Neutral Citation Number: 2023:DHC:3633

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

% Reserved on: 10th May, 2023
Pronounced on: 24th May, 2023

\+ **BAIL APPLN. 1120/2023**

SHANKAR KUMAR SINHA ..... Petitioner

Through: Mr. Lalit Kumar, Advocate along with petitioner.

versus

NARCOTICS CONTROL BUREAU ..... Respondent

Through: Mr. Shashwat Bansal, Advocate for NCB.

CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

1. This application has been filed for seeking regular bail in VIII/80/DZU/2022 under Sections 22/23/29 of NDPS Act.

2. It is the case of NCB that on 15th November, 2022, on the basis of information received, parcel AWB No. 7869722276 lying at DHL Exp. Pvt. Ltd. Office at Rama Road, Kirti Nagar, Delhi was searched and 700 grams amphetamine was recovered. Sender's name on the parcel was of the petitioner herein, whose address was given to be S-12/171, Indra Gandhi Camp, Lodhi Road, New Khanna Market Delhi- 110003. During the course of investigation, voluntary statement of the petitioner was recorded. As per the NCB, he accepted that he had booked the parcel. In follow up action, one foreign national, namely *Abigail Momah*, was also arrested. According to the learned counsel of NCB, the complaint had not been filed and was expected to be filed in a proximate time. Subsequently the complaint was filed for offence punishable under Sections 8(c), 22(c), 23(c), 29 NDPS Act.

3. Learned counsel for the petitioner has contended that the petitioner is employed with M/s Pooja Fabrics, run by the *pairokar* through which this bail application has been filed, having its establishment at Mohan Singh Market, INA, New Delhi -23. The petitioner has been employed with said

employer since the last 12 to 13 years and draws a salary of Rs. 15,000/- per month from said employer. The employer / *pairokar* was present in Court and confirmed the aforementioned position.

4. Employer of the petitioner is engaged in the vocation of retail, trade and export of all types of fabrics from India under an EXIM license, issued by the Director General of Foreign Trade. At the said shop, customers come to purchase various types of fabrics and sometimes customers request shipping their parcels to overseas destinations through courier companies including DHL Express having local offices in the vicinity. The petitioner, upon instructions of the employer, calls the local field boys of these courier companies for shipment of a parcel for a customer.

5. It is contended that for the last 2 or 3 months before the said incident, a foreigner of Nigerian origin stating his name as *"Ike"*, used to come to the shop and purchase cloth. On 12th November 2022, said *Ike* arrived at the shop and after purchasing cloth, handed over some boxes that he wanted to shipped overseas to Melbourne, Australia and consequently requested if it could be couriered by the agencies that the shop deals with. Accordingly, the petitioner called the field boy of the courier company, DHL Express who spoke to the concerned person and took the boxes for the purpose of couriering.

6. It transpired later that the said box belonging to the Nigerian person *Ike,* was couriered using the identity details of the petitioner. On 16th November, 2022, some officers of NCB arrived at the shop to inquire about the petitioner and he mentioned that he was working at the said shop since the last 12-13 years. Further inquiries were made regarding whether he had sent any box through DHL company to Australia and the petitioner narrated the aforementioned facts to them about the Nigerian national.

7. At the behest of the NCB officials, petitioner called the Nigerian

national and asked him to collect back his parcel, but instead he mentioned the name of a lady, one *Abigail Momah* who would collect said parcel on his behalf. After her arrival, the aforementioned *Abigail Momah* was arrested by the NCB and has been arrayed as an accused. On 16th November 2022, the petitioner was released after his interrogation. However, on 19th November 2022, NCB personnel again arrived at the shop where the petitioner works, took his signatures and showed him as arrested.

8. Learned counsel for the petitioner has *inter alia* submitted as under:

- *firstly,* he drew attention to the courier receipt where the name of the petitioner is mentioned as a consignor, and consignee is one Paul Baker of Melbourne, Australia. The contents of the said packet are noted as Auto Parts (Rear Foot Rest) made of 80% of steel and 20% rubber weighing 7.2 kg., estimated at a value of 4,500 INR. Attention was drawn to the fact that as per the receipt, duty and tax on the said parcel was to be paid by the receiver and therefore the said parcel was booked on a credit basis;
- *secondly,* it has been contended that as per the application for remand dated 19th November, 2022, it had been stated by NCB that *"during investigation a courier employee also disclosed that one Nigerian person was making inquiry regarding the parcel in question and he has provided his contact number, thereafter the said Nigerian was contacted and asked him to collect his parcel to which the Nigerian sent the accused No.2 to collect his parcel. Accordingly, accused No.2 came to the courier office for making inquiry/collecting backed the parcel in question, therefore she was examined and her statement was recorded. Wherein she disclosed about the investigation about the present case"*. It is therefore submitted that even at that stage the fact that the package belonged to the Nigerian national and the accused No.2 was to collect

the return of the package was confirmed;

- *thirdly,* attention is drawn to the remand application dated 21st November 2022, where the same fact has again been recorded. It is submitted therefore that despite a PC remand of the petitioner, no new facts have come to light and investigation of the NCB had revealed only what has been stated in said remand applications. The exact same position is also stated in the extension of remand application dated 5th December, 2022;
- *fourthly,* as regards the investigation, it portrays the clear unambiguous involvement of the Nigerian nationals while the role of the petitioner was limited to the use of his identity papers for couriering. However, the status report now suggests that he has confessed his involvement in the present crime as per the disclosure recorded, which is not admissible as per the decision of the Hon'ble Supreme Court in ***Tofan Singh v. State of Tamil Nadu***;
- *fifthly*, it is contended that there was clearly no conscious possession, in any event, and therefore none of the presumptions under the NDPS Act would apply;
- *sixthly,* it was reiterated that it was evident from the investigation that as per the statement of the courier employee, the Nigerian national was making inquiries regarding the parcel in question and had provided his contact number. Therefore, the allegation that the petitioner was in fact the one who was in touch with the Nigerian national and was conspiring with him to send the contraband, is untenable and unsustainable;
- *seventhly*, it is contended that there will be no benefit to the petitioner regarding couriering the package and as an employee of the said shop for the last 12 to 13 years, he would naturally not risk his employment and his livelihood.

9. Learned counsel for the NCB draws attention to the Section 35 and 54

of the NDPS Act, stating that there is a presumption regarding the culpable mental state of an accused and possession of illicit articles. Further, reliance is placed on the disclosure statement of the petitioner where the petitioner has allegedly disclosed that he had the mobile numbers of the Nigerian nationals. Additionally, he has allegedly disclosed that he knew that the package contained contraband and that he had taken Rs. 10,900/- for booking the same, as also that he had booked parcels for the said Nigerian even earlier.

10. Learned counsel for the NCB has also submitted that the package contained motor parts and not cloth materials which was what was exported from the shop where the petitioner worked at. However, the learned counsel for the petitioner has refuted this contention stating that the petitioner has not said that he was facilitating the courier of a parcel related to the shop but has fairly stated that he was facilitating the courier of the parcel at the behest of the Nigerian customer.

11. The NCB further relies upon the fact that the consignor of the said package was the petitioner himself. Further reliance is placed on the application of the twin conditions of Section 37 NDPS as per which jail is the rule and bail is the exception.

12. A perusal of the complaint would reveal that the parcel which was intercepted was cut open and amphetamine was recovered hidden inside the car spare parts which weighed 700 grams. The parcel was booked by the petitioner and Rs. 8800/- cash given by him. He stated that address of the receiver of the parcel was sent to him by the Nigerian on his Whatsapp, on his mobile number, and after booking the parcel he sent the tracking ID of the parcel to the Nigerian person. He also stated he could help nab the culprit on 18th November 2022. The Nigerian asked him to return the parcel to a lady whose mobile number was given to him and said she will come to

collect the parcel. As per the complaint, the courier person Prabhat Giri stated that petitioner asked him to pick up the parcel from the shop and after ascertaining the weight at about 7.2 kg took Rs. 8,800/- from him. Then petitioner sent him the receiver's address to the courier person on Whatsapp. The petitioner stated that his job in the shop was to ensure packing of cloth materials and booking to international destinations through different couriers.

13. Having considered the respective contentions of the parties, this Court is of the considered opinion that *prima facie* it seems that the petitioner was not the owner of the package and had merely facilitated the booking of the package with the courier company on behalf of and at the request of the Nigerian national. This seems *prima facie* possible from the sequence of events in that when the NCB approached the petitioner on 16th November, 2022, the petitioner stated clearly that he had indeed booked the parcel for the Nigerian and sent the receiver details through Whatsapp to the courier person. This was further corroborated by the statement recorded by the courier person. Also, upon asking of the NCB, the petitioner continued to communicate with the Nigerian *Ike* and told him regarding the return of the package. Pursuant to his communication with the Nigerian, that the lady *Abigail Momah* was sent to collect the return of the package. This would possibly show that he was merely an intermediary who was used to courier the package which did not belong to him. There is no other evidence placed yet as part of charge-sheet to show that the package of contraband was consciously booked by the petitioner knowing it contained narcotics except for a disclosure statement obtained three days later on 19th November, 2022, which is inadmissible.

14. In these facts and circumstances, to suggest that the petitioner was in conscious possession of the contraband would be premature. There was no

recovery from the petitioner. Further, reliance on the disclosure by the NCB, particularly the so-called confession of the petitioner that he knew that there was contraband in the package and that he had taken Rs. 10,900/- for the same, cannot be taken into account considering such disclosure statements are not admissible in law. Considering that the only evidence with the NCB is that Rs. 8800/- was paid by the petitioner to the courier company, it seems evident that the petitioner did not financially benefit from this transaction and was mainly facilitating, coordinating the package for the Nigeria (at worst for maybe a small fee/charge/tip). There is no evidence in the complaint that the package belonged to the petitioner, in that he was the one who was packing and dispatching the contraband. There are call records to show that messages have been received from the Nigerian and that the return parcel was to be collected by the person sent by the Nigerian. At this stage, the benefit of doubt would have to go to the petitioner as not being the owner and possessor of the said package of contraband.

15. Further, the petitioner has been arrested and is in custody since November 2022 and the complaint was filed in May, 2023, when the matter was listed before the Court. At least *prima facie* there is nothing that has been revealed in six months between the arrest of the petitioner and the filing of the charge-sheet, which would serve to additionally incriminate the petitioner.

16. In view of the above facts and circumstances, in the considered opinion of this Court, there are reasonable grounds for believing that the petitioner is not guilty of the offence as alleged. Furthermore, considering he has no previous involvements and that his conduct and work has been certified by his employer and there is no adverse information regarding his past, it would be prudent to believe that he is not likely to commit any offence while on bail.

17. Reference is also made to the recent decision of the Hon'ble Supreme Court in ***Mohd. Muslim v. State (NCT of Delhi)***, 2023 SCC OnLine SC 352 where the Hon'ble Supreme Court has stated in a matter relating to NDPS:

> "*20. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.*
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> *21. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation …*"
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> *(emphasis added)*

18. In light of the above, and the fact that the trial in the matter is likely to take some time, and it would not be prudent to keep the petitioner behind bars for an indefinite period, this Court finds it to be a fit case for grant of bail to the petitioner. Consequently, the petitioner is directed to be released on bail on furnishing a personal bond in the sum of Rs. 50,000/- with one surety of the like amount subject to the satisfaction of the Ld. Trial Court, further subject to the following conditions:

i. Petitioner will not leave the country without prior permission of the Court.

ii. Petitioner shall provide permanent address to the Ld. Trial Court. The petitioner shall intimate the Court by way of an affidavit and the IO regarding any change in residential address.

iii. Petitioner shall appear before the Court as and when the matter is taken up for hearing.

iv. Petitioner shall join investigation as and when called by the IO concerned.

v. Petitioner shall provide all mobile numbers to the IO concerned which shall be kept in working condition at all times and shall not switch off or change the mobile number without prior intimation to the IO concerned. His mobile location be kept on at all times.

vi. Petitioner shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the prosecution witnesses.

vii. Petitioner will report to the IO every alternate Saturday between 4 to 5pm.

19. Needless to state, but any observation touching the merits of the case is purely for the purposes of deciding the question of grant of bail and shall not be construed as an expression on merits of the matter.

20. Copy of the Order/judgment be sent to the Jail Superintendent for information and necessary compliance.

21. Accordingly, the petition is disposed of. Pending applications (if any) are disposed of as infructuous.

22. Order/judgment be uploaded on the website of this Court.

ANISH DAYAL, J.

MAY 24, 2023/RK