

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.4555 OF 2017

Gota Ahmed Siraj A.

...Petitioner

Versus

Asst. Commissioner of Customs and

Anr.

...Respondents

.....

Mr. Sagar V. Kasar with Mr. Amol Wagh for the Petitioner.

Mr. N. Natarajan for the Respondent No.1.

Mr. Prashant Jadhav, APP for the Respondent No.2-State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 22nd NOVEMBER, 2017.

P.C.:-

Rule. Rule is made returnable forthwith. By consent of the parties the Petition is heard finally.

2. By this Petition, the Petitioner has challenged the order dated 24th August, 2017 whereby the learned Additional Sessions Judge, Greater Mumbai dismissed the Criminal Revision Application No.687 of 2017 and thereby confirmed the order dated 18th July, 2017 passed by the learned Metropolitan Magistrate, 8th Court Esplanade, Mumbai in Application No.741/Misc/2017 rejecting the application for modifications of conditions in bail order dated 17th February, 2017.

3. The Petitioner herein was arrested by the officers of the Air Intelligence Unit, Customs for allegedly carrying 2.1 kg of gold valued of Rs.56,99,400/- thereby committing offences punishable under Section 135(1) (ii) of the Customs Act, 1962. The learned Chief Metropolitan Magistrate by order dated 17th February, 2017 ordered to release the Applicant on bail on executing P.R. bond of Rs.1,00,000/- with solvent surety in the like amount. The Applicant was also directed to report AIU, Sahar on every Monday in between 10.00 a.m. to 12.00 a.m. until further orders and further directed to submit passport with AIU office and not to leave India with prior permission of the Court.

4. By application dated 20th June, 2017 the Petitioner sought modifications of conditions to deposit the passport and not to leave India without prior permission of the Court. The said application came to be rejected by order dated 18th July, 2017 mainly on the ground that the Petitioner is not an Indian National and may not be available for trial. The Petitioner challenged the said order before the learned Additional Sessions Judge, Greater Bombay in Revision Application No.687 of 2017. By impugned order dated 24th August, 2017 the

learned Sessions Judge dismissed the said revision application on the same ground. Aggrieved by these orders the Petitioner has invoked writ jurisdiction of this Court.

5. Heard Mr. Sagar Kasar, the learned counsel for the Petitioner. He submits that the offence under Section 135 (1) (ii) is bailable offence and that the learned Magistrate could not have imposed condition to deposit the passport and further not to leave India without permission of the Court. He has relied upon the decision of this Court in *Sultan Kamruddin Dharani Vs. Union of India 2008 (231) E.L.T. 217 (Bom)*, *Stefan Muller Vs. State of Maharashtra 2010 ALL MR (Cri) 2503* and *Waman Naren Ghia Vs. State of Rajasthan AIR 2009 SC 1362*.

6. The learned counsel for the Petitioner further submitted that the Petitioner is an Overseas Citizen of India. His parents, wife and children are residing in Saudi Arabia and that his in-law are residing at Gujarat at the address mentioned in the cause title. The learned counsel has submitted that the Petitioner needs to travel to Saudi to meet his family. The Petitioner has filed an affidavit giving the detail address of Saudi Arabia and has undertaken to return to Mumbai within a period of three months. He has further stated that he

will attain the office of the Respondent No.1 as and when required. The learned counsel for the Petitioner has further submitted that the Petitioner will be otherwise represented by a lawyer before the Trial Court and that he will remain present before the Court as and when required by the Trial Court.

7. The learned counsel for the Petitioner, under instructions submits that the Petitioner is willing to deposit cash of Rs.2,00,000/- before the Trial Court within a period of two days and further submits that the said amount can be forfeited in case the Petitioner fails to remain present as and when required and directed by the Trial Court. Statement is accepted.

8. Mr. N. Natarajan, the learned counsel for the Respondent No.1 has submitted that the Petitioner was earlier involved in a similar offence. He has further submitted that the Petitioner is a foreign national and is not likely to return, in the event he is allowed to travel abroad. He further submits that on this count the decision of the *Sultan Kamruddin Dharani* is distinguishable and not applicable to the facts of the present case.

9. I have perused the records and considered the submissions

advanced by the learned counsels for the respective parties. It may be mentioned that the contention of the learned counsel for the Respondent No.1 that the Petitioner was involved in a similar crime prior to this incident is not borne out of records. On the contrary, the order dated 8th September, 2017 of Additional Commissioner of Customs reveals that no material was brought before him to show that the Petitioner had smuggled gold on previous occasions or that there were recovery of any more quantity of gold from him other than the impugned seized goods on the date of seizure.

10. Be that as it may, the records reveal that the Petitioner was arrested on 16.2.2017 for allegedly carrying 2.1 kg of gold valued at Rs.56,99,400/- which is an offence under Section 135 (1)(ii) of the Customs Act. It is not in dispute that the said offence is bailable and would attract the provisions under Section 436 of Cr.PC.

11. In *Sultan K. Dharani, supra* this Court had considered the question whether the learned Magistrate while enlarging the Petitioner on bail in a bailable offence could impose conditions such as to surrender his passport and not to travel abroad without prior permission of the concerned Court. This Court after considering the

relevant provisions under the Cr.P.C. and the principles laid down by the Apex Court in several decisions held thus :

“19. Thus, the position of the law is that a person who is alleged to have committed a bailable offence has an unfettered and absolute right to be enlarged on bail and the Court or the Police Officer concerned, as the case may be, has no discretion to grant or refuse bail.

Subject to first proviso to sub-section (1) of [section 436](#) of the Code of 1973, the Court may modulate the condition of bail as regards the bail amount and the number of sureties. However, the Court cannot impose a condition which is not a term as to the bail. The condition of requiring a person accused of a bailable offence to surrender his passport to the Court is not a term as to bail. If in such a case a condition is imposed that bail is granted subject to condition of deposit of passport, such a condition will defeat the absolute right of the accused under Section 436(1) of the said Code to be set at liberty. In the circumstances, while enlarging the Petitioner on bail in a bailable offence, the learned Magistrate has no jurisdiction to direct deposit of the passport. The Magistrate cannot impose a condition while granting bail in a bailable offence of not leaving India without the permission of the Court. Whenever the Petitioner is enlarged on bail, he is bound to attend the concerned Court on the date fixed or whenever he is called upon to do so. This obligation is created by the bail bond. If he desires to remain absent, he will have to seek an exemption from the Court. In a given case if there is an apprehension that the accused is likely to abscond, steps can also be taken under the appropriate provisions of law. Steps can be also taken for impounding the passport. ”

12. The facts of the present case are similar to the facts of the case of **Sultan K. Dharani**, *supra*. I do not find any distinguishing features as contended by the learned counsel for the Respondent No.1.

In the light of the principles laid down by this Court in *Sultan K. Dharani*, *supra*, which squarely covers the issue involved in this Petition, the learned Magistrate could not have imposed the conditions requiring the Petitioner to deposit his passport to AIU office and further not to leave India without prior permission of the Court. Consequently, the learned Magistrate as well as the learned Sessions Judge were not justified in rejecting the application for modifying the said conditions.

13. Be that as it may, the Petitioner herein is a Person of Indian Origin (PIO) and is holding OCI card (Overseas Citizen of India). The Petitioner's parents, wife and children are permanent residents of Saudi Arabia. The Petitioner cannot be permanently refrained from visiting his family on an apprehension that he would not return to India. Such apprehension can be alleviated by modulating the condition as regards the bail amount and the number of sureties. In the instant case the Petitioner has undertaken to deposit cash surety of Rs.2,00,000/-, which will stand forfeited in the event the Petitioner fails to appear before the Court.

14. In the circumstances, I pass the following order:-

(i) The Petition is allowed.

- (ii) The impugned orders dated 18th July, 2017 in Application No.741/Misc./2017 and 24th August, 2017 in Criminal Revision Application No.687 of 2017 are hereby quashed and set aside.
- (iii) The directions in order dated 17th February, 2017 viz. (a) to appear before A.I.U. Office, Sahar Mumbai on every Monday in between 10.00 a.m. to 12.00 a.m. until further orders; (b) to submit his passport with A.I.U. Office; (c) not to leave India without prior permission of the Court are hereby set aside.
- (iv) The Petitioner is directed to furnish PR bond and cash surety of Rs.2,00,000/- before the Trial Court within a period of two days from the date on which this order is uploaded.
- (v) The Respondent No.1 shall return the passport of the Petitioner within a period of four days from the deposit of cash surety of Rs.2,00,000/-.

15. All concerned to act on an authenticated copy of this order.

(ANUJA PRABHUDESSAI, J.)