

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO.569 OF 2008

Mr.Kum Thapa Tamang	.. Applicant
V/s.	
Union of India & Anr.	.. Respondents.

**WITH
CRIMINAL REVISION APPLICATION NO.570 OF 2008**

Mr.Dawa Ghale	.. Applicant
V/s.	
Union of India & Anr.	.. Respondents.

Ayaz Khan a/w.Nilopher Baiyed for the Applicant.
Mr.Vijay M.Kantharia for Respondent No.1.
Ms.S.D.Shinde, A.P.P.

CORAM : A.R.JOSHI, J.

DATED : MARCH 31ST, 2009.

P.C.

These two criminal Revisions are being disposed of by this common order as the issue involved is same as to challenge of the

respective orders of discharge filed by the respective Petitioners before the N.D.P.S. Special Court in some case. Present both the Petitioners are respective accused Nos. 3 and 4 in NDPS Special Case No.90 of 2006 presently pending before the Special Court (Sessions Court), Mumbai.

2. According to the case of Air Intelligence Unit original accused Nos. 1,2 and 3 accosted while they were to board Kenyan Airline Flight No.KQ-201 on 26th January, 2006. They were accosted and during search by the said Air Indian Security Staff five bags were identified as bags of said accused Nos. 1 and 2. The said five bags were opened under the panchanama and were collectively found containing 21.785 grams of Hashish. Requisite samples were taken and during investigation raid was conducted at the hotel premises from where reportedly accused Nos. 1 and 2 had left for the Air port. At the hotel premises, present Petitioner Nos. 1 and 2 were found. They were introgated. Their statements were recorded under section 67 of the N.D.P.S.Act and it is admitted that the statements are not incriminating in as much as accused Nos. 3 and 4 i.e. present Petitioners did not disclose anything of having knowledge about the contents of the bags which they carried from Nepal to Delhi by Bus and Delhi to Mumbai. If the said statements of Petitioners are taken into consideration as gospel truth that they had carried the luggage to the Hotel room at Mumbai and given the bags in the custody of

Accused No.1 and 2, also it could be ascertained that till the late evening of 26th January, 2006 they were in the Hotel room even after the departure of accused Nos. 1 and 2 for Air travel. Still it is the factual position as per statements of these Petitioners, and also the statement of accused Nos. 1 and 2 that the bags were in locked position and the keys were with accused No.1, all alone. Even in the impugned order, rejecting the application learned Special Judge had opined in the following manner :-

“ It is true that the material produced by the prosecution do not disclose as to whether the baggage carried by the accused No.3 from Delhi to Mumbai was at that time containing contraband Hashish”.

Similar, such observations was made with respect to the discharge application of accused No.4 also. However, while bearing in mind such factual position, it appears that Court had given a reasoning in the following manner :

“There is a reasons to believe that accused No.3 must be having knowledge about the concealment of contraband Hashish at least during his stay in the room sharing with accused No.1 and 2.”

After going through the entire contentions of the impugned order,

rejecting the discharge application and even after going through the statement of accused Nos. 1 and 2 and also of present Petitioner accused Nos. 3 and 4, there is nothing to ascertain as to how such reasonable belief was entertained by the Special Court as to Petitioners having the knowledge about the concealment of contraband hashish in the bag.

6. In the opinion of this Court, definitely an error committed by the Special Court in appreciating, prima facie material produced before him holding that there is a triable case against the Petitioners for the offence of conspiracy for committing the offence under the NDPS Act, 1985. Even if the entire case of Air Intelligent Unit as against the present Petitioners is accepted then only it is difficult to ascertain as to their involvement and as to having any conspiracy with accused Nos. 1 and 2. It may not be out of place to mention here that at the most the Petitioners can be the best witnesses for Air Intelligence Unit for establishing the case against the accused Nos. 1 and 2. However, it is for the prosecuting agency to deal with its matter in their best interest. There is a ground to interfere with the impugned order of rejecting the discharge application of the Petitioners and hence, both the criminal Revisions are disposed of with following order :

:: O R D E R ::

- i. This criminal Revision Applications are allowed and disposed of accordingly.
- ii. Applicants i.e. Original Accused Nos. 3 and 4 shall be released forthwith from Jail custody, if not required in any other case.

(A.R. JOSHI, J.)