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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 3rd December, 2019

Date of Decision: 11th December, 2019

+ BAIL APPLN. 2381/2019 & CRL.M.As. 36899/2019 &
36370/2019

MONU KAPOOR

..... Petitioner

Through: Dr. Ashutosh & Ms. Fatima,
Advocates

versus

DIRECTORATE OF REVENUE
INTELLIGENCE

..... Respondent

Through: Mr. Talha Abdul Rahman,
Junior Standing Counsel with
Mohd. Shaz Khan, Advocate

CORAM:

HON'BLE MR. JUSTICE CHANDER SHEKHAR

CHANDER SHEKHAR, J.

1. The petitioner has filed the present application under Section 438 of the Code of Criminal Procedure, 1973 (Cr. PC) for the grant of anticipatory bail.

2. Briefly stated, the facts of the case as per the status report are that, on 6.09.2018, a seizure of gold was effected from a shop situated at 34/3128, Gali No.34, Beadonpura, Block-P, Karol Bagh, New Delhi – 110005 and Lease Agreement of the said shop was in the name of Monu Kapoor, the petitioner herein.

3. The statement of one Rahul Kapoor, present in the shop at the time of seizure, was recorded under Section 108 of the Customs Act, 1962 (in short, called 'Customs Act'), wherein he, *inter alia*, admitted

to the facts that (i) the seized gold was of foreign origin; (ii) the smuggled gold was sold in lieu of cash only; (iii) no bills used to be furnished for the sale of smuggled gold and (iv) the shop was not registered with VAT/GST Department. He further disclosed that his uncle, Vijay Kapoor and his cousin, Monu Kapoor were partners in the said shop along with him and he used to share business details with them.

4. During the course of investigation, forensic examination of the mobile phones and laptop of co-accused Rahul Kapoor was carried out and certain material that incriminates Monu Kapoor was recovered. In the whatsapp chats of Rahul Kapoor, it was stated to have been, clearly established that he was involved in hawala payments and cash payments to Tilak Raj @ Pankaj Dhingra. It is stated that Pankaj Dhingra has criminal history of smuggling and is on bail in other cases of smuggling as well.

5. The petitioner, on 29.08.2019, was granted interim protection by the learned Additional Sessions Judge, New Delhi from arrest in the application for anticipatory bail for the offences committed under Sections 174/175 of the Indian Penal Code, 1860.

6. On 5.9.2019, the aforementioned application for anticipatory bail was rejected and the interim protection given to him was vacated by the learned Additional Sessions Judge, New Delhi, primarily on the ground that he did not join the investigation despite repeated summons by the DRI and that he was intentionally avoiding to join the investigation.

7. Learned counsel for the petitioner submitted that the petitioner has been falsely implicated in the present case. Learned counsel further submitted that the Department's intentions are not bonafide *vis-à-vis* the petitioner, whom they intend to harass and humiliate by arresting him at any cost, contrary to settled principles of law. It is submitted that the initial statements of various persons, who were picked up along with the co-accused Rahul Kapoor from the Karol Bagh shop, demonstrate that petitioner was not named as the person, with whom they had any kind of transactions(s) and further that for ulterior motives, after seeing the Lease Deed, the co-accused Rahul Kapoor was made to write that the petitioner was one of the partners.

8. Learned counsel for the petitioner also submitted that the father of the petitioner was illegally picked up on 12.09.2019, without any summons/authorization, and then releasing him next day early in the morning, with the summons dated 12.09.2019 itself, asking him to appear at 6 p.m. on that day itself also reflects the *mala fide* intentions of the Department in this case.

9. It is further submitted by the learned counsel for the petitioner that the shop in question was taken on rent by the petitioner on lease for making jewellery, in which he could not succeed, because of which he wanted to surrender his lease. However Rahul Kapoor persuaded the said Monu Kapoor to transfer the lease in his favour orally and promised to pay the rent for the same, which he (Rahul Kapoor) intended to use for his business of local sale/purchase of gold.

10. It is further argued by the learned counsel for the petitioner that repeated summoning of the co-accused Rahul Kapoor (besides asking

even the other co-accused Vijay Kapoor to appear before the Department) and detaining him till late in the evening invariably on all the occasions also shows the Department's *mala fide* intentions to harass the family of the petitioner.

11. Learned counsel for the petitioner also submitted that there is no material on record to show involvement of the petitioner in this case, which is apparent from the fact that (i) his business premises, as reflected from Income Tax Returns of previous years, is situated in Krishna Nagar (and not in Karol Bagh) and (ii) his bank transactions also reflect that he is having business in Krishna Nagar. This aspect can be also substantiated by the statements of other co-noticees, who have named Rahul Kapoor and not the petitioner *vis-à-vis* the alleged transactions.

12. Further, the learned counsel for the petitioner submitted that after issuance of Show Cause Notice under Section 124 of the Customs Act, the Department has no power to record the statements of the petitioner pursuant to Section 108 of the Customs Act, as once the Show Cause Notice has been issued under Section 124 of the Customs Act, nothing can be inquired further. If that is done, it is *ultra vires* as it affects the rights of the noticee to defend himself. Section 124 of the Customs Act very clearly lays a bar to the effect that no order confiscating the goods or imposing any penalty on any person can be made unless the owner of the goods or such a person is given a notice in writing with the proper approval of the officer not below the rank of Assistant Commissioner of Customs, informing him the grounds on which it is proposed to confiscate the goods or to impose a penalty.

13. *Per Contra*, in the Status Report/reply filed by the DRI, it was contended by the prosecution that the petitioner had pleaded that there was an oral transfer of Lease Deed in favour of co-accused Rahul Kapoor, which is not a satisfactory answer because Rahul Kapoor had himself shown the petitioner as a partner in the business along with Vijay Kapoor and further that there is electronic evidence which had been put to forensic examination also showing pervasive role of petitioner Monu Kapoor.

14. Further, it is submitted by the prosecution that the petitioner's contention that since Show Cause Notice has been issued to the petitioner, no further investigation can go on, is untenable, in view of amendment of the Customs Act, which included Section 28(7A) in the Customs Act, that allows issuance of Supplementary Show Cause Notice. Learned Junior Standing Counsel for the DRI submitted that in view of Customs (Supplementary Notice) Regulation, 2019, notified on 18.06.2019, supplementary SCN can be issued in cases of "additional evidence" or for invoking penal action. It is stated that since prosecution for smuggling is not launched yet and presently Show Cause Notice has been issued, the respondent authority is well within its powers under the law to insist on custodial interrogation of the petitioner.

15. Learned Junior Standing Counsel for the DRI has drawn attention towards Section 123 of the Customs Act regarding burden of proof, and submitted that in the present case, the same lies upon those found with the smuggled goods.

16. Learned Junior Standing Counsel for the DRI, during the course of arguments, submitted that the petitioner is not appearing for the purpose of investigation despite the service of show-cause notice, on the pretext that the present petition under Section 438 of the Cr.PC is pending before this Court and the Officers of the respondent are in dilemma whether the petitioner is exempted from his appearance before the respondent by merely filing the present application under Section 438 Cr.P.C. and/or they cannot take any action against him.

17. I wish to clarify here that merely filing of an application by any person under Section 438 Cr.P.C. and/or pendency thereof does not mean that the petitioner has been granted any protection by this Court, hence the respondent is not precluded in any manner from taking any action or proceedings in the matters pending before them, as per law until and unless there are specific orders of protection or stay by the Court in favour of a party.

18. It is an admitted case that the petitioner had filed an application under Section 438 of the Cr.PC before the Sessions Court, which was dismissed vide order dated 5.9.2019.

19. It would be quite fruitful to reproduce the relevant portion of the order dated 05.09.2019 for better appreciation of the reasoning of the Sessions Court which are as follows:

“That a huge recovery of smuggled gold and cash amount has been effected in this case and the applicant is directly linked with the shop premises from which the recovery has been effected and his custodial interrogation is required to find out the source and other details of the above smuggled gold and cash. It has further been argued that the applicant has been evading

the joining of investigation of this case since long and for his above failure and non compliance to the summons issued by the department, a criminal prosecution for the offences under Section 174 & 175 IPC stands already launched by the DRI against him before the court of Ld. CMM, PHC, New Delhi District. Ld. SPP for the DRI has also relied upon the judgments/orders in cases Special Leave Petition (Crl.) No. 2075/2007 titled Union of India Vs. Padam Narain Aggarwal, V. Nandan Vs. DIG of Police (Crime), Hyderabad & Anr. 1986 Crl. L.J. 1032, order dated 18.02.2016 of the Hon'ble High Court on Bail Application No. 224/2016 titled Sanjay Kumar Bhartiya Vs. DRI and Inderjeet Nagpal Vs. DRI 2005 (1) CC cases (HC) 382 on the aspect of the powers conferred by and provisions contained in under Section 438 Cr.P.C.

This case pertains to the seizure of a huge quantity of gold weighing 35.175 kgs and valuing around Rs.10.75 crores and also a huge cash amount of Rs.3.49 crores in Indian currency, which was effected by the DRI on 06.09.2018 from the shop/premises situated at 34/3128, Gali No.34, Beadonpura, Block-P, Karol. Bagh, New Delhi-5. It has also been stated that 50 gms of gold recovered from the said premises/shop is in the form of metal bar having mark/stamp "Perth Mint Australia 50 gm". It is also alleged that the above smuggled gold is having a foreign origin. It has been admitted on behalf of the applicant that the lease of the above shop/premises is in the name of applicant and though, it has been stated by Ld. Counsel for the applicant that the above lease was transferred in the name of co-accused Rahul Kapoor, but again, admittedly, this transfer is stated to be oral only and hence, no record or document in this regard is or could have been available.

The submissions being made on behalf of the applicant that the other two co-accused Rahul Kapoor and Vijay @ Anil Kapoor in their statements made

under Section 108 of the above Act have stated that the co-accused Rahul Kapoor was doing the business or was in possession of the said shop/premises are not found supported from the records and rather, they are found to have been stated that the present applicant is a partner in the said business being conducted from the above shop/ premises and is having 25% share in the same. Various incriminating facts have also been stated and disclosed by them in their above statements showing the nature of seized gold as smuggled one and having a foreign origin and further that they all have been involved in illegal business of smuggling of the gold and dealings therein. The above statements made by the co-accused are admissible during trial, if the same are proved to have been made voluntarily.

Again till date, the source of procurement of the above seized gold or of the cash amount recovered in this case has not been disclosed or furnished by any of the accused persons, though in terms of the provisions contained in Section 23 of the above Act, the burden of proof that the above gold is not a smuggled one is upon the person, who has been found to be in possession of the said gold or is the owner thereof. Further, during the course of investigation conducted so far, the I.O. has also been able to seize various incriminating records and documents including the account books/ledgers, records of whatsapp chats and calls etc. showing involvement of the present applicant in commissions of the alleged offence and these incriminating documents and materials may be required to be put to the applicant and he is required to be interrogated and questioned with regard to the same.

Besides the above, it can also be seen that though the above seizure was effect around one year back, but the applicant has yet not joined the investigation of this case despite issuance of repeated summons by the DRI on 12.09.2018, 04.10.2018, 31.12.2018,

08.01.2019 and 06.02.2019 and he did not even turn up and appear in the criminal prosecution launched by the DRI for his default in complying with the said summons and it is only on 02.09.2019, when he had appeared in the said case and got his NBWs cancelled and was admitted to bail.

The allegations made against the applicant are serious in nature and in the considered opinion of this court, he has been intentionally avoiding to join the investigation of this case for a long time. His custodial interrogation is required in connection with the above seizures. The scope of adjudication process and investigation involving the criminal aspects pertaining to the above seizures has to be viewed separately. Therefore, this anticipatory bail application is being dismissed and the interim protection granted to the applicant vide order dated 29.08.2019 is being vacated. Copy of the order be given dasti to both the Ld. Counsels.”

20. There is no doubt that the anticipatory bail may be granted when there is material on record to show that prosecution was inherently doubtful or where there is material on record to show that there is a possibility of false implication. However, when the element of criminality is involved; the custodial interrogation is required and/or the other aspects and facts are required to be unfolded in investigation, the applicant is not entitled for anticipatory bail.

21. It is a well-settled law that, while considering the question of grant of anticipatory bail, the Court *prima facie* has to look into the nature and gravity of the alleged offence and the role of the accused. The Court is also bound down and must look into, while exercising its power to grant bail, the antecedents of the applicant and also the

possibility of the applicant fleeing from justice, apart from his conduct in not joining and/or in not co-operating in the investigation along with other factors and parameters in view of the facts of each and every case.

22. Now, reverting back to the facts of the present anticipatory bail application, the record demonstrates that the petitioner, despite being issued summons by the DRI on various dates, did not join the investigation on sham and farce excuses.

23. Apart from what was argued by learned counsel for the petitioner and learned counsel for the respondent, there are some Whatsapp chats, which are part of the Show Cause Notice dated 02.03.2019 and read as under:

“In whatsapp chat with Vijay Kapoor@ Anil Kapoor, it appears that Anil Kapoor sent Note no. of Rs. 1 with No. 96D969145 to Rahul Kapoor and directed him to pay an amount ‘65.28 KG’ which was later changed to 114.240 and Rahul Kapoor confirmed the payment of 114.24 on 06.09.2018. This appears to be Hawala payment of Rs. 114.24 lakhs.

Further, Rahul Kapoor sent pictures of trial balance of different dates to Vijay Kapoor @ Anil Kapoor detailing debit/credit entries of cash and smuggled gold from various parties and the quantum of sale of smuggled gold in lieu of cash can be seen which is to the tune of Rs. 26 crore (around Rs. 13 crore each in credit and debit). Thus it appears that Vijay Kapoor @ Anil Kapoor, used to keep track of daily transactions of smuggled gold and cash in lieu of sale of smuggled gold.

In whatsapp chat with Monu Kapoor, it appears that Monu Kapoor and Rahul Kapoor had shared

numbers of Rupee notes and details of persons to whom payment has to be made and the same was confirmed by them. In whatsapp chat with Monu Kapoor, Rahul Kapoor sent three messages to Monu Kapoor in which he wrote 'Vipul 95660460418 5ka32ka6374' '100 peti' 'PK' from which it appears that Rahul Kapoor shared mobile no. of one person named Vipul and Rupees 5 Note No. and Monu Kapoor confirmed the payment by sending message '100 peti de di ok pk ki'. This implies that Rs. 100 lakhs was paid in favour of Tilak Raj @ Pankaj Dhingra @ PK as part of sale proceeds of smuggled gold."

24. We should keep in mind that a person who wants that the process of law should be followed, he should also follow and submit to the process of law. Normally, the law does not countenance that the person who fails to submit to the processes of law should be granted any relief by the Courts. If it is allowed to happen, it will send a wrong message to the society. The facts of the case demonstrate that the petitioner, despite having been served with various show cause notices, has preferred not to join the investigation. The questions which arise for consideration, in these circumstances, are (i) if the accused has joined the investigation and he is not fully cooperating with the investigating agency and/or (ii) a person does not join the investigation on false pretexts or sham/farce excuses, then what should be done. To my mind, where the accused has failed to join the investigation on false pretexts or sham/farce excuses despite being given opportunities and/or is not fully cooperating with the investigating agency, the anticipatory bail application of such accused should be rejected, solely on this ground.

25. The facts of the present case demonstrate that the petitioner has failed to join the investigation on sham and farce excuses, hence his conduct itself disentitles him for any relief whatsoever from this Court in the matter.

26. It is alleged by the prosecution and is also noted by the Sessions Court, while dismissing the application of the petitioner under Section 438 of the Cr.P.C. that huge recovery of smuggled gold and cash amount has been effected in the present case and the shop premises of the applicant is directly linked with the same, hence, in my opinion, the custodial interrogation of the petitioner is required in this case to know the *modus operandi* in connection with the smuggled gold, cash amount as well as to know the person involved and also to unearth the conspiracy in the commission of the alleged offences.

27. Hence, taking into consideration the nature and gravity of the accusations, the stage of the investigation, the alleged role of the accused and the enormity of financial transactions to be investigated, severity of crime and resultant loss to the public as well as nation; non co-operation of the accused in the investigation and requirement of his custodial interrogation, this Court does not find any merit in the anticipatory bail application of the petitioner.

28. The anticipatory bail application is, accordingly, dismissed. Pending applications are also dismissed.

CHANDER SHEKHAR, J.

DECEMBER 11, 2019/tp