

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

CRM M-36861 of 2013

Date of Decision: May 26, 2016

Central Excise Commissionerate, Rohtak

.....Petitioner

Vs.

Vishal Gupta

.....Respondent

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI.

-. -

Present:- Mr.Sunish Bindlish, Advocate
for the petitioner.

Mr. N.S. Shekhawat, Advocate
for the respondent.

-. -

M.M.S. BEDI, J.

This is a petition under Section 439 (2) Cr.P.C. for setting aside the order granting bail to respondent by Sessions Court, Rohtak on August 29, 2013 in proceedings under Section 9 of the Central Excise Act, 1944, for short 'the Act', claiming that the respondent was arrested on August 13, 2013 in the office punishable under Section 9 of the Act and was produced before the CJM on August 14, 2013. He was remanded to judicial custody till August 21, 2013. The bail application was declined by CJM, vide order

dated August 21, 2013 and judicial remand was extended till September 4, 2013. The respondent moved the Sessions Court, Rohtak for grant of bail in which notice was issued for August 27, 2013. Reply was filed in the bail application. Even written submissions were made in the application. The Sessions Judge vide order annexure P-8 had granted bail.

The cancellation of bail has been prayed for on the ground that the investigation was pending at the juncture when bail was granted and an number of persons were not joining inquiries despite summons under Section 14 of the Act. The Court did not appreciate the magnitude of the fraud committed. The Sessions Court did not appreciate that the offence was punishable upto 7 years; the respondent was involved in a serious economic offence; large number of inquiries are still pending at crucial stage; the respondent is likely to tamper with the evidence; and the Sessions Judge wrongly applied the ratio of the judgment cited by both the parties.

Mr. Sunish Bindlish, counsel for the petitioner has argued that the offence under the Central Excise Act has been made non-bailable by way of amendment which came into effect w.e.f. May 10, 2013. The judgment of the Apex Court in **Om Parkash Vs. UOI**, 2011 (2762) ELT 321 (SC), has held that offences under Excise were non-cognizable, bailable and would be operative prospectively. It was urged that the amendment is not merely a procedural change rather same was the substantive law vide which the offence was made cognizable and non-bailable as such the nature of the offence cannot be changed o bailable. It was urged that the bail could not be

granted as by an amendment the offence was declared non-bailable. Learned counsel for the petitioner has urged that the only grievance of the petitioner is that the observations made by the Sessions Court are likely to affect the other cases in which the petitioner is a complainant. Learned counsel for the petitioner has submitted that the finding of the Sessions Judge in order dated August 29, 2013 holding that the respondent would be governed by the old provisions prior to May 10, 2013, should be set aside as the procedure law can be made operative retrospectively. The main contention of learned counsel for the petitioner is that the amendment which was made vide Bill NO. 17 of 2013 making the offence non-bailable, should be construed to be retrospective in nature and it should be held that respondent would be deemed to be an accused in non-bailable offence despite the fact that the offence committed by him was prior to May 10, 2013, as the duty evasion alleged in the case is from January 2012 to April 2013 and duty exceeds Rs.50 lacs.

The contentions of learned counsel for the petitioner have been answered by the learned Sessions Judge by making the following observations:-

“15. In the instant case, by way of Finance amendment in Act No.17, which came into effect on 10.5.2013, the offence which was non-cognizable and bailable has been made cognizable and non-bailable if the evasion of duty exceeds Rs.50.00 lacs.

16. Therefore, prior to the amendment which came into effect on 10.5.2013, the right of the accused-applicant was to be enlarged on bail on account of offence being bailable in nature and after the amendment the offence has been made non-bailable and as such the valuable right of the accused – applicant to be released on bail by the Arresting officer has been infringed and as such the amendment vide Act No.17 cannot be said to be a procedural amendment rather the same has affected the valuable right of the accused- applicant.

17. The Hon'ble Apex Court in Thiramalai Chemicals Limited's case (supra) has dealt with the substantive and procedural law and has come to the following conclusion:-

“Substantive law refers to body of rules that creates, defines and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them. Right of appeal being a substantive right always

acts prospectively. It is trite law that every statute prospective unless it is expressly or by necessary implication made to have retrospective operation. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.

*Law on the subject has also been elaborately dealt with by this Court in various decisions and reference may be made to few of those decisions. This Court in [Garikapati Veeraya vs. N. Subbiah Choudhry & Ors.](#) AIR 1957 SC 540, *New India Insurance Company Limited Vs. Smt. Shanti Mishra* (1975) 2 SCC 840, [Hitendra Vishnu Thakur & Ors. vs. State of Maharashtra & Ors.](#) (1994) 4 SCC 602; [Maharaja Chintamani Saran Nath Shahdeo vs. State of Bihar & Ors.](#) (1999) 8 SCC 16; [Shyam Sundar & Ors. vs. Ram Kumar & Anr.](#) (2001) 8 SCC 24, has elaborately discussed the scope and ambit of an amending legislation and its retrospectivity and held that*

every litigant has a vested right in substantive law but no such right exists in procedural law. This court has held the law relating to forum and limitation is procedural in nature whereas law relating to right of appeal even though remedial is substantive in nature.

Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective.”

18. Therefore, since the Hon’ble Apex Court in Om Parkash’s case (supra) has held that the offence of bailable nature, but the amending Bill NO.17 of 2013 has divested the accused- applicant of his right to be released on bail by the Arresting officer by making the offence as non-bailable in nature and as such the same is liable to be construed as prospective in nature.

It is pertinent to mention here that there is no saving clause in the newly amended provisions or there is no manifest intention that the amendment which came into effect would operate retrospective and as such it has

to be held that the enactment which came into effect was prospective in nature and not retrospective and as such the accused- applicant would be governed by the old provisions i.e. prior to 10.5.2013.”

In view of the above observations, the respondent had been granted the concession of bail.

I have considered the above said observations and taking into consideration the contentions of learned counsel for the petitioner, I do not find any infirmity in the observations made by the Sessions Judge in applying the principle of prospectivity in the matter of interpretation of an amendment. Even if for the sake of arguments, it is presumed that the offence qua the respondent is non-bailable and cognizable, there is no bar for a Court to grant concession of bail in non-cognizable offence, as per the provisions of the Cr.P.C. Section 437 Cr.P.C. reads as follows:-

“437. When bail may be taken in case of non bailable offence—(1) When any person accused of, or suspected of, the commission of any non- bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty

of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three year or more but not less than seven years:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that It is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail

and gives an undertaking that he shall comply with such directions as may be given by the Court.

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life,, or imprisonment for seven years or more, be released on bail by the Court under this subsection without giving an opportunity of hearing to the Public Prosecutor.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non- bailable offence, but that there are sufficient grounds for further inquiry into his¹ guilt the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail] or at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code or abetment of, or conspiracy or

attempt to commit, any such offence, is released on bail under sub- section (1), the Court shall impose any condition –

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any 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 to any police officer or tamper with the evidence,

And may also impose, in the interest of justice, such other conditions as it considers necessary.

(4) An officer or a Court releasing any person on bail under sub- section (1) or sub- section (2), shall record in writing his or its [reasons or special seasons] for so doing.

(5) Any Court which has released a person on bail under sub- section (1) or sub- section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non- bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non- bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.”

A perusal of the above said provisions indicates that even if it is presumed for the sake of arguments that offence qua the respondent is non-bailable, the learned Magistrate or the Sessions Court could have ordered the release of any person on bail under sub-sections (1) or (2) of Section 437 Cr.P.C. by recording in writing the reasons for doing so. The learned Sessions Judge has exercised jurisdiction in accordance with law. There does not appear to be any reason to interfere in the order passed by the

Sessions Court. There does not appear to be any requirement to adjudicate on the question raised by counsel for the petitioner that offence under Section 9 of the Act should be held non-bailable and cognizable with retrospective effect with an objective to maintain stringency of grant of bails in offences under the Excise Act. The power to exercise discretion in non-bailable offences is guided by the provisions of law and a Judicial Officer is required to objectively consider the circumstances to consider whether the discretion of bail is to be exercised in non-bailable offence in a particular case or not.

In view of the above circumstances, no ground is made out to cancel the bail granted to respondent.

Dismissed.

May 26 , 2016
sanjay

(M.M.S.BEDI)
JUDGE