

Court No. - 15

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 15242 of 2023

Applicant :- Mohammad Imran

Opposite Party :- Union Of India Thru. Suprinten. Custom Chaudhary Charan Singh Internat. Airpot Lko.

Counsel for Applicant :- Prabhakar Srivastava

Counsel for Opposite Party :- Dipak Seth, Manish Misra

Hon'ble Mohd. Faiz Alam Khan, J.

1. Heard learned counsel for the applicant as well as Shri Manish Misra, learned counsel appearing for Union of India and perused the record.
2. The present application has been moved by the accused-applicant- **Mohammad Imran** in D.R.I. Case No. 21/2023-24, under Section 135 of the Customs Act, Police Station- Custom Airport, District Lucknow, with the prayer to enlarge him on anticipatory bail as she is apprehending arrest in the above-mentioned case.
3. Learned counsel for the applicant submits that it is a case of false implication and nothing as claimed by the prosecution has been recovered from the possession of the applicant.
4. It is vehemently submitted that on 3.8.2023, the applicant had gone to Dubai to meet a person namely, Rahul @ Bengali and as the applicant had gone to search any work for him and the same was not made available to him, the aforesaid Rahul @ Bengali told him that there is no possibility of getting any work and he may go back to India and he also purchased a return ticket of the applicant on 13.8.2023 and also gave him a black colour trolley suitcase informing him that it contains some old articles and the same would be given to a person namely, Sonu who is a resident of Barabanki, who will contact the accused/applicant at Lucknow Airport.
5. It is further submitted that the applicant had taken the bag given to him by the aforesaid Rahul @ Bengali as there was no

money available with the applicant in Dubai and the aforesaid Rahul @ Bengali has also threatened him.

6. It is next submitted that in the seizure memo prepared by the Department, the market value of the seized gold bars has been mentioned as Rs. 98,73,600/-. However, the said gold bars were not in the conscious possession of the applicant and even if the case of the prosecution is believed as it is, he was only a carrier. He is in jail in this case since 14.8.2023 as the complaint has already been filed, there is no apprehension that after being released on bail, the applicant may misuse the liberty of bail granted to him.

7. It is further submitted that as the value of the gold bars allegedly seized from the possession of the applicant is below Rs. 1 Crore, thus the same is not covered under an clause of sub Section 6 of Section 104 of the Customs Act and keeping in view sub Section 7 of Section 104 of the Customs Act, the alleged offence committed by the applicant is bailable and punishable up to 3 years imprisonment.

8. It is also submitted that the applicant is the sole bread earner of his family and in case of his prolonged confinement, his family would come on street and he is not having any criminal history.

9. Shri Manish Misra, learned counsel appearing for the Union of India vehemently opposes the prayer for bail of the applicant on the ground that the applicant has been found in conscious possession of 14 gold biscuits weighing about 1632 grams and he has admitted in his statement recorded under Section 108 of the Customs Act that the said gold bars were given to him by some other person and it was also in his knowledge that the transportation of these gold bars within the domain of India is illegal and therefore, having regard to the fact that a large amount of gold has been imported to India illegally which may affect the economy of the country, a serious offence has been committed by the applicant and thus, he is not entitled to be released on bail, more so when the offences have been committed pertaining to import of prohibited goods which is punishable with seven years of imprisonment.

10. In support of his contentions, Shri Manish Mishra, learned counsel for the Union of India has relied on the judgements of the High Court of Delhi passed in ***Nidhi Kapoor vs. Principal***

Commissioner and Additional Secretary to the Government of India & Ors., decided on 21 August, 2023 in W.P. (C) No. 8902/2021 as well as by the coordinate Benches of this Court passed in the cases of ***Murli Asandas Chandiramani vs. State of U.P. and Mohd. Farook vs. Union of India through the Superintendent Customs (Prevention) Division, decided on 21.4.2015 and 8.9.2020 in Criminal Misc. Bail Application Nos. 8812 of 2015 and 16668 of 2020***, respectively.

11. Having heard learned counsel for the parties and having perused the record, it is reflected that on 13.8.2023 at about 4.30 pm, the applicant arrived from Dubai through Flight No. IX 194 and having noticed some unusual luggage in his trolley bag, the same was checked and 14 gold biscuits/bars were found concealed in two artefacts and on weighing, the weight of the same was around 1632 grams. The statement of the applicant was also recorded under Section 108 of the Customs Act wherein he admitted to have gone to Dubai and also that these gold bars were given to him by the aforesaid Rahul @ Bengali and as there was no option for him, he consented for this illegal work and was eventually apprehended. The value of the gold bars allegedly seized from the possession of the applicant has been assessed as Rs. 98,73,600/- by an approved jeweller. The contention of learned counsel for the applicant appears to be that the alleged offence is bailable. In this regard, the attention of this Court has been drawn towards the definition of prohibited goods defined under Section 2(33) of the Customs Act.

12. Though learned counsel for Union of India has relied on ***Nidhi Kapoor, Murli Asandas Chandiramani and Mohd. Farook (supra)***, however, a coordinate Bench of this Court in ***Mohd. Tufail vs. Union of India and Another in Criminal Misc. Bail Application No. 57731 of 2022***, ***Mohammad Alam vs. State of U.P. and Another in Criminal Misc. Bail Application No. 60061 of 2022*** vide order dated 23.3.2023 opined as under:

"23. Applicants have been challaned under the provisions of Section 135 Customs Act which runs as follows:

"135. Evasion of duty or prohibitions.--(1) Without prejudice to any action that may be taken under this Act, if any person--

(a) is in relation to any goods in any way knowingly concerned in misdeclaration of value or in any fraudulent evasion or

attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods; or

(emphasis supplied)

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111 or Section 113, as the case may be; or

(c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under Section 113; or

(d) fraudulently avails of or attempts to avail of drawback or any exemption from duty provided under this Act in connection with export of goods or

(e) obtains an instrument from any authority by fraud, collusion, wilful mis-statement or suppression of facts and such instrument has been utilised by such person or any other person,

he shall be punishable,--

(i) in the case of an offence relating to,--

(A) any goods the market price of which exceeds one crore of rupees; or

(B) the evasion or attempted evasion of duty exceeding fifty lakh of rupees; or

(C) such categories of prohibited goods as the Central Government may, by notification in the Official Gazette, specify; or

(D) fraudulently availing of or attempting to avail of drawback or any exemption from duty referred to in clause (d), if the amount of drawback or exemption from duty exceeds fifty lakh of rupees,

(E) obtaining an instrument from any authority by fraud, collusion, wilful mis-statement or suppression of facts and such instrument has been utilised by any person, where the duty relatable to utilisation of the instrument exceeds fifty lakh

rupees, with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than one year;

(ii) in any other case, with imprisonment for a term which may extend to three years, or with fine, or with both.

(2) If any person convicted of an offence under this section or under sub-section (1) of section 136 is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court such imprisonment shall not be for less than one year.

(3) For the purposes of sub-sections (1) and (2), the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than one year, namely:--

(i) the fact that the accused has been convicted for the first time for an offence under this Act;

(ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods which are the subject matter of such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party to the commission of the offence;

(iv) the age of the accused.

Explanation.- For the purposes of this section, the expression "instrument" shall have the same meaning as assigned to it in the Explanation 1 to Section 28-AAA"

24. From the perusal of Section 135 Customs Act it appears that if any person acquires possession or the possession in any way is concerned in carrying any goods liable to be confiscated and market price of the goods exceeds Rs. One Crore then he

may be punished with imprisonment for the term which may extend upto seven years along with fine.

25. Section 104 Customs Act deals with the power of arrest and it runs as follows:

"104. Power to arrest.--(1) If an officer of customs empowered in this behalf by general or special order of the Principal Commissioner of Customs or Commissioner of Customs has reason to believe that any person in India or within the Indian customs waters has committed an offence punishable under section 132 or section 133 or section 135 or section 135A or section 136, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a magistrate.

(3) Where an officer of customs has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police-station has and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898).

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence relating to--

(a) prohibited goods; or

(b) evasion or attempted evasion of duty exceeding fifty lakh rupees; or

(c) fraudulently availing of or attempting to avail drawback or any exemption from duty provided under this Act, where the amount of drawback or exemption from duty exceeds fifty lakh rupees; or

(d) fraudulently obtaining an instrument for the purpose s of th is Act or the Foreign Trade (Development and Regulation) Act, 1992(22 of 1992), and such instrument is utilised under this Act, where duty relatable to such utilisation of instrument exceeds, fifty lakh rupees, shall be cognizable.

(5) Save as otherwise provided in sub-section (4), all other offences under the Act shall be non-cognizable.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974) an offence punishable

under section 135 relating to--

(a) evasion or attempted evasion of duty exceeding fifty lakh rupees; or

(b) prohibited goods notified under section 11 which are also notified under sub-clause (c) of clause (i) of sub-section (1) of section 135; or

(c) import or export of any goods which have not been declared in accordance with the provisions of this Act and the market price of which exceeds one crore rupees; or

(d) fraudulently availing of or attempt to avail of drawback or any exemption from duty provided under this Act, if the amount of drawback or exemption from duty exceeds fifty lakh rupees or,

(e) fraudulently obtaining an instrument for the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992(22 of 1992), and such instrument is utilised under this Act, where duty relatable to such utilisation of instrument exceeds fifty lakh rupees, shall be non-bailable.

(7) Save as otherwise provided in sub-section (6), all other offences under this Act shall be bailable.

Explanation.- For the purposes of this section, the expression "instrument" shall have the same meaning as assigned to it in Explanation 1 to section 28-AAA. "

26. According to Section 104 (6) Customs Act an offence punishable under Section 135 Customs Act relating to prohibited goods notified under Section 11 of Customs Act which are also notified under sub-clause (c) of Clause (i) of sub-section (1) of Section 135 Customs Act, or import or export of any goods which have not been declared in accordance with the provisions of this Act and the market price of which exceeds Rs. One Crore shall be non-bailable and as per Section 104(7) Customs Act all the other offences are bailable except provided in sub-section (6) of Section 104 Customs Act.

27. Therefore, from the perusal of Section 104 Customs Act it is evident that if import or export of any goods have not been declared as per the provisions of the Customs Act and market price of such recovered goods exceeds Rs. One Crore then offence will be non-bailable and similarly the offence committed with regard to prohibited goods also would be non-

bailable.

28. In case at hand, from the individual possession of both the applicants gold valuing less than Rs. One Crore was recovered, however, value of total gold recovered from the possession of applicants and two others was more than Rs. One Crore.

29. Therefore, question arises whether value of individually recovered gold should be considered or value of combined recovered gold should be considered.

30. In Section 135 Customs Act, term "any person" has been used and, in my view, it denotes to an individual. The term "any person" cannot be interpreted as a group of persons. From the plain reading of Section 135 Customs Act it appears that it refers to an individual.

31. Delhi High Court also in the case of **Air Customs Vs. Begaim Akynova (supra)** observed that punishment which is to be imposed on the accused should correspond to the gold that has solely been recovered from his possession and each person should be made answerable for the recovery of gold found in his possession.

32. Therefore, in my view, for the purpose of Section 135 Customs Act value of individually recovered gold should be considered and not the value of combined recovered gold.

33. The next question in the case at hand is whether alleged recovered gold was prohibited goods as if it was prohibited goods then by virtue of Section 104 (6) and 135 Customs Act, the alleged offence committed by the applicants would be non-bailable and maximum punishment provided for such offence is seven years.

34. Prohibited goods has been defined under Section 2 (33) Customs Act which reads as under:

2 (33) —"prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.

35. From the perusal of Section 2(33) Customs Act it appears that every good is prohibited if its import or export is subject to an prohibition under the Customs Act or any other law for the

time being in force.

36. The two Judges Bench of the Apex Court in the case of **Om Prakash Bhatia (supra)** observed that prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods and if conditions are not fulfilled, it may amount to prohibited goods.

37. The Apex Court in the case of **Om Prakash Bhatia (supra)** relied upon its earlier two Judges Bench judgment in the case of **Sheikh Mohd. Omer Versus Commissioner of Customs, Calcutta and others, 1970 SCC (2) 728** in which it was held that any restriction on import or export is to an extent prohibition and any prohibition whether it is complete or partial is the prohibition and as held by the Apex Court in the case of **Sheikh Mohd Omer (supra)** "any prohibition" means "every prohibition".

38. Therefore as per the judgments of **Sheikh Mohd. Omer (supra)** and **Om Prakash Bhatia (supra)** of the Apex Court even if the goods are not prohibited but if there is some restriction on its import or export then it will be prohibited goods but both the above noted judgments of Apex Court were delivered by two Judges, recently three Judges Bench of the Apex Court in the case of **Commissioner of Customs Vs. Atul Automation Private Limited, (2019) 3 Supreme Court Cases 539** with regard to multi function device observed that MFDs were not prohibited but restricted items for import and further observed that there will exist fundamental distinction between what is prohibited and what is restricted. Therefore, from the case of **Atul Automation (supra)** it appears that on the basis of restriction on import a good cannot be said to be prohibited good in terms of Section 2 (33) Customs Act .

39. In case as hand, according to the prosecution, gold was recovered from the possession of the applicants which was liable for confiscation under Section 111 of the Customs Act and as per Section 125 Customs Act the authority concerned may levy fine in lieu of confiscation and, therefore, it appears from the provisions of Section 11 of Customs Act gold is not prohibited goods but it is restricted goods and as per Section 125 Customs Act in lieu of confiscation fine may be levied. Therefore, as import of gold is not prohibited but restricted subject to prescribed payment of duty, thus alleged recovered

gold is not prohibited goods under Section 2(33) Customs Act but it is restricted goods in view of the judgment of three Judges Bench of the Apex Court in the case of Atul Automation (supra).

40. Therefore, from the discussions made above, it appears that applicants committed offence under the provisions of Customs Act for which maximum punishment is three years and as their case does not fall under Section 104 (6) Customs Act, therefore, by virtue of Section 104(7) Customs Act the alleged offence committed by applicants is bailable one, therefore, they are entitled to be released on bail."

13. Having gone through the aforesaid judgements passed by the coordinate Bench of this Court, I find that the judgement of the coordinate Bench in ***Mohd. Tufail, Mohammad Alam (supra)*** appears to be more reasoned wherein it is held that the import of gold into the territory of India is not prohibited goods and also that if the value of the gold being imported illegally into India is less than 1 Crore, the same would be a bailable offence. Thus having regard to the reasons mentioned given therein, I do not find any reason to differ from the view adopted by the coordinate Bench in ***Mohd. Tufail, Mohammad Alam (supra)***.

14. Thus having regard to the reasons mentioned herein before, in the considered opinion of this Court, the facility of bail may be safely extended to the applicant. Accordingly, without expressing any opinion on the merits of the case, the instant bail application is **allowed**.

15. Let the applicant- **Mohammad Imran** be released on bail in the aforesaid case on furnishing a personal bond of Rs. 2 lac and two sureties in the like amount to the satisfaction of the court concerned with the following conditions:-

(i) The applicant shall appear before the trial court on the dates fixed, unless his personal presence is exempted.

(ii) The applicant shall not directly or indirectly, make inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or any police officer or tamper with the evidence.

(iii) The applicant shall not indulge in any criminal and anti-social activity and will cooperate in the proceedings which may

be undertaken with regard to the gold confiscated from the possession of the applicant.

(iv) The applicant shall deposit his passport before the trial court along with the copy of this order.

(v) Applicant will cooperate in trial and would not seek any adjournment when the prosecution witnesses would be in attendance.

16. In case of breach of any of the above conditions, the prosecution will be at liberty to move an application before this Court for cancellation of the bail of the applicant.

Order Date :- 10.1.2024

Shravan