IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRM-M No. 14587 of 2016 (O&M)
Date of Decision: 08.07.2016

Mandeep Singla

.... Petitioner

Versus

State of Punjab and others

.... Respondents

CORAM: HON'BLE MR. JUSTICE JASWANT SINGH

Present: Mr. Manoj K. Singh, Advocate,
Mz. Madhu Dayal, Advocate,
Mr. Vishal Garg, Advocate
for the petitioner.

Mr. Kirat Singh Sidhu, Deputy Advocate General, Punjab

Mr. Satya Pal Jain, Sr. Advocate assisted by
Mr. Sunish Bindlish, Sr. Standing Counsel, Indirect Taxation.

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JASWANT SINGH, J.

CRM No. 15390 of 2016

The petitioner has filed the application for placing on record orders dated 02.12.2013 and 20.10.2014 passed by Customs Excise & Service Tax Appellate Tribunal, and order dated 15.07.2014 passed by a Division Bench of this Hon'ble Court as Annexures P-9, P-10 & P-11, respectively.

CRM allowed and P-9 to P-11 are taken on record.

MAIN CASE

1. The present application/petition under Section 439 Cr.P.C. has been filed by the accused-petitioner seeking grant of regular bail in criminal complaint bearing No. 1766/2016 dated 03.03.2016, titled as "Central Excise Commissionerate, Jalandhar Vs. M/s. Dunar Foods Limited and

Ors.” **(Annexure P-5)** filed under the Section 9 & 9AA of the Central Excise Act, 1944, pending before the Court of learned CJM, Amritsar.

2. The petitioner-Mandeep Singla has been arrested by an Inspector of Central Excise, Amritsar under Section 13 of the Central Excise Act, 1944 (for short ‘**1944 Act’**). The petitioner has been arrested for commission of an offence punishable under Section 9 and 9AA of the 1944 Act. The petitioner was arrested on 05.01.2016 and the respondent-Central Excise Department (for short ‘department’) vide application dated 05.01.2016 produced and sought judicial remand from the Learned CJM, Amritsar, who sent the petitioner to judicial custody. The respondent-Department filed Complaint No. 39 dated 03.03.2016 in the Court of Learned CJM, Amritsar.

3. The petitioner was arrested being incharge of affairs of M/s Dunar Foods Ltd., alleging evasion of duty amounting to Rs. 29.59 crores for period Aug’ 2014 to Jan’ 2015 and for the said amount a Show Cause Notice dated 06.01.2016 (**Annexure P-6**) has already been issued to M/s Dunar Foods Ltd., Tarn Taran. In the said Show Cause Notice, the duty has been demanded from the said company and penalty under Rule 26 of the Central Excise Rules, 2002 has been proposed against the petitioner. As per show cause notice, M/s Dunar Foods Ltd. has cleared in Domestic Tariff Area (DTA) goods i.e. broken rice, basmati rice (small size), rice bran and basmati rice without payment of duty leviable in terms of proviso to Section 3 of the 1944 Act.

4. The petitioner has raised below mentioned contentions in the bail application as well as during the course of arguments:-

(i) The petitioner is neither a Director nor a Share Holder of the company. He is not an employee and not deriving any kind of benefit from the company. He is merely a relative of the Director of the company who happens to be his maternal uncle (*Mama*).

(ii) The respondent has arrested the petitioner in respect of demand raised vide Show Cause Notice dated 06.01.2016 and the petitioner has no concern with the demand raised on earlier occasions.

(iii) The Company is a 100% Export Oriented Unit (EOU) and selling its products in domestic tariff area. The Company is liable to pay excise duty which is computed as aggregate of customs duty. As per judgment of Hon'ble Supreme Court, it is not customs duty which is payable but it is excise duty.

(iv) The process carried out by the company is milling of rice from paddy and it does not amount to manufacture, resultantly Section 3 of the Act itself is not invokable.

(v) The rate of duty in Chapter 10 of first schedule to the Central Excise Tariff Act, 1985 is blank so no duty is payable.

(vi) The learned Customs Excise and Service Tax Appellate Tribunal (for short '**Tribunal**') has already stayed recovery of ` 11 crores. The Tribunal in its order dated 02.12.2013 (Annexure P-9) has observed that how the mathematical exercise shall be made when the rate of duty does not appear in excise tariff.

(vii) The petitioner was arrested for alleged evasion of duty amounting to ₹ 25 crores and the department has filed complaint with respect to duty amounting to ₹ 29 crores.

(viii) The maximum sentence prescribed for the alleged offence is 7 years so the respondent could be arrested only in the case of reasons and necessity as mandated in Section 41 A of the Cr.P.C. The petitioner has complied with the summons which are even after thought so there was no reason to arrest.

(ix) The petitioner was not produced before the learned CJM on 19.01.2016 and 02.02.2016 so judicial remand is bad in the eyes of law.

(x) The goods sold by EOU are exempt from duty in terms of Notification No. 23/2003 dated 31.03.2003 issued under Section 5A of the Central Excise Act, 1944.

(xi) The finished goods have not been cleared after obtaining due permission from Development Commissioner, therefore, goods cannot be treated as “allowed to be sold in India”.

(xii) The goods sold in India are fully exempt from duty, therefore, company is not liable to pay duty.

5. Learned counsel for the respondent-Department vehemently opposed the bail application. As per the respondent, the company (Dunar Food) is liable to pay customs duty in terms of Section 12 of the Customs Act, 1962. The petitioner was supervising all the affairs of the company so he cannot claim that he is stranger to the company. The amount of the duty involved is as much as more than 170 crores based on sales for other periods even though the petitioner was arrested in respect of the evasion of duty amounting to ` 29 crores. The arrest can be made in any case where the amount of duty involved is more than ` 1 crore as per directions of the Central Board of Excise and Customs (Board). The offence in question is an economic offence and as per judgments of Hon’ble Supreme Court, no leniency should be shown in case of white collared crimes because these

offences are committed with cool mind and sitting in air conditioned offices. The amount involved is very huge and the petitioner does not deserve any leniency.

6. I have considered the record of the case produced during hearing and oral arguments made by the counsel for both the parties.

7. The petitioner was arrested on 05.01.2016 and his statement was recorded. In his statement, he has admitted that he was looking after production and other activities of the company and Managing Director of the Company is his maternal uncle (*Mama*). The other employees of the companies had also confirmed that they were getting instructions from the petitioner. In these circumstances, it is fallacious on the part of the petitioner to canvass that he is not concerned with the company.

8. Learned counsel for both the parties cited few judgments relating to goods sold by EOU, inviting duty based on the un-amended proviso to Section 3 of the Act which contained the phrase "allowed to be sold in India". Court finds that Section 3 has been amended w.e.f 11.05.2001 and proviso to said Section has been substituted with phrase "brought to any other place in India" meaning thereby duty would be attracted irrespective of permission accorded or not to sell goods in Domestic Tariff Area by Development Commissioner, the competent authority constituted under Foreign Trade (Development and Regulation) Act, 1992 unless goods sold are notified to be duly exempted or within permissible limits. Therefore, all the judgments which are dealing phrase "allowed to be sold in India" have become meaningless. None of the party has cited any judgment to show that in circumstances like present case, duty is payable or not, beyond iota of doubt.

9. Learned counsel for the petitioner has argued that his remand was extended on 19.01.2016 and 02.02.2016 without being presented before the Learned CJM. The respondent-Department at the time of hearing has produced letter dated 31.05.2016 of Deputy Superintendent (Jail), who has confirmed that on 19.01.2016, the petitioner was produced through video conferencing and on 02.02.2016, the petitioner was already admitted in hospital because he had complained chest pain. The judicial remand of the petitioner was extended thereafter in his presence and he did not point out this fact at that stage. Now at this stage especially in view of explanation of department, the court does not consider it as plausible ground of bail.

10. Learned counsel for the petitioner has vehemently argued on the question of levy of duty. It is neither desirable nor appropriate for this Court to consider the question of levy or exemption of duty at this stage because as pointed out by both the parties, Ld. CESTAT (Tribunal) is already seized of the matter, which is the final fact finding authority.

As the counsel for the petitioner vehemently and insistently argued the question of levy of duty in support of making out a case for bail, this court is thus constrained to *prime facie* consider the question of levy of duty.

11. It is a conceded case of the parties that Central Excise Duty is levied under Section 3 of the 1944 Act, and proviso to Section 3 of the Act deals with levy of duty on goods manufactured by the EOU and cleared into Domestic Tariff Area. As per proviso to said Section, an EOU is liable to pay excise duty which is equal to **aggregate of duties of Customs** which would be leviable under Customs Act, 1962 or any other law for the time being in force. Customs duty is levied under Section 12 of the Customs Act,

1962 and apart from customs duty, Additional Customs Duty known as countervailing duty (CVD) relatable to Central Excise duty is levied under Section 3 (1) of the Customs Tariff Act, 1975. The imported goods are further subject to special Additional Customs Duty (SAD) which is equal to VAT leviable on goods sold in India. In this way imported goods are subjected to 3 duties namely Basic Customs Duty, Additional Customs Duty and Special Additional Duty as per the statutory provisions.

12. The relevant statutory provisions i.e. proviso of Section 3 of the Central Excise Act, 1944, Section 12 of the Customs Act, 1962 and Section 2, 3(1) and 3(5) of the Customs Tariff Act, 1975 are reproduced for ready reference as under:-

Proviso to Section 3(1) of the Central Excise Act, 1944:

> Provided that **the duties of excise** which **shall be levied** and collected on **any excisable goods** excluding goods produced or manufactured in special economic zones which are produced or **manufactured-**
>
> (i) xxxxxxx
>
> (ii) by a **hundred per cent export-oriented** undertaking and **brought to any other place in India**,
>
> Shall be an amount **equal to the aggregated of the duties of customs which would be leviable under the Customs Act, 1962 or any other law for the time being in force**, on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value; the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962(52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975).
>
> Explanation - Where in respect of any such like goods, any duty of customs leviable for the time being in force is leviable at different rates, then, such duty shall for the purposes of this proviso, be deemed to be leviable at the highest of those rates.
>
> Explanation -In this proviso,-
>
> (i) xxxxxx
>
> (ii) "hundred per cent export-oriented undertaking" means and undertaking

which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951) and the rules made under that Act;

(iii) "Special economic zone" has the meaning assigned to it in clause (za) of section 2 of the Special Economic Zones Act, 2005 (28 of 2005).

Customs Act, 1962

Section 12. Dutiable goods.

(1) Except as otherwise provided in this Act, or any other law for the time being in force, **duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975** or any other law for the time being in force, on goods imported into, or exported from, India.

Customs Tariff Act, 1975

Section 2. Duties specified in the schedules to be levied.

The rates at which duties of customs shall be levied under the Customs Act, 1962 are specified in the First and Second Schedules.

Section 3. **Levy of additional duty equal to excise duty, sales tax, local taxes and other charges.**

(1) Any article which is imported into India shall, **in addition**, be liable to a duty (hereafter in this section referred to as the additional duty) **equal to the excise duty** for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article:

Provided that in case of any alcoholic liquor for human consumption imported into India, the Central Government may, by notification in the Official Gazette, specify the rate of additional duty having regard to the excise duty for the time being leviable on a like alcoholic liquor produced or manufactured in different States or, if a like alcoholic liquor is not produced or manufactured in any State, then, having regard to the excise duty which would be leviable for the time being in different States on the class or description of alcoholic liquor to which such imported alcoholic liquor belongs.

Explanation.— In this sub-section, the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty.

(2), (3) (4) xxxxxxx

(5) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article whether on such article duty is leviable under subsection (1) or, as the case may be, sub-section (3) or not such **additional duty as would counter-balance the sales tax**, **value added tax, local tax or any other charges** for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent. of the value of the imported article as specified in that notification.

Explanation.—In this sub-section, the expression " sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India" means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs, and where such taxes, or, as the case may be, such charges are leviable at different rates, the highest such tax or, as the case may be, such charge.

[**Emphasis supplied**]

13. Learned counsel for the petitioner has pointed out that goods in question are classifiable under Chapter Heading 1006 of first schedule to Central Excise Tariff Act. Under the Column of rate of duty there is no entry (it is left blank), so goods in question i.e. rice is exempt from Excise Duty

i.e. Counter Veiling Duty (CVD).

It is revealed on a close scrutiny of the contents of the Show Cause Notice (**Annexure P-6**) that the Department has demanded, in the light of the proviso to Section 3 (1) of the 1944 Act, only the customs duty leviable under Section 12 of the Customs Act read with entries of CTH 1006 of the First Schedule to Customs Tariff Act, 1975, notifying the rate of duty as 80% and not CVD i.e. duty equal to excise duty. In **P-6** at page 75 of the paper-book, custom duty on different products i.e. rice broken (CTH 10064000), rice bran (CTH 23024000), rice basmati (short in length) and rice basmati (CTH 10063020) has been calculated and shown payable whereas no amount of Excise Duty/CVD has been calculated and shown payable. Thus, the whole emphasis of the argument *prima facie* appears to be misplaced. However, the question of levy of custom duty, as demanded from the relevant entry of Chapter-X of the First Schedule to Custom Tariff Act, 1975, is a question of interpretation of the statutory provisions and final adjudication by the learned Tribunal in the pending litigation between the parties.

Learned counsel for the petitioner next argued that the goods are eligible for exemption in terms of Notification No. 23/2003 issued under Section 5-A of the 1944 Act. There is nothing on record to indicate that whether goods had been sold with or without permission of Development Commissioner. There is also nothing on record that whether goods were sold within permissible limits or not, even though counsel for the petitioner has fairly admitted that sale in Domestic Tariff Area (DTA) was more than permissible 50% of the goods exported. It is not disputed that the Company has manufactured the goods and did not clear (i.e. sold in the domestic area) in a clandestine manner, and their returns were duly filed, as acknowledged the show cause notice (P-6). The Department has collected figures from the record maintained by the Company. Therefore, it would be for the learned Tribunal to interpret and decide as to whether or not the goods sold/cleared by the Company/petitioner would be covered under the exemption notification and thus not liable to pay any duty.

14. As regards the claim for admitting the petitioner to bail, it is apt to notice here that company cleared goods during last couple of years and continued to reflected in their records and also filed their returns with the Department, thus, it is not an isolated instance of clearance of goods. The respondent-Department continued to issue Show Cause notices and in respect of prior periods even orders by the adjudicating officer have already been passed. The records are lying in the custody of the Department, thus there cannot be any apprehension of manipulation or tampering with the record. The petitioner is in custody since 05.01.2016 and the Department has already concluded the investigation, which primarily is record/document based, and also instituted the complaint on 03.03.2016 before the learned CJM, Amritsar. Still further, as per Section 9-A (2) of the 1944 Act, any offence either before or after the institution of prosecution may be compounded by the Chief Commissioner on payment of such amount and in such manner as may be prescribed.

15. Apart from above observations, this court finds that the petitioner was arrested by the Inspector and he was produced before the Learned CJM by an Inspector, namely, Mr. Dhiraj Surangi. The Central Excise Officers have power to arrest under Section 13 of the 1944 Act and after arrest, Department is bound to follow procedure prescribed under the

said Act. Power to arrest is independent from disposal of person arrested. The procedure of disposal of person arrested is prescribed under Section 19 and 21 of the 1944 Act. As per Section 21 of the 1944 Act, a Central Excise Officer shall either admit the person arrested to bail or forward in the custody of Magistrate. A Central Excise Officer duly empowered can admit arrested person to bail or forward to custody of the Magistrate. Section 13, 19 and 21 of the 1944 Act are reproduced as under:-

> **(13). Power to arrest**
>
> Any Central Excise Officer not below the rank of Inspector of Central Excise may with the prior approval of the Commissioner of Central Excise, arrest any person whom he has reason to believe to be liable to punishment under this Act or the rules made thereunder.
>
> **(19). Disposal of persons arrested**
>
> Every person arrested under this Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send person so arrested to a Magistrate, or, if there is no such Central Excise Officer within a reasonable distance to the officer-in-charge of the nearest police station.
>
> **(21). Inquiry how to be made by Central Excise Officers against arrested persons forwarded to them under section 19**
>
> (1) When any person is forwarded under section 19 to a Central Excise Officer empowered to send persons so arrested to a Magistrate, the Central Excise Officer shall proceed to enquire into the charge against him.
>
> (2) For this purpose the Central Excise Officer may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a police station may, exercise and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898) when investigating a cognizable case;
>
> Provided that—
>
> (a) if the Central Excise Officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;
>
> (b) if it appears to the Central Excise Officer that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise Officer may direct, to appear, if and when so required, before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior.

In the present case, it is borne out from the produced record that the petitioner was forwarded to custody of Magistrate by an Inspector. It would be appropriate to consider that whether he was empowered to forward the petitioner to custody of the Magistrate. As per the relevant Notification No. 9/99-CE (N.T) dated 10.02.1999/11.05.1999 issued under the 1944 Act concededly governing the issue, only Superintendent can forward arrested person to custody of Magistrate. Based on the said instruction, a similar question has been considered and decided by the Hon'ble Jharkhand High Court in the case of **Hemant Goyal Versus Union of India (2016 TIOL 992-HC-Jharkhand)** decided on 25.01.2016. The relevant para Nos. 10 to 12 of the said judgment are as under:-

> **10.** Section 19 very categorically states that every person arrested under this Act shall be forwarded without any delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate.
>
> **11.** Section 21 is a follow up of Section 19, in which if the Central Excise Officer so empowered on enquiry into the charge against the accused, if he is of the opinion that there is sufficient evidence or reasonable ground of suspicion he may either admit him to bail or to appear before a Magistrate or forward him in custody to such Magistrate. It can, therefore, be deciphered from a bare reading of sections 19 to 21 of the Act that the Central Excise Officer in order to act in terms of the provisions of Section 19 and 21 has to be empowered to carry out such provisions.
>
> **12.** In the context of the above, learned counsel for the petitioner has produced a Notification dated 11.05.1999, in which in order to send a person to the Magistrate and to exercise consequential powers under Section 21 of the Act, such powers have been vested with all Central Excise Officer not below the rank of Superintendent of Central Excise. Learned Counsel for the petitioner has submitted that respondent no. 2 being an Intelligence Officer was not empowered to act in terms of Sections 19 and 21 of the Act, This contention has not been controverter either in the counter affidavit or in course of argument and with respect to authorization what has been stated in the counter affidavit is with respect to Section 13 of the Act, which relates to power to arrest and which power was delegated to respondent no. 2 by the Additional Director General of Central Excise, Intelligence, Kolkata Zonal Unit. The power of arrest as envisaged in Section 13 of the Act does not co relate with sections 19 and

> 21 of the Act. The respondent no. 2 may have been given the power to arrest, which he had exercised but nothing has been indicated as to whether he was empowered to send such person arrested to a Magistrate in order to forward him to judicial custody. In absence of any authorization to act in terms of Sections19 and 21 of the Central Excise Act, 1944, the remand of the petitioner pursuant to the prayer made by an officer not authorized to forward the petitioner for remand, the consequent order of remand dated 21.12.2015 automatically gets vitiated. It has been submitted at the Bar by the learned counsel for the petitioner that the remand of the petitioner is being extended from time to time without there being any such prayer made by the prosecuting agency.

Therefore, in view of the above, the petitioner not being presented before the learned Magistrate by an authorized officer, at least a strong case for grant of bail would be made out.

16. Learned counsel for the respondent-Department has argued that it is an economic offence and no leniency should be shown. The counsel has ignored the fact that matter is pending for last more 5 years and nothing new had occurred in Jan'2016 which prompted the department to take harsh action of arrest. Further, it is an economic offence where separate Assessment/Adjudication proceedings are going on. It is not a case of mass level cheating, as involved in the *cited* and relied case, where except criminal trial no effective remedy was available. In the present case, if the department succeeds in adjudication, the department shall have all rights to recover the dues. So, the contention of Department is repelled.

17. In view of the fact that alleged offence is a compoundable offence, triable by Magistrate, custody period since 05.01.2016 and investigations are complete, complaint has already been filed, Tribunal is seized of the question of levy of duty, completion of trial would take a lot of time, this court finds it an appropriate case for releasing the petitioner on bail. Accordingly, the bail application is allowed and the petitioner is

ordered to be released on bail subject to furnishing of bond of Rs. 5 lacs with two sureties of equal amount to the satisfaction of learned Chief Judicial Magistrate, Amritsar.

July 8th, 2016 **(JASWANT SINGH)**
'dk kamra' **JUDGE**