

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

Dated this the 28th day of April, 2017

BEFORE

THE HON'BLE MR.JUSTICE P.S.DINESH KUMAR

Criminal Petition No.303/2017

BETWEEN:

CHANDRU KUNTHUR RAGHUVEGOWDA
S/O LATE RAGHUVEGOWDA
AGE: 41 YEARS
PARTNER OF M/s.OVERSEAS EXPRESSE
No.58, 2ND LANE, 3RD CROSS
LALBAGH ROAD
BENGALURU-560 027
(NOW IN JUDICIAL CUSTODY)

... PETITIONER

(By Shri. HASHMATH PASHA &
Shri. H.S.CHANDRAMOULI, ADVOCATES)

AND :

STATE BY INSPECTOR OF CUSTOMS
CIU, AIRPORT & AIR CARGO COMPLEX
CARGO TERMINAL, DEVANAHALLI
BENGALURU-560 030

... RESPONDENT

(By Smt. M.C.NAGASHREE, ADVOCATE)

THIS CRL.P IS FILED U/S.439 CR.P.C PRAYING TO
ENLARGE THE PETR. ON BAIL IN CR.NO.893/2016 OF
INSPECTOR OF CUSTOMS, CIU, AIRPORT AND AIR CARGO
COMPLEX, CARGO TERMINAL, DEVANAHALLI, BANGALORE FOR
THE OFFENCES P/U/Ss.9(A), 25A, 43 OF NDPS ACT R/W 135,
104 OF CUSTOMS ACT. THE XXXIII ADDL. CITY CIVIL AND S.J.,

AND SPL. JUDGE (NDPS) BANGALORE HAS DISMISSED THE BAIL APPLICATION ON 14.12.2016 IN CRL.MISC.NO.8962/2016.

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 26.04.2017, COMING ON FOR PRONOUNCEMENT OF ORDER, THIS DAY, THE COURT PRONSOUNCED THE FOLLOWING:-

ORDER

This petition under Section 439 of Cr.P.C. is filed seeking enlargement of petitioner on bail in Crime No.893/2016 registered by the Inspector of Customs, CIU, Airport & AIR Cargo Complex, Cargo Terminal, Devanahalli, Bengaluru for offences punishable under Sections 9(A), 25A, 43 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) read with Sections 135, 104 of Customs Act, 1962.

2. Heard Shri Hashmath Pasha, learned Counsel for the petitioner and Smt M.C.Nagashree, learned Special Counsel for the respondent.

3. Shri Hashmath Pasha, made following submissions in support of this petition:

(a) that the petitioner had obtained an Import Export Code ('IE code' for short) in the name of his Partnership Firm M/s.Overseas Express. The said firm was converted into a Private Limited Company in April 2016 and the accused No.2 was working as a Sales Executive under the petitioner;

(b) that the newly formed Private Limited Company had not obtained an IE code and the goods were being exported by using the IE code of the Partnership Firm. But, the accused No.2 has misused the IE code and filed Shipping Bills in the name of petitioner's firm in respect of the consignment in question. In his statement, he has categorically admitted that he was solely responsible for the export of goods;

(c) that the prosecution, after completion of investigation filed a complaint before the learned Sessions Judge and the same is registered as Spl.C.C.No.51/2017;

(d) that the prosecution has not complied with the provisions of Section 42 of the NDPS Act by recording the information in writing. It is stated in paragraph No.3 of the complaint that the customs authorities had received credible information with regard to the export of the alleged contraband. Documents annexed to the complaint do not include any record of such information. Therefore, the entire proceedings are vitiated. In support of this contention, reliance is placed on the following authorities:

(i) *AIR 1994 SC 1872 (State of Punjab v. Balbir Singh)*

(ii) *(2004)12 SCC 266 (Sarija Banu alias Janarthani alias Janani and another v. State through Inspector of Police)*

(iii) *2009 Cr.L.J. 4299 (Karnal Singh v. State of Haryana); and*

(iv) *AIR 2013 SC 953 (Sukhdev Singh v. State of Haryana)*

(e) that the Custom House Laboratory report dated January 13, 2017, shows that Pseudoephedrine

Hydrochloride was found in the sample. However, the 'quantitative analysis' of the samples was not carried out for want of facilities. Clause 1.18 of the Standing Instruction No.1/88 issued by the Narcotics Control Bureau requires that the analysis of the drug is completed within 15 days from the date of receipt of the sample. It further requires that the results of 'quantitative test' should be sent to the officer from whom the samples were received within the next 15 days. Compliance with the Standing Instruction No.1/88 is a requirement of law as held by the Hon'ble Supreme Court in the case of *Union of India v. Bal Mukund and others* reported in (2009)12 SCC 161. This Court in the case of *Ejem Peter v. State of Karnataka (Crl.P.No.7314/2016)* has also taken note of the said Standing Instruction;

(f) that as per the test report presence of 'Pseudoephedrine Hydrochloride' was found. Therefore,

it is not a psychotropic substance. Hence, the vigor of Section 37 of the NDPS Act is not applicable;

(g) that in his statement recorded under Section 67 of the NDPS Act, the petitioner has stated that he was totally unaware of any concealment. Therefore, as held by the Hon'ble Supreme Court in the case of *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* reported in (2000)2 SCC 513, the burden cast upon the petitioner under Section 35 of the NDPS Act can be discharged by relying upon the prosecution evidence. The statement of accused No.2 clearly shows that the petitioner herein was not having any knowledge of the acts and omissions committed by accused No.2 and particularly, the export of alleged contraband;

(h) that the complaint filed by the customs authority is not maintainable as the provisions of Section 38 of the NDPS Act are not complied with. The Partnership Firm, which had obtained the IE code has not been arraigned

as an accused. Hence, the complaint is unsustainable in law as held by the Hon'ble Supreme Court in the case of *Aneeta Hada v. Godfather Travels and Tours Private Limited* reported in AIR 2012 SC 2795;

(i) that it is stated in the complaint that the contraband in question was supplied by one Subair, but he is not prosecuted; and

(j) that accused No.2 has been enlarged on bail by the learned Sessions Judge by his order dated 30.3.2017 in Spl.C.C.No.51/2017 and petitioner is in custody since December 2, 2016.

With the above submissions, Shri Hashmath Pasha, prayed that the petitioner may be enlarged on bail.

4. Smt. H.C. Nagashree, learned Standing Counsel for the Customs Department, has filed a detailed counter and vehemently opposed this petition.

5. She submitted that a combined reading of statements of the petitioner, his wife and the Directors of M/s.Overseas Express Consolidators Private Limited clearly shows that they are attempting to shift the entire blame on accused No.2.

6. She further submitted that the statement of Shivaram Pranesh, one of the Directors of M/s.Overseas Express shows that the petitioner was in-charge of the affairs of the Company.

7. With regard to compliance of Section 42 of the NDPS Act, she placed for perusal of this court a copy of the office note dated December 1, 2016 recorded by D. Anil, Additional Commissioner for Customs stating that he had received a reliable information that packages in S.B.No.2531710 dated November 30, 2016 could contain concealed goods not declared in the Shipping Bill. Thus, there was sufficient compliance of Section 42 of the NDPS Act.

8. Adverting to petitioner's argument that, Firm was not prosecuted, Smt. Nagashree submitted that as the persons, who have committed the offences having been prosecuted, it would not be necessary to prosecute the Company.

9. Placing reliance on paragraph No.9 of the authority of the Hon'ble Supreme Court in the case of *Pushpabai Parshottam Udeshi and others v. Ranjit Ginning and Pressing Co. Pvt. Ltd* and another reported in AIR 1977 SC 1735, she submitted that though it is claimed by the petitioner that the entire act was executed by the employee, petitioner cannot be escape his vicarious liability.

10. Smt. Nagashree, drew the attention of this Court to a Multilingual Dictionary of Precursors and Chemicals published by UNODC and a list of precursors issued by the International Narcotics Control Board; and submitted that 'Pseudoephedrine' is used in illicit manufacture of Methamphetamine, which is found at Sl.No.16 in the

schedule to the NDPS Act. Therefore, the contraband in question is a psychotropic substance.

She further submitted that the contraband is 24.76 Kgs of Ephedrine valued at Rs.1,23,84,000/- and accordingly prayed for dismissal of this petition.

11. I have carefully considered the submissions made by the learned Counsel for the parties and perused material papers.

12. In substance, the case of the petitioner is that, his employee, Srinivas Anjaneya (accused No.2) has indulged in attempting to export the alleged contraband by using the IE code of the partnership firm of which the petitioner was a partner; and that the petitioner had no knowledge with regard to the contraband.

13. The Customs Authorities, after completion of investigation have lodged a complaint before the Special Judge (NDPS), which is registered as *Spl.C.C.No.51/2017* (*The*

Inspector of Customs v. Mr.Chandru Kunthur Raghuvegowda and another). In the complaint, the prosecution has alleged commission of offences under Sections 9A & 8(c) of the NDPS Act read with Section 135A of the Customs Act, 1962 and prayed for punishment under Sections 25(A), 28 and 29 of the NDPS Act.

14. It is stated in paragraph No.68 of the complaint that the investigation has revealed that the accused had attempted to smuggle the controlled substance to Malaysia; that the accused had succeeded in smuggling in the past also, which is corroborated by the cash deposits received by accused No.2.

15. Section 37 shall be applicable, if the offences alleged are punishable under Sections 19 or 24 or 27A of the NDPS Act. Petitioner is not alleged of these offences. Therefore, Section 37 shall have no application.

16. The IE code is in the name of petitioner's firm. Shipping Bills are also prepared in the name of the firm. A careful reading of the statements of accused No.2 recorded on January 23, 2017 and particularly the answers to questions No.15 & 16 reveal that he was interacting with one Subair on phone and receiving payments, which were being credited to his Savings Bank Account maintained with Syndicate Bank, Shanthinagar Branch.

17. Compliance of provisions under Section 42 of the NDPS Act have been held to be mandatory by the Hon'ble Supreme Court in the case of *Sukhdev Singh v. State of Haryana*, supra. The relevant passage reads as follows:-

"18..... *But there could be cases where the Investigating Officer instantaneously, for special reasons to be explained in writing, is not able to reduce the information into writing and send the said information to his superior officers but could do it later and preferable prior to recovery. Compliance of Section 42 is mandatory and there cannot be an escape from its strict compliance."*

(Emphasis supplied)

18. The list of documents annexed to the complaint are as per Annexure-II. The said list does not contain any document which can satisfy compliance of Section 42 of the NDPS Act. Hence, there is non compliance of the said provision.

19. The report dated January 13, 2017 issued by the Custom House Laboratory, Chennai, shows that the six samples answered the test for presence of Pseudoephedrine Hydrochloride. The foot note contained in the report is categorical to the effect that 'quantitative analysis' of the sample was not carried out. Thus, there has been infraction of Standing Instruction No.1/88. Compliance with the 'Standing Instruction' is a requirement of law as held by the Hon'ble Supreme Court in the case of *Union of India v. Bal Mukund and others*, supra.

20. In view of my finding that Section 37 of NDPS Act is not applicable, this petition is considered within the parameters of Section 439 Cr.P.C. The investigation is

complete and complaint has been lodged. The accused No.2, has admitted that he was receiving monetary consideration from the alleged supplier of contraband Subair. He has admitted in his statement recorded under Section 67 of the NDPS Act that he was transacting with one Subair and the said transactions were not known to anybody else in the office. He has been enlarged on bail by the Sessions Court. Petitioner has been in custody since December 2, 2016. The offences alleged against him are not punishable with death or life imprisonment. In the circumstances, in my considered view, petitioner deserves to be enlarged on bail with stringent conditions. Hence, it is directed that:

- (i) Petitioner shall be released on bail in Crime No.893/2016 registered in Inspector of Customs, CIU, Airport & AIR Cargo Complex, Cargo Terminal, Devanahalli, Bengaluru, upon his executing a self bond for a sum of ₹ 5,00,000/- (Rupees five lakhs only) with two sureties for the like sum to the satisfaction of the jurisdictional Court;

- (ii) Petitioner shall surrender his passport before the jurisdictional Court namely., XXXIII Addl. City Civil & Sessions Judge & Spl. Judge (NDPS), Bengaluru;
- (iii) Petitioner shall attend the hearings before the trial Court regularly subject to it's directions;
- (iv) Petitioner shall not directly or indirectly make any inducement, threat or promise to prosecution witness or any person acquainted with the facts of the case, so as to dissuade him from disclosing such facts to the Court or investigating officer;
- (iv) Petitioner shall not involve himself in any criminal activities; and
- (v) If the petitioner violates any one of the conditions, the prosecution shall be at liberty to seek cancellation of bail.

Petition ***allowed.***

Sd/-
JUDGE