

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

+ BAIL APPLN.No.241/2008

Reserved on : 12.02.2008

% Date of decision : 18.02.2008

ARUN KUMAR GUPTA ... PETITIONER
Through : Mr.Pradeep Jain, Advocate

- V E R S U S -

DIRECTORATE OF REVENUE INTELLIGENCE,
NEW DELHI ...RESPONDENT
Through : Mr.P.P.Malhotra, ASG with Mr.Satish
Aggarwal, Advocate with
Mr.Deepankar Aron, Jt.Director, DRI;
Mr.Harish Kumar, Dy.Director, DRI;
Mr.S.K.pandey, Appraiser, DRI; and
Mr.Sushil Kumar, Intelligence Officer,
DRI.

CORAM :
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

SANJAY KISHAN KAUL, J.

1. The petitioner being the working partner of one M/s Shri Balaji Oversees, a partnership firm registered in Mumbai dealing in the business of export till 2003 seeks an anticipatory bail under Section 438 of the Code of Criminal Procedure (hereinafter referred to as the said 'Code') for

alleged violations of provisions of Customs Act, 1962 (in short the said Act).

2. The brief facts relevant for disposal of the present application are that the petitioner during the period from June 2002 to Jan 2003 exported certain consignments covered under 8 shipping bills wherein the shipping bills covered under serial number 1-4 were made to Dubai from Bombay in Dollar value which were assessed by the Customs authorities and thereafter the drawback amount @ 12.25% was credited into the account of the petitioner and the remaining 4 consignments were exported under Repayment of State Credit Scheme (popularly known as the Rupee-Rubal Agreement) for which also the drawback back amount had been credited into the account of the petitioner. It is stated that the petitioner accordingly withdrew a sum of Rs. 32, 75,000/- but before the remaining amount of Rs. 36, 87, 493/- could be withdrawn by the petitioner, the respondent/Directorate of Revenue Intelligence (in short 'DRI') authorities freezed the said account of the petitioner in 2003. On two occasions, the petitioner's statement was recorded in April, 2003 and later in April, 2004.
3. It is the case of the petitioner that the petitioner at many instances made several requests to the DRI to de-freeze his account including the communication made on 15-10-2005, 12-11-2005, 08-12-2005 and 06-02-2006 but to no avail and instead was issued summons dated 08-06-2006 and 04-08-2006 from DRI, Delhi requiring the presence of the petitioner which are stated to be complied with on 19-06-2006 and 04-09-2006 respectively by the petitioner. Further, a complaint u/s 173/174 of the Indian Penal Code (in short 'IPC') was filed by the respondent before the Ld. ACMM, New Delhi for non-compliance of summons. The

petitioner sought personal exemption from appearance on medical grounds but the Ld. ACMM issued NBWs against the petitioner. In the meantime, the petitioner filed an application for anticipatory bail before the Sessions Court, Mumbai and subsequently filed a revision petition before the Sessions Court, Delhi against the order of the Ld. ACMM, Delhi wherein the Ld. Sessions Court, Delhi stayed the NBWs and directed the petitioner to appear before the Ld. ACMM, Delhi on 19-12-2007. On 12-12-2007, the Ld. Sessions Court, Mumbai disposed of the said Anticipatory bail application of the petitioner as not maintainable on the ground that the respondent/DRI did not require the petitioner to be arrested and that the offence under section 135 of the said Act was bailable. On 19-12-2007, the petitioner appeared before the Ld. ACMM, Delhi and was admitted to bail for bailable offence.

4. It is further submitted that the respondent tried to physically lift the petitioner from outside the court of ACMM, Delhi which even led to a scuffle on account of summons being served to the petitioner for appearing before the respondent soon after the court proceedings. It is the case of the petitioner that such recourse was taken by the DRI even before the petitioner could furnish his bail bonds and in spite of having given an undertaking that the petitioner was not required to be arrested. It is averred that the petitioner apprehending arrest in view of the incident of 19-12-2007 filed an anticipatory bail application before the Sessions Court, Delhi on 15-01-2008 which was dismissed on 23-01-2008. Hence the present petition wherein this court was pleased to grant interim protection to the petitioner on his undertaking that he shall join the investigation and appear before the officer concerned of DRI. The DRI was directed to produce relevant material in a

sealed cover which was so produced.

5. The learned counsel for the parties were heard at length. The learned counsel for the petitioner contended that the case pertained to 2003 and therefore arrest in 2008 is unwarranted and also that the respondent/DRI itself had conceded before the sessions court, Mumbai that the petitioner is not required to be arrested. It was also the petitioner's case that the DRI, Delhi had no jurisdiction since the matter relates to Mumbai and no cause of action has arisen in Delhi for DRI, Delhi to have jurisdiction. It is submitted that the alleged over valuation in respect of first eight shipments is belated and is not substantiated with any evidence. In regard to the diversion of remaining four shipments to Dubai, the petitioner's plea is that the respondent has not contented that such goods were not exported therefore once such goods were exported and crossed the territorial waters of India, the petitioner became entitled to the incentive by way of duty drawback. Reliance was placed on the cases of *Terai Oversees Ltd. v. UOI* 2001 (129) ELT 574 (Cal.); *Collector of Custom v. Sun Industries* 1988 (35) ELT 241 (SC) and *UOI v. Rajindra Dyeing & Printing Mills Ltd.* 2005 (180) ELT 433 wherein it was held that if the ship has left the Indian port and passed beyond the territorial waters of India, the title of the goods passes to the purchasers and the export of such goods are to be treated as complete as also the fact that the granting of benefit of drawback duty can be given in the event the conditions under section 75 of the said Act being fulfilled by the exporter. Therefore, when the Customs Authority is satisfied that the goods are brought for export and the clearance thereof is permitted and particularly when the consideration for export has been released and/or ensured then nothing is to be looked into for the purpose of granting

benefit of drawback duty, no matter whether the goods have been received by the consignee concerned.

6. Further, it was submitted that the petitioner has not received any complaint from the foreign buyer or their bank in Russia and all the payments were duly received through proper banking channels in accordance with law. The money had been received through RBI into petitioner's bank account from buyers bank in Russia under the agreement. It is also contented that similar allegations have been made by DRI against other exporters where transactions worth 100 crores have taken place (whose particulars have also been provided by the petitioner) but none of them have been arrested by DRI so far for verification and investigation purposes.
7. The petitioner's averment is that the DRI is a creature of statute and is governed by the provisions of the said Act wherein at most they have power to arrest u/s 104 for alleged contravention u/s 135 upon which the person accused can be taken into judicial custody and not police custody and for which the maximum punishment if found guilty can be up to 3 years or fine or both. There is no power to investigate under the said Act for such alleged transfer and such power is vested under the FEMA which indicts the person only with civil liability and no criminal liability can be foisted upon such person.
8. The learned counsel for the petitioner also pleads that the said offence u/s 135 (1) (ii) of the said Act is held bailable in the cases of Avinash Bhosle v. UOI; Order dated 27-08-2007 in Crl. Appeal No. 1138/2007; Joint Commissioner of Custom, Punjab v. Kulbhushan Goyal Crl. M.P. 10436/06 decided on 31/10/2006; Sangit Krishna Kumar Aggrwal v. UOI; Crl. Appl.No. 272/2007 decided on 06-02-2007.
9. The petitioner was stated to have already joined

investigation as per the direction of this Court vide order dated 04-02-2008 and further undertook to join the investigation and did not wish to realize the remaining amount of Rs. 36, 87, 493/- lying with DRI pending the adjudication proceedings.

10. On the other hand, it is the case of DRI that the investigations conducted so far reveal that the petitioner has availed of the drawback amounting to Rs. 68,87,513/- (export value of approx. Rs. 5.74 crores) and fraudulently remitted Rs. 3 crores from RBI against ostensible exports to Russia under the Indo-Russia Rupee Rouble Agreement but the goods never reached Russia which is in violation of the said Agreement and provisions of the Exim Policy and the Customs Act. To substantiate its case, the attention of this court was brought to the evidence collected (marked as Annexure 'A' brought in sealed cover) which indicated that the Russian consignee was neither registered nor existed at the given address in Moscow as also that the said consignments reached Dubai instead of Russia and in view of such fictitious exports to Russia and diversion of goods to Dubai, it appeared that certain financial transactions were effected by the petitioner to give an ostensible cover of credibility to the exports as so declared. It was also indicated that the statement of the accomplice, showed that it was the petitioner who had directed him to book the container only for Dubai and had also paid him to meet the freight expenses. Further, that during search, the petitioner did not co-operate in the investigations and there were details of huge cash transactions on behalf of the petitioner which required deeper probe. On the whole, it is averred that the money laundering that appears to have been done by the petitioner needs investigation since its implications concern National Security as well.

11. The second submission made on behalf of DRI was that the conduct of the petitioner has been malafide on account of his failure to appear before the DRI and non co-operation with the investigation in spite of repeated summons.
12. The respondent contends that DRI, Delhi is the head quarters and assumes jurisdiction all over India and thus, the petitioner's case falls well within the jurisdiction of the respondent.
13. In so far as the bailability of the said offence is concerned, the respondent pleaded that during the period of the alleged export, the unamended section 135(1) (ii) of the said Act was applicable where the punishment prescribed is imprisonment for a term which may extend up to three years or fine or both. Since the said Act is a Special statute, Table II of the First Schedule of the said Code would be applicable, which makes the offence non-bailable. It is stated that in case the offence committed by the petitioner is considered under the amended Customs Act, section 135(1)(i) would be applicable since the drawback claimed exceeds Rs. 30 lakhs in which case the punishment prescribed is up to seven years and with fine. The respondent's contention of the offence u/s 135(1) (ii) of the unamended Act being non-bailable is further supported by three decisions of this Court in Mohan Lal Thapar v. Y.P. Dabra, Inspector of Customs, New Customs House, New Delhi 2002(1) JCC 460, Inderjeet Nagpal v. Directorate of Revenue Intelligence 2005 (1) JCC 433 and Lalit Goel v. Commissioner of Central Excise, Delhi, B.A.No. 2102/2007 decided on 02-11-2007. It is the case of the respondent that the judgment of Avinash Bhosle(supra) would not be applicable since the matter is sub-judice on account of the fact that the Government has filed a review against the said order. The respondent has also made an attempt to

distinguish the case of Terai Overseas (supra) and Sun Industries case (Supra) with the present one wherein it is stated that the facts of the present case are different from the cases mentioned aforesaid and thus, the ratio of both the cases cannot be applied to the present case.

14.I have given deep thought to the rival contentions advanced by learned counsel for the parties. In fact, Mr. Deepankar Aron, Joint Director, DRI, ably assisted learned ASG and did explain before the Court the suspicion of the Department about the nature of transaction and the requirement of custodial interrogation very succinctly.

15.The first aspect to be taken note of is that the transaction relates to the period of June, 2002 to January, 2003. The matter has been under investigation since 2003 itself when the account of the petitioner of the Duty Drawback receipt was frozen to preserve the balance amount relating to the alleged export to Russia. As per the direction of this Court, the petitioner has joined the investigation and a statement has been recorded. The grievance of the Department is that the petitioner is not forth-coming with the true facts as to how the shipment was diverted to Dubai and how the monies were routed from Dubai. The stand of the petitioner, of course, is that he has no knowledge about the same as he had only exported the goods to Russia and the transactions to Dubai could have been routed by some fictitious party in Russia and the petitioner had no reason to suspect the same. Learned counsel for the petitioner has rightly pointed out that there is no question of any custodial interrogation since in case of detention, the petitioner has to be sent to judicial remand. The Custom Authorities unlike the police authorities cannot take the petitioner into custody for custodial interrogation and that proposition is not even disputed by the respondent.

16.The aforesaid shows that there will be no purpose served by taking the petitioner into custody. I am unable to agree with the proposition propounded by the Department that there are chances of the petitioner tampering with the evidence. This is so since the transaction in question is already five years old and the alleged illegality was detected also about five years ago. Thus, even though as per the Department the transaction in question is part of a larger scam, in the particular case the transaction is not of large value and is limited to one set of transaction which was known to the Department.

17.It is, however, not possible to accept the plea of the learned counsel for the petitioner that the offence is bailable for the reason that this Court on previous occasions has taken a view that the offences under the relevant provisions are not bailable. If the offences would have been bailable, there would have been no occasion to apply for anticipatory bail.

18.No doubt the transaction relates to Mumbai, but there is force in the contention of the Department that Delhi Office has All-India jurisdiction and since they are investigating into a larger scam, the Delhi Office cannot be said to have no jurisdiction to investigate into the matter in question. In the present case the monies have been received in India against the goods which have been exported. The only question is of the destination to which the goods went and as to whether there were any routing of funds from Dubai and as to how the payments were made under the Rupee-Rubal exchange. It also cannot be lost sight of that the Department is investigating into the offences only under the said Act.

19.I am, thus, inclined to grant anticipatory bail to the petitioner on the following terms and conditions:

- i) The petitioner will join the investigation as and when

required by the respondent/Department;

ii) In case the petitioner is arrested, he shall be enlarged on bail on furnishing a personal bond in the sum of Rs.5.00 lacs with one surety of the like amount.

lii) The petitioner will not seek release of the remaining Duty Drawback amount which is lying frozen till the investigation is completed;

iv) The petitioner will surrender his passport and consequently would not travel abroad without prior permission of the DRI, Delhi or without permission of this Court.

20. The petition is accordingly allowed.

FEBRUARY 18, 2008
'ra/sp'

SANJAY KISHAN KAUL, J.