

Delhi High Court

Ahmed Hassan Muhammed vs The Customs on 11 February, 2021

\$~

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 03.02.2021

Pronounced on: 11.02.2021

+ BAIL APPLN. 3076/2020

AHMED HASSAN MUHAMMED

..... Petitioner

Through: Ms.Sushma Sharma, Advocate

Versus

THE CUSTOMS

..... Respondent

Through: Mr.Pramod Bahuguna, Advocates

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT

1. Petitioner is accused in Complaint No. VIII/SIIB/CUS/ACC Import/Angel/19/2019, registered for the offences under Sections 8/22/23/29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (henceforth referred to as the "NDPS Act"). He was arrested on 05.02.2019 and since then, he is in judicial custody. Vide this petition, petitioner is seeking bail during pendency of trial.

2. The allegations levelled against him by the petitioner are that on 30.01.2019, on receipt of secret information that some contraband goods would be imported from Addis Abbaba by Ethiopian Airlines vide Air Way Bill No. 07133613576 in a consignment of packet of green tea, Sh. Lal Singh Maroria, Superintendent, SIIB, ACC, Import, New Custom House, New Delhi, the same was placed by him before his immediate Superior Sh. Sukanta Das, Deputy Commissioner (SIIB), further placed it before his senior Ms. S. Vijayarani, Joint Commissioner (SIIB) for further directions. The Joint Commissioner directed Superintendent Lal Singh and Ramesh to keep surveillance and follow up the arrival of aforesaid consignment. The directions were conveyed to the Deputy Commissioner and air cargo information available on internet was searched and it was found that AWB had confirmed a cargo booking Vide Ethiopian Airline No. ET 686 dated 22.01.2019, ET 688 dated 30.1.2019 and ET 686 dated 01.02.2019. It was also secretly gather that on ET 686 dated 22.02.2019, the cargo had not arrived and a watch was kept on ET 688 dated 30.01.2019 but then also the consignment did not reach and hence a constant watch was kept on ET 686 dated 01.02.2019 as well as through Indian Customs EDI System. They also had the information that in the guise of green tea, khat leaves (also known as Kat/Qat/Chat/Mira), which is listed in the list of psychotropic substances at S. No. 110X of the Schedule of NDPS Act, as per Ministry of Finance, Department of Revenue Notification issued from F No. 12019/3/2016 dated 27.02.2018, however, possibility of any other kind of contraband could not be ruled out. On 01.02.2019, it was found that Import General Manifest (IGM) No. 1559970 for FLT No. ET 686 was filed which showed that 10 packages of dry chat shipped under AWB under reference had arrived on 01.02.2019 and immediately Ethiopian Airlines were contacted to submit a copy of AWB and it was found that the goods were mentioned as

dry chat in the AWB and the consignee were one AGEL incorporation and the address mentioned there-on was not proper. Since the address looked vague, therefore, the Airlines officials were asked to provide the correct name of the consignee and it was informed that M/S Angel Incorporation was the consignee. Immediately shipments of M/S Angel Incorporation through Air Cargo Imports were checked through ICES system and it was informed that two previous consignments of the said firm pending clearance are as below:-

S No.	B/E No. & Date	Description of goods as per B/E	Quantity (kg) as per B/E	AWB No. & Date
1.	9812967 dt. 28.01.2019	Dried green leaf	191.25	071-33613403 dt. 25.01.2019
2.	9786830 dt. 25.01.2019	Green Tea	221.00	071-33613414 dt.23.01.2019

3. As the goods declared in the Bill of Entry matched the intelligence, the Airline was immediately asked to provide copies of AWBs under the two bills of entry available with them along with the details of person collecting delivery order. The Airlines vide letter dated 01.02.2019 submitted the copies of three AWBs 071-33613576 dated 31.01.2019 and 071-33613403 dated 25.01.2019 and 071-33613414 dated 23.01.2019. On examination of the aforesaid AWBs submitted by the Airlines, it was seen that the goods declared therein were also "DRY CHAT" and they have been declared as dried green leaf and green tea respectively. Hence, a preventive check was done on all the three shipments. Accordingly, vide letter dated 01.02.2019, the Joint Commissioner, SIIB directed the Duty Manager, CELEBI, Air Cargo Complex, Near IGIA, New Delhi to hold the said three consignments for examination by Special Intelligence and Investigation Branch (SIIB), ACC Import, New Delhi.

4. Accordingly, a team of SIIB headed by Sukanta Das, Deputy Commissioner (SIIB) visited the import shed on 02.02.2019 at 06:00 hours for conducting the examination of the said goods and therefore, at around 06:15 hours, two independent witnesses were called in the SIIB Office by Inspector Gaurav Sinha, Air Cargo Imports, NCH, New Delhi and he briefed the witnesses that an intelligence had been gathered that consignments imported vide Bill of Entry 9786830 dated 25.01.2019 covered under MAWB No. 07133613414 dated 23.01.2019, Bill of Entry No. 07133613403 dated 25.01.2019, and the consignment covered under MAWB No. 07133613576 dated 31.01.2019, for which Bill of Entry has not yet been filed were containing contraband substances and hence had been put under preventive-check and the said consignment was to be examined by the SIIB officers. The impugned goods were lying in the custody of CELEBI and therefore, the custodian i.e. CELEBI was requested to produce the consignment covered under the subject Bills of Entry/MAWBs in the examination SIIB Officers. Sh Rajeev Khatri, G Card holder No. 592/1999 of M/s Ananya Exim, representative of the customs broker who had filed the two bills of entry referred above on behalf of M/s Angel Incorporation, the importer, was also called to witness the proceedings of examination in presence of two independent witnesses.

5. In total, the consignment wise goods as per MAWBs were found to be packed in 30 cartons, with each consignment containing 10 cartons per MAWBs. The cartons were then opened and examined one by one MAWB wise. The cartons marked Number A-1 to A-10, pertaining to MAWB Number 07133613414 were then examined. It was noticed that one carton was found sealed using lac. All the cartons bearing numbers A-1 to A-10 were then opened and examined. The said one carton bearing lac seal was found to contain 10 plastic packages of same type of dry leaves suspected to be Dry Chat leaves and one plastic package out of these 10 plastic packages was found sealed with lac seal. It was observed by the examining officers that this could be on account of the fact that a certain quantity would have been taken out by FSSAI officials for testing purpose. All the other Nine cartons were opened and examined and were found to contain 10 plastic packages of same type of dry leaves suspected to be Dry Chat leaves. Allegedly, total 100 such plastic packages were found which were also numbered as A-1/1, A-1/2.....A-1/10 and A-2/1, A-2/2...A-2/10 and so on till A-10/1, A-10/2,A-10/10 respectively. The same were declared as Dry Chat in the MAWB whereas in the Bill of Entry Number 9786830 dated 25.01.2019 filed for the said consignment, the goods were declared as Green Tea. The Gross weight of the 10 cartons was taken on the electronic weighing machine provided by CELBI in the examination area and it was found to be 220.360 Kgs. As the packaging in respect of the consignments covered under 10 cartons pertaining to the said MAWB were the same, in order to arrive at the net quantity of the suspected Dry Chat leaves, the contents of one carton were emptied and weight of the emptied carton taken which was found to be 1.740 Kg. Thereafter, the contents in one plastic package containing Dry Chat leaves were taken out and the emptied plastic package weighed which was found to be 0.070 Kgs. The total weight of the packing material in respect of the said consignment covered under MAWB No. 07133613414 was found to be 24.400 Kgs and accordingly, the net weight of suspected Dry Chat leaves was found to be 195.960 Kgs.

6. Thereafter, the cartons marked Number B-1 to B-10, pertaining to MAWB Number 07133613403 were then examined. It was noticed that one carton was found sealed using lac. All the cartons bearing numbers B-1 to B-10 were then opened and examined. The said one carton bearing lac seal was found to contain 10 plastic packages of same type of dry leaves suspected to be Dry Chat leaves and one plastic package out of these 10 plastic packages was found sealed with lac seal. It was observed by the examining officers that this could be on account of the fact that a certain quantity would have been taken out by FSSAI officials for testing purpose. All the other Nine cartons were opened and examined and were found to contain 10 plastic packages of same type of dry leaves suspected to be Dry Chat leaves. In total 100 such plastic packages were found which were also numbered as B-1/1, B-1/2B-1/10 and B-2/1, B-2/2...B-2/10 and so on till B-10/1, B-10/2, ...B-10/10 respectively. The same were declared as Dry Chat in the MAWB whereas in the Bill of Entry number 9812967, dated 28.01.2019, were declared as Dried Green Leaf. The gross weight of the 10 cartons was taken on the electronic weighing machine provided by CELBI in the examination area and it was found to be 221.890 Kgs. As the packaging in respect of the consignments covered under 10 cartons pertaining to the said MAWB were the same, in order to arrive at the net quantity of the suspected Dry Chat leaves, the contents of one carton were emptied and weight of the emptied carton taken which was found to be 2.180 Kg. Thereafter, the contents in one plastic package containing Dry Chat leaves were taken out and the emptied plastic package weighed which was found to be 0.065 Kgs. The total weight of the packing material in respect of the said consignment covered under MAWB No. 07133613403 was found to be 28.300 Kg. and accordingly, the net weight

of Suspected Dry Chatt leaves was found to be 193.590 Kgs.

7. Thereafter, the cartons marked Numbers C-1 to C-10, pertaining to MAWB Number 07133613576 were found to contain ten plastic packages of same type of dry leaves suspected to be Dry Chat leaves in 08 such cartons whereas in carton No C-5, there were 07 such plastic packages and in carton No. C-10, there were 08 such packages. In total 95 such plastic packages were found which were also numbered as C-1/1, C-1/2...C-1/10 and C-2/1, C-2/2... C-2/10 and so on till C-10/1, C-10/2 ... C-10/8 respectively. The same were declared as Dry Chat in the MAWB whereas no Bill of Entry was filed for the same. The Gross weight of the 10 cartons was taken on the electronic weighing machine provided by CELBI in the examination area and it was found to be 219.405 Kgs. As the packaging in respect of the consignments covered under 10 cartons pertaining to the said MAWB were the same, in order to arrive at the net quantity of the suspected Dry Chat leaves, the contents of one carton were emptied and weight of the emptied carton taken which was found to be 1.895 kg. Thereafter, the contents in one plastic package containing Dry Chat leaves were taken out and the emptied plastic package weighed which was found to be 0.090 Kgs. The total weight of the packing material in respect of the said consignment covered under MAWB Number 07133613576 was found to be 27.500 Kgs and accordingly, the net weight of Suspected Dry Chatt leaves was found to be 195.960 Kgs.

8. On a reasonable belief, that all the above three consignments contained Dry Chat leaves which is included in the list of Psychotropic Substances at S No. 110X of the Schedule to the NDPS Act, 1985 as per Ministry of Finance, Department of Revenue Notification issued from F. No. N-12019/3/2016-NC.II dated 27.02.2018, the total qty of 581.455 Kgs (195.960 Kgs+193.590 Kg+191.905 Kgs) of suspected Dry Chatt leaves was seized by the officers of SIIB, Air Cargo Imports under the provisions of NDPS Act, 1985.

9. Thereafter representative samples in duplicate from consignments covered under each MAWB were drawn by Shri Gaurav Sinha, Inspector in the presence of Sh. Rajeev Khatri, G-Card holder No. 592/1999 of M/s Ananya Exim and the panchas in total six representative samples were drawn in total.

10. For drawl of the representative sample from the consignment pertaining to MAWB number 07133613414, the inspector took a small quantity of substance i.e. Dry Chat leaves from each of the plastic packages containing suspected dry chatt leaves, mixed thoroughly to make the mixture homogenous and out of these two representative samples each weighing 24 grams were taken, which were individually kept in press locked plastic pouches. The same process was undertaken for drawl of representative samples in respect of other two consignments imported under MAWB No. 07133613403 and MAWB No. 07133613576. The representative samples in duplicate were serially numbered as SO1 (for original sample) and SD1 (for duplicate sample). Corresponding to lot A1 to A10, SO2 (for original sample) and SD2 (for duplicate samples). Corresponding to lot B1 to B10 and SO3 (for original sample) and (SD3 for duplicate sample) Corresponding to lot C1 to C10. Thereafter, the press locked small plastic pouches were further placed inside polythene lined yellow colour paper envelopes which were sealed with the official seal of SIIB Branch, NCH, Delhi bearing No. 2-98 over a paper slip containing the signatures of the panchas Sh. Rajeev Khatri, G-Card holder

No. 592/1999 of M/s Ananya Exim and Shri Gaurav Sinha, Inspector in such a way that the same could not be tampered without breaking the seal or damaging the envelope. Test memo No. 37, 38 & 39 were also prepared for testing of the samples at Central Revenue Control Laboratory, Hill Side Road, Pusa, New Delhi-110012.

11. After completing the given process, the remaining quantity of the homogenous mixture which was lying in the press locked plastic pouch was then kept lot wise in carton serial No. A1, B1 and C1 respectively. Thereafter, the seized suspected Dry Chat leaves excluding the representative samples drawn, were repacked in the same cartons from which they were recovered, pasted with cello tape and wrapped with plastic straps and sealed over paper slip containing the signatures of the panchas Sh. Rajeev Khatri, G-Card holder No. 592/1999 of M/s Ananya Exim and Shri Gaurav Sinha, Inspector. The seized goods as well as the sealed samples were then handed over to Sh. Jamshed Khan, Duty Officer of custodian M/S Celebi for safe custody under superdginama dated 02.02.2019. The facsimile of SIIB seal used for sealing was also affixed on the test memos prepared. The panchnama proceedings were conducted in a peaceful manner, which concluded at about 19:00 hours on 02.02.2019. The witnesses remained present throughout the proceedings.

12. At this stage, learned counsel for petitioner points out that as per the prosecution, the alleged consignment contained 10 cartons of dry leaves suspected to the Dry Chat leaves and during examination, it was found that the consignment which was containing cartons A1 to A10, one out of those packages was found to be sealed with lac seal and could be on account that certain quantity might have been taken out by FSSAI officials for testing purpose. The same procedure was adopted for other two consignments as well. Thus, it is apparent that the packets containing dry leaves were tampered with by the agency, which was not entrusted for investigation and that too without the knowledge of custom officials. Learned counsel submitted that it was thus very clear that some agency, other than the investigating agency had broke open the sealed packets and allegedly put a lac seal and thus, the case property was tempered by FSSAI officials.

13. Learned counsel next submitted that as per the prosecution, in all total six representative samples were drawn. For drawl of the representative sample from the consignment pertaining to MAWB No. 07133613414, the investigation agency / Inspector took a small quantity of substance i.e. Dry Chat leaves from each of the plastic packages containing suspected Dry Chat leaves, mixed thoroughly to make the mixture homogenous and out of these two representative samples each weighing 24 grams were taken, which were individually kept in press-locked pouches. The same process was undertaken for drawl of representative samples in respect of other two consignments imported under MAWB No. 07133613403 and 07133613576 respectively. It is the submission of petitioner's counsel that by collecting the samples from each packet and thereafter mixing all the samples together before drawing any representative samples, the sanctity of the case property in individual packet had lost. Learned counsel relied upon decision of a Coordinate Bench of this Court dated 13.03.2020 in Criminal Appeal No. 1027/2015, titled as Amani Fidel Chris Vs. NCB, wherein the accused was acquitted while observing that mixing of the substance before drawing any sample vitiates the entire sample. In addition, learned counsel also placed reliance upon a decision dated 02.07.2012, pronounced by me in Crl. Appeal 909/2005, titled as Basant Rai Vs. State.

14. Learned counsel next submitted that the petitioner was apprehended on 04.02.2019 and it is an admitted fact that no incriminating material was recovered from his person and that he has been falsely roped in this case without any evidence. It was also submitted that there is no corroborative evidence on record to connect petitioner with the offence in question and out of 41 witnesses, so far only 04 witnesses have been examined by the prosecution and trial of this case is likely to take time and that the entire trial is vitiated due to tampering of the seal by FSSAI and mixing of samples before drawing any representative sample. Thus, petitioner deserves concession of bail.

15. On the other hand, learned counsel appearing for respondent submitted that the petitioner has allegedly conspired with co-accused Manoj Kumar Vishwakarma in regard to import of three shipments of contraband and the recovery is of commercial quantity and that since trial is still pending, therefore, petitioner does not deserve bail in view of Section 37 of NDPS Act.

16. I had heard learned counsel appearing from both the sides.

17. In Basanti Rai (Supra), while dealing with a case where accused was found carrying a polythene bag containing 8 similar polythene bags having brown colour substance and Investigating Officer took small pieces of charas from each packet, mixed the same and drew two sample parcels which were sent to FSL for analysis, I had allowed the appeal while holding as under:-

"25. After hearing both the learned counsel for parties and going through the Trial Court Record, I find force in the submission of learned counsel for appellant. Admittedly, the samples were drawn after breaking small pieces from 08 of the polythene bags which were allegedly kept in a green coloured bag by the appellant in his right hand. The 10 prepared two samples of 25 grams each after taking a small quantity from each of the slabs.

26. Though the settled law is that if it is not practicable to send the entire quantity then sufficient quantity by way of samples from each of the packets of pieces recovered should be sent for chemical examination. Otherwise, result thereon, may be doubted.

27. For example, if the 08 packets were allegedly recovered from the appellant and only two packets were having contraband substance and rest 6 packets did not have any contraband; though all may be of the same colour, when we mix the substances of all 8 packets into one or two; then definitely, the result would be of the total quantity and not of the two pieces. Therefore, the process adopted by the prosecution creates suspicion. In such a situation, as per settled law, the benefit thereof should go in favour of the accused. It does not matter the quantity. Proper procedure has to be followed, without that the results would be negative."

18. The fact of the present case is that prosecution has mixed all the packets and thereafter, sent to FSL for examination, which is contrary to the procedure prescribed under the law.

19. This Court is informed that the petitioner is a Somalian National resident and his Refugee Certificate issued by UNHCR (United nation High Commissioner for refugees) was valid till 20/12/2019. Hence, he has a valid document to stay in India at the time of his arrest. He is in judicial custody since 04.02.2019. No doubt the recovered substance in the present case is of commercial quantity, however, the procedure prescribed is contrary to the dictum of this Court. This court is informed by learned counsel for the petitioner that petitioner is not a habitual offender and is not likely to get involved in any other case during bail. Thus, petitioner has qualified twin conditions of Section 37 of NDPS Act.

20. Keeping in view the aforesaid fact, I am of the view that petitioner deserves bail. Accordingly, petitioner is directed to be released on bail forthwith on his furnishing personal bond in the sum of Rs.25,000/- with one surety in the like amount, to the satisfaction of the Trial Court.

21. Petitioner shall not directly or indirectly influence the witnesses or tamper with the evidence.

22. Trial court shall not get influenced by any observations made in this order.

23. The petition is disposed of accordingly.

24. A copy of this order be sent to the court concerned for information and compliance.

25. The judgment be uploaded on the website of this Court forthwith.

(SURESH KUMAR KAIT) JUDGE FEBRUARY 11, 2021 r