

*** THE HONOURABLE Dr.JUSTICE B.SIVA SANKARA RAO**

+ CRIMINAL PETITION No.10382 of 2014

% 15.09.2014

#C.Surendran

....petitioner

Vs.

Government of India,
Rep. by its Spl.Public Prosecutor
Directorate of Revenue Intelligence,
Ministry of Finance, Department of Revenue,
Hyderabad.

.... Respondent

!Counsel for the petitioner : Sri K.Sarvabhuma Rao

Counsel for the Respondent: Sri A.Rajasekhar Reddy

<Gist :

>Head Note:

? Cases referred:

1.AIR 2012 SC 545

2. (1980)2 SCC 565

3 AIR 1996 SC 1042

4 (1998) 9 SCC 348

5 (2004) 7 SCC 558

6 2005) 4 SCC 303

7 (2009) 8 SCC 325

8 (2011)1 SCC 694

9 2008(231) E.L.T.. 397 (s.c.)

10 2012 (3) Supreme 292

11 (2012)4 SCC 684

12 (2014)2 SCC 171

THE HONOURABLE Dr.JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION No.10382 of 2014

ORDER:

This Criminal Petition is filed under Section 438 Cr.P.C by petitioner in F.No.DRI/CZU/HRU/26A/ENQ-77(INT-06) of 2014.

2. Heard the Learned Counsel for the Petitioner and the Learned Additional Public Prosecutor for the Respondent-State. Perused the material placed on record.

3. The petitioner is working as an Appraiser in Customs Department. The respondent is Intelligence Officer of Directorate of Revenue Unit, Hyderabad, who registered the above crime against three persons for the offences punishable under Sections 132 and 135 of the Customs Act (in brief 'the Act').

4. It is important in this juncture to mention that there is an expression of the Apex Court (three judges Bench) in **Om Prakasash v. Union of India with Choith Nanikram Harchandani v. Union of India**^[1], referring to Central Excise Act (1 of 1994) Sections 9, 19 and 20 that the offences are bailable. They also referred the Customs Act Sections 104, 108, 132 and 135 holding with reference to Section 436 Cr.P.C. After the said expression dated 30.09.2011, there is an amendment to the Customs Act covered by the Finance Act, 2012 whereunder besides other provisions, Section 104 is also amended with non-obstante clause in sub-section (4) in saying, notwithstanding anything contained in the Code of Civil Procedure, 1973, for the offence relating to prohibited goods or evasion or attempted evasion of duty exceeding fifty lakh rupees, those are cognisable and by incorporating sub-section (5) in saying, save as otherwise provided in sub-section (4), all other offences under the Act shall be non-

cognizable and by incorporating sub-section (6), it is further stated that none other obstante clause like in sub-section (4) notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offences under the Act shall be bailable. This amendment making the offences bailable while distinguishing what are cognisable and what are non-cognizable was again subjected to another amendment by Finance Act 17 of 2013 w.e.f. 10.05.2013 when it received assent of the President of India by amendment Section 104 of the Customs Act whereunder sub-section (6) of Section 104 of the amended Section by Act 23 of 2012 was modified.

5. The amendment to Section 104 by Act 23 of 2012 reads as follows:

“In Section 104 of the Customs Act, for sub-sections (4), the following sub-sections shall be substituted, namely:-

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

(a) prohibited goods; or

(b) evasion or attempted evasion of duty exceeding fifty lakh rupees, shall be cognisable.

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, the offences under the Act shall be bailable (2 of 1974.)”

By the amended Act 17 of 2013, Section 104 reads as follows:

“In Section 104 of the Customs Act, for sub-section(6), the following sub-sections shall be substituted, namely:-

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence punishable under Section 135 relating to – (2 of 1974.)

- (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 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, shall be non-bailable.

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

6. It is clear that evasion or attempt to evade excise duty above fifty lakhs and dealing with prohibited goods and non-declaration of import or export of any goods as per the provisions of the Act with market price of which exceeds one Crore and fraudulently availing or attempt to avail drawback or exemption from duty of the amount exceeds fifty lakhs are made non-bailable.

7. In this case the accused persons 1 to 3 are involved in the non-bailable offence referred supra under Sections 132 and 135 of the Customs Act, leave about any penal provisions of the Central Excise Act included and attracts if any.

8. From the above back ground, coming to this anticipatory bail sought by the petitioner, who is the employee of the Customs Department itself working as Appraiser in International Airport, Samshabad, Hyderabad, though, there is a disclosure made by A2 in recording of his statement under Section 104 r/w 108 of the Customs Act showing the complicity of the petitioner as if the *modus operandi* for A1 to A3 in committing the crime by giving false declaration of the

goods for their unlawful gain by fraudulent causing loss to the Central exchequer, he stated that the petitioner is privy and from his advise the *modus operandi* they adopted.

9. It is the contention of the petitioner in moving for anticipatory bail under Section 438 Cr.P.C. that from the very so called disclosure statement of A2 saying complicity of the petitioner herein as if their *modus operandi* is at the instance and advise of the petitioner to adopt; he is likely to be arrested in the non-bailable offence by showing as co-conspirator or abettor or the like with vicarious liability under the criminal law and he is entitled to the concession bail as there is reasonable ground for believing that he is going to involve in a non-bailable offence.

10. If this is the case and basis, since admissible under law of the disclosure statement as a confession not only of the disclosure i.e., A2 but also of the co-accused like any voluntary confession by waiving the constitution privilege enshrined under Article 20 of the Constitution and statutorily admissible under Section 108 of the Customs Act at par with Sections 24, 28 to 30 of the Evidence Act, to say a co-accused is also involved in a non-bailable offence, leave about credibility of the said disclosure, apart from the probative value of said statement that are part of appreciation during the trial.

11. From this now coming to Section 438 Cr.P.C. right from the Constitutional Bench expression of the Apex Court in **Gurbaksh Singh Sibbia Vs. State of Punjab**^[2], a pre-arrest bail can be granted within the judicial discretion of Court of Sessions or by the High Court as the case may be from the factual matrix of the case. However, it is not like a regular bail envisaged by Sections 437 and 439 Cr.P.C. of a non-bailable offence but some what an extraordinary in character. Much water flown under the bridge subsequent to it in interpreting the scope of Section 438 in saying the anticipatory bail

must be only for a limited period which is some what different to the regular bail and it

co-terminus with filing of the charge sheet at any cost by leaving it to the prerogative of the regular Court to consider under Sections 437 or 439 for entitlement or not of a regular bail from the investigation material. That conclusion in the expressions right from **Salauddin Abdulsamad Shaikh v. State of Maharashtra**^[3] and **K.L.Verma V. State**^[4], **Nirmal Jeet Kaur v. State of M.P.**^[5], **Adri Dharan Das v. State of West Bengal**^[6] and **Savitri Agarwal v. State of Maharashtra**^[7], were held not as per the law laid down by the Constitutional Bench expression in **Gurbaksh Singh Sibbia (supra)** in the subsequent two bench expression of the Apex Court in **Siddharam Satlingappa Mhetre v. State of Maharashtra**^[8] in saying above expressions and following the same in that line by any Court are *per incurium*. It is important herein to state that even the Constitutional Bench expression in **Gurbaksh Singh Sibbia (supra)**, observed as law of the land in ruling the field even date that the Court in exercise of the judicial discretion under Section 438 Cr.P.C. even where facts permit can grant anticipatory bail for a limited period though generally anticipatory bail is at par with regular bail ensures till end of trial unless cancelled, the bail, once granted.

12. From the above, coming to the entitlement or not of the anticipatory bail by the petitioner herein from his contention in the positive; opposed by the learned Special Public Prosecutor that besides factual matrix does not permit the concession within the four corners of Section 438(1) Cr.P.C.; it is premature for the Court even to consider by placing reliance upon the two Judge Bench expression of the Apex Court in **Union of India v. Padam Narain Aggarwal**^[9] referring to Sections 108 and 104 of the Customs Act and the other

expression approving the same of another two Bench judgment in

Rashmi Rekha Thatoi v. State of Orissa^[10].

13. From the above, the points that arise for consideration are:

1. Whether the petitioner is entitled to the concession of anticipatory bail or it is premature or otherwise factual matrix does not entitle him?
2. To what result?

POINT NO.1:

14. Needless to repeat the facts and also suffice the propositions discussed supra; now coming to the wording of Section 438(1) Cr.P.C. as the grant or refusal of anticipatory bail is only within the four corners of Section 438(1) besides any need of imposing conditions under sub-section (2) as also laid down by the Apex Court in **Shobhan Singh Khanka V. State of Jharkhand**^[11] and **State of Madhya Pradesh v. Pradeep Sharma**^[12] that require consideration as to nature and gravity of the accusation, the antecedents of the applicant including the fact as to whether he is previously undergone imprisonment on conviction by a Court in respect of any cognisable offence, the possibility of the applicant to flee from justice and where the accusation has been met with the object of injuring or humiliating the applicant by having so arrested. With reference to it the Court may either grant or reject the application or issue an interim order for grant of anticipatory bail. The proviso to sub-section 438(1) Cr.P.C speaks that where the Court has not passed any interim order or rejected the application for grant of anticipatory bail, it shall be open to Officer in-charge of the Police Station to arrest without warrant. The applicant on the basis of the accusation apprehend in such application.

15. It speaks that once there is an apprehension expressed in the

application by the applicant for anticipatory bail for pre-arrest concession, pending the same, the arrest can be made in the absence of non-granting of any interim order pending final disposal or for rejection on disentitlement to the anticipatory bail. Needless to go into further sub-sections of Section 438 Cr.P.C, so far as contention of the petitioner is concerned, the nature and gravity of the accusation is definitely severe as he is a public servant and taking alms from the public exchequer and the allegation is he joined hands with law evader in perpetrating the crime and causing loss to the exchequer in mis-guiding. So far as second limb out of four limbs concerned, there is an undisputedly no adverse record against him of involvement much less conviction in any criminal case. Coming to the third limb of possibility of fleeing from justice, he is being a public servant that question does not arise and not a difficult task to secure back besides can be taken care of including by imposing of conditions not to leave the country or seizure of passport if any, apart from other safeguards and so far as fourth limb of the four conditions concerned, in the very application for anticipatory bail it is his contention that A2 either of his own or at the instance of other accused among A1 to A3 in the retention of the consignment uncleared from the non-payment of excise duty and non-production of relevant papers having offended in his failure to manage and clear the consignment illegally through petitioner; falsely roped him in so called disclosure statement with animus, that is nothing but false accusation to injure and humiliate him being honest public servant in accusing so severely as if he joined hands with them in committing a crime. Therefrom so far as the condition No.1 concerned as discussed supra it is severe though there is force in the contention relating to fourth condition subject to further ascertainment of facts and there is in fact a safeguard similar to Cr.P.C. Amended Act 5 of 2009 in Section 41 and 41A Cr.P.C. by virtue of Sections 108 and 104 of the Customs Act apart from

admissibility of the statement and once summoned, duty of the person to appear and disclose the truth in the larger public interest. It is left open to him to give his disclosure of what is truth as contended by the learned Public Prosecutor in saying without exhausting such examination under Section 108 and recording of his statement by summoning for which the investigation agency (complainant) is contemplating it is premature to consider the plea of anticipatory bail from the alleged so called disclosure statement of involving his complicity by A2 as the complainant Intelligence Officer is not isolatedly relying on it and thus wants to examine the petitioner. The question arises only then of any arrest, from disclosure of true facts where found complicity that too with prior permission of the Commissioner of Customs and Excise as contemplated by the safeguard of Section 104 if permission accorded. Thereby under Section 438(1) Cr.P.C there is nothing for the petitioner of reason to believe that he is likely to be arrested in this case in haste involving in a non-bailable offence. The expression of the Apex Court in **Padam Narain Aggarwal**^[13] and in **Rashmi Rekha Thatoi v. State of Orissa**^[14] also laid down the same.

16. Having regard to the above, it is premature for this Court from non-satisfaction of the requirements under Sections 438(1) Cr.P.C by reason to believe that he is likely to be arrested since that stage is not even reached, even there is accusation by A2 of his role, from the complainant Intelligence Officer says they are going to examine the petitioner by summoning under Section 108, where he can disclose true facts and it is only therefrom if necessary from any material with substance to the accusation after such examination and eliciting of truth, the permission being obtained as contemplated by Section 104 of the Customs Act for arrest and pending the application seeking permission for arrest under Section 104 of the Customs Act that too

that stage arises after exhausting the examination contemplated by Section 108 of the Customs Act, the petitioner cannot seek for anticipatory bail.

17. Accordingly, the criminal petition is rejected as premature without going into further merits, needless to say the observations made for the above conclusion in the above paras no way influence the mind of any Court, though, it is practically a disposal of the petition and not dismissal, since rejected being premature.

Dr. B.SIVA SANKARA RAO J,

September 15, 2014
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Note: L.R. copy to be marked-Yes

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- [\[1\]](#) AIR 2012 SC 545
 - [\[2\]](#) (1980)2 SCC 565
 - [\[3\]](#) AIR 1996 SC 1042
 - [\[4\]](#) (1998) 9 SCC 348
 - [\[5\]](#) (2004) 7 SCC 558
 - [\[6\]](#) (2005) 4 SCC 303
 - [\[7\]](#) (2009) 8 SCC 325
 - [\[8\]](#) (2011)1 SCC 694
 - [\[9\]](#) 2008(231) E.L.T.. 397 (s.c.)
 - [\[10\]](#) 2012 (3) Supreme 292
 - [\[11\]](#) (2012)4 SCC 684
 - [\[12\]](#) (2014)2 SCC 171
 - [\[13\]](#) 2008(231) E.L.T.. 397 (s.c.)
 - [\[14\]](#) 2012 (3) Supreme 292