the particular person to be looked into to determine the commission of any offence and as such the plea that he was in employment, has no significance in law and advantage to the petitioner. It is relevant to note that petitioner admits that he played the role in trafficking of narcotics drug and psychotropic substances which is also apparent from the print outs of whatsapp of the mobile phone with the

petitioner meaning thereby the role of petitioner was direct in illicit trafficking of narcotics drug and psychotropic substances as per definition of “illicit traffic” defines under section 2(viii b), (iv), (v), (v) (2).

10. Further submitted that the recovery in this case is of commercial quantity, therefore, provisions of section 37 of NDPS Act applies and the bail application of the offender has to be dealt with and can only be granted when twin conditions imposed in the said application fulfil i.e. 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. Thus, there is no merit in the present petition and the same deserves to be dismissed.

11. I have heard learned counsel for the parties and carefully gone through the role assigned to the petitioner and co-accused Mohan Kumar who was granted bail by this Court vide order dated 23.03.2020 in Bail Appl.2839/2019. In my opinion, role assigned to co-accused Mohan Kumar as per prosecution is graver in comparison to the present petitioner on the grounds discussed inter alia.

12. As per the panchnama, no recovery could be made out from the

custody of petitioner. In the case of ***Mohan Lal vs. State of Rajasthan: (2015) 6 SCC 222***, the Hon'ble Supreme Court held that "*the legislature while enacting the said law was absolutely aware of the said element and that the word "possession" refers to a mental state as is noticeable from the language employed in Section 35 of the NDPS Act.*" The said provisions read as follows:

"35. Presumption of culpable mental state- (1) in any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be defence for the accused to prove that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation- In this Section 'culpable mental state' includes intention, motive, knowledge, of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

13. In the case of ***Kashmir Singh vs. NCB: MANU/DE/9207/2006***, it is held by this court that the embargo under section 37 NDPS Act has been explained in detail as to how the same shall not apply and under what circumstances, an accused is entitled to bail.

14. In the case of ***Mohd. Ramzan vs. State (NCT of Delhi): 2005 (82)***

DRJ 435, it was observed that it is requirement of Section 37 that the Court considering an application for bail has to go into the question as to whether there exist or do not exist reasonable grounds for believing that the accused is not guilty of such offence. Consequently, it becomes imperative that even at the stage of grant of bail, the Court has to go into the question of whether any reasonable grounds exist to indicate that the accused is not guilty of the offence on the basis of the available material before the Court.

15. The alleged parcel seized by NCB was dispatched from Agra as per the Charge Sheet and Panchnama whereas the said Consignment Slip marked as Annexure-5 on page no.70 of the Charge Sheet, shows the address of the said courier company. i.e. Apex Courier, Mahipalpur, Delhi, clearly proving that the said Consignment Note has been fabricated at Delhi and the same was never ever generated at Agra. Said factum clearly falls under the category wherein this Court has observed that the Court should be satisfied that there are reasonable grounds for believing the accused is not guilty of such offence. There is no mention of any such Consignment Slip in the Seizure Memo or the Panchnama of the main Charge Sheet which further proves that the Consignment Slip has been concocted after 19.01.2019 and subsequently inserted in the main Charge-Sheet. Moreover,

sample received at the laboratory was in the form of light brown coloured lump and the sample, when allegedly taken was said to weigh 5 gms., however, at the laboratory, it was found to weigh 4.6 gms. Whereas in the present case, the sample was sent and tested by CRCL, Delhi and as per the alleged Consignment Note No.20235315 (generated in Delhi and not in Agra) the total weight of the parcel is mentioned as 25.460 kg and weight of the seized contraband was found to be 21.960 kg. By no stretch of imagination, can the packing material be equivalent to 3.5 kg, thus, it is clearly evident from the aforesaid discrepancy that no such parcel was ever sent from Agra and received at Delhi at the office of Apex Courier. Moreover, no Consignment Note from Agra was ever generated and the consignment note annexed by the NCB in its Charge-Sheet is generated at the office of the courier company at Delhi.

16. Be that as it may, the respondent NCB wrote a letter dated 15.03.2019 to the Director, JPEE Drugs, Plot No.53, Sector-6A, SIDCUL, Haridwar, Uttarakhand whereby they directed aforesaid company under section 67 of NDPS Act to provide details in prescribed format in excel sheet as well as in hard copy at the earliest to facilitate investigation into the matter regarding CAF, Distributor name, address, email and license no. and

quantity supplied whereby they submitted details as under:

S.NO.	DISTRIBUTOR NAME, ADDRESS, EMAIL, LICENCE NO.	BILL NO.	BATCH NO.	QUANTITY SUPPLIED
1.	M/s. J.P. MEDICAL AGENCIES 25, SANT SINGH SURI MARKET FOUNTAIN AGRA- 282003 GOWDUN F-50, SITE C INDUSTRIAL AREA, SIKANDRA AGRA -7 (U.P.) DL. NO. 51GR/20B/2011 & 51 AGR/21B/2011 NEW LICENSE NO. AGA-2016/20B/00046, AGA-2016/21B/00046, VALID UPTO 19.10.2021.	JD/0591/12 DATE 21.12.2018 & JD/0604/12 DATE 31.12.2018	JDT-3692 12/2018 11/2021	2240 BOX 715 BOX
2.	M/s. J.P. MEDICAL AGENCIES 25, SANT SINGH SURI MARKET FOUNTAIN AGRA- 282003 GOWDUN F-50, SITE C INDUSTRIAL AREA, SIKANDRA AGRA -7 (U.P.) DL. NO. 51GR/20B/2011 & 51 AGR/21B/2011 NEW LICENSE NO. AGA-2016/20B/00046, AGA-2016/21B/00046, VALID UPTO 19.10.2021.	JD/0604/12 DATE 31.12.2018 & JD/0620/01 DATE 09.01.2019	JDT-3693 12/2018 11/2021	240 BOX 2014 BOX

17. In addition to above, said M/s JPEE Drugs also sent tax invoice dated

21.12.2018 and freight receipt of Rs.20,000/- with tax invoice of 31.12.2018, e-way bill dated 31.12.2018 addressed to M/s J.P. Medical Agencies, Agra, Uttar Pradesh.

18. Admittedly, in the present case, there is no recovery being effected from the petitioner either for substance or money trail. He was employee of the company of Mohan Kumar. He is no involved in any other case previously. His role, under any imagination, cannot be graver than Mohan Kumar. As per facts discussed above, twin conditions of section 37 of NDPS Act satisfy in this case.

19. In view of above facts, this Court is of the view that prima facie case is not established against the petitioner. However, since the present order is being passed in bail application, therefore, without commenting on the merits of the prosecution case, the petitioner deserves bail who is in judicial custody since 02.07.2019.

20. Accordingly, the petitioner shall be released on bail on his furnishing personal bond in the sum of ₹25,000/- with two sureties of the like amount to the satisfaction of the Trial Court.

21. Before parting with the order, it is relevant to mention that nothing

contained in this order shall be construed as an expression on the merits of the prosecution case. The Trial Court shall not get influenced by the observations made by this Court, while passing the final orders in the trial.

22. The present petition is allowed and disposed of.

23. Copy of this order be transmitted to the Jail Superintendent and the Trial Court concerned for compliance.

24. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through email.

(SURESH KUMAR KAIT)
JUDGE

AUGUST 06, 2020/ab