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

+ W.P.(CRL) 342/2019, CrI. M.A. 2415/2019

ROHIT WASSAN

..... Petitioner

Through: Mrs. Anjali J. Manish, Mr. Priyadarshi
Manish and Ms. Nidhi Sairi, Advs.

versus

ADDITIONAL DIRECTOR GENERAL, DIRECTORATE OF
REVENUE INTELLIGENCE & ORS

..... Respondent

Through: Mr. Aditya Singla, Adv. for DRI

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

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05.02.2019

The petitioner has been served with a notice under section 108 of the Customs Act, 1962. He seeks the presence of his counsel at the time of interaction, with the condition that the counsel would be able to watch the interaction, but would not be within audible range. The petitioner apprehends coercive measures and reason for seeking the said relief are that: i) his company M/s. Stella Industries, has been issued a notice; ii) the entire management of the company has been appearing before respondent no. 3 for the past many months; iii) in one of the recent interactions, one of the employees of the company was made to take off his shirt leading to his utter humiliation and; iv) there are other allegations of high handedness by the investigating agency. The petitioner is ready and willing to join investigations in compliance of the order of a Division Bench of this Court in W.P. (CrI.) 270/2018. The petitioner relies upon the dicta of the Supreme Court in (i) *D.K. Basu Vs. State of W.B., (1997) 1 SCC 416*; (ii) *Senior Intelligence Officer, Directorate of Revenue Intelligence Vs. Jugal Kishore*

Samra, (2011) 12 SCC 362; (iii) *Mahendra Kumar Kundia Vs. Union of India*, (2015) (319) E.L.T. 9 (S.C.); (iv) *Vijay Sajnani Vs. Union of India*, (2017) (345) E.L.T. 323 (S.C.); (v) *Rohit Sakhuja vs. Dy. Dir, DRI, New Delhi*, (2017) (349) E.L.T. 204 (S.C.); (vi) *Birendra Kumar Pandey Vs. Union of India*, W.P. (Crl.) 28 of 2012 and (vii) *Nandini Satpathy Vs. P.L. Dani & Anr.*, (1978) 2 SCC 424.

The learned counsel for the respondent opposes the relief on the ground of the judgment of the Supreme Court in ***Poolpandi and Others vs. Superintendent, Central Excise and Others*** (1992) 3 SCC 259, para 11 of which inter alia held as under:

“11. We do not find any force in the arguments of Mr Salve and Mr Lalit that if a person is called away from his own house and questioned in the atmosphere of the Customs office without the assistance of his lawyer or his friends his constitutional right under Article 21 is violated. The argument proceeds thus : if the person who is used to certain comforts and convenience is asked to come by himself to the Department for answering questions it amounts to mental torture. We are unable to agree. It is true that large majority of persons connected with illegal trade and evasion of taxes and duties are in a position to afford luxuries on lavish scale of which an honest ordinary citizen of this country cannot dream of and they are surrounded by persons similarly involved either directly or indirectly in such pursuits. But that cannot be a ground for holding that he has a constitutional right to claim similar luxuries and company of his choice. Mr Salve was fair enough not to pursue his argument with reference to the comfort part, but continued to maintain that the appellant is entitled to the company of his choice during the questioning. The purpose of the enquiry under the Customs Act and the other similar statutes will be completely frustrated if the

whims of the persons in possession of useful information for the departments are allowed to prevail. For achieving the object of such an enquiry if the appropriate authorities be of the view that such persons should be dissociated from the atmosphere and the company of persons who provide encouragement to them in adopting a non-cooperative attitude to the machineries of law, there cannot be any legitimate objection in depriving them of such company. The relevant provisions of the Constitution in this regard have to be construed in the spirit they were made and the benefits there under should not be "expanded" to favour exploiters engaged in tax evasion at the cost of public exchequer. Applying the 'just, fair and reasonable test' we hold that there is no merit in the stand of appellant before us."

This judgment of ***Poolpandi*** was subsequently considered by various judgments including ***Senior Intelligence v. Jugal Kishore Samra*** (2011) 12 SCC 362, which, *inter-alia*, observed as under:

"..... 25. In our view, the distinction sought to be drawn by Mr. Tulsi is illusory and non-existent. The decision in Poolpandi was in cases under the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973. Both these Acts have stringent provisions regarding search, seizure and arrest and some of the offences under each of these two Acts carry a punishment of imprisonment up to 7 years. We, therefore, fail to see, how a case registered under NDPS Act can be said to be a "regular criminal" case and the cases under the Customs Act and the Foreign Exchange Regulation Act not as criminal cases.

26. In view of the clear and direct decision in Poolpandi, we find the order of the High Court, affirming the direction given by the Sessions Judge clearly unsustainable.

27. We may, however, at this stage refer to another decision of this Court in D.K. Basu v State of West

Bengal (1997) 1 SCC 416. In this case, the Court, extensively considered the issues of arrest or detention in the backdrop of Articles 21, 22 and 32 of the Constitution and made a number of directions to be followed as preventive measures in all cases of arrest or detention till legal provisions are made in that behalf. The direction at serial number 10 in paragraph 35 is as follows:

"(10). The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation."

28. Strictly speaking the aforesaid direction does not apply to the case of the respondent, because he being on bail cannot be described as an arrestee. But, it is stated on behalf of the respondent that he suffers from heart disease and on going to the DRI office, in pursuance to the summons issued by the authorities, he had suffered a heart attack. It is also alleged that his brother was subjected to torture and the respondent himself was threatened with third degree methods. The medical condition of the respondent was accepted by the Metropolitan Sessions Judge and that forms one of the grounds for grant of anticipatory bail to him.

29. Taking a cue, therefore, from the direction made in DK Basu and having regard to the special facts and circumstances of the case, we deem it appropriate to direct that the interrogation of the respondent may be held within the sight of his advocate or any other person duly authorized by him. The advocate or the person authorized by the respondent may watch the proceedings from a distance or from beyond a glass partition but he will not be within the hearing distance and it will not be open to the respondent to have consultations with him in course of the interrogation...."

This principle was applied by a Division Bench of the Rajasthan High Court in ***Bhag Singh and Ors. v. Union of India and Ors.*** (2018) 3 RLW

2102 decided on 08.06.2018, and directed, *inter alia*, that:

“9. In view of authoritative enunciation of the law noticed above, we are not inclined to hold that recording of statement of the petitioners under Section 108 of the customs Act by DRI officials without the presence of their counsel would in any manner violate any of their fundamental rights. On the contrary, if the kind of allegations which the petitioners have made against the DRI officials are accepted on their mere ipse dixit and all the statements of this nature are generally ordered to be recorded in the presence of their advocate, the purpose of enquiry under the Customs Act and the other enactments of similar nature may be defeated. If the DRI authorities in the present case have identified many such dubious transactions, they have legitimate right to question such importers and persons associated with them in isolation and not necessarily in the company of their counsel. Such act on the part of DRI cannot be held to be violative of Article 20(3), 21 and 22(1) of the Constitution of India”

However, while testing a similar issue, apropos granting of permission for a counsel to be present during interrogation under section 108 of the Customs Act, the Supreme Court in ***Vijay Sajnani v. Union of India*** 2017 (345) E.L.T. 323 (S.C.) held as under:

“3. Similar matters have been filed before us earlier and in those matters, we have directed that during interrogation of the petitioner(s), his/ their counsel would be allowed to be present within visible distance, but beyond hearing range. Inasmuch as, the same orders are being passed in these matters, we dispose of the writ petition by directing that in similar cases, in the event of person(s) summoned under Section 108 of the Customs Act, 1962, wish(es) for similar orders, he (they) may apply to the custom authorities concerned and a similar provision may be made for his/their interrogation in the presence of learned counsel, as indicated hereinabove.”

In ***Birendra Kumar Pandey v. Union of India***, [W.P. (CrI.) 28/2012], decided on 16.04.2012, the Supreme Court had discussed all the aforesaid issues and held inter alia:

“The prayer has been opposed by the learned Additional Solicitor General, Mr. P.P. Malhotra, who has brought to our notice the decision of a Three Judges Bench in the case of Poolpandi and Others v. Superintendent, Central Excise and Others (1992) 3 SCC 259. Mr. Malhotra pointed out that the very first paragraph of the said judgment mentions that the common question arising in the said case before their Lordships was the stand taken by the petitioners that they were entitled to the presence of their lawyers when they were being questioned during the interrogation under the provisions of the customs Act, 1962, or the Foreign Exchange Regulation Act, 1973. Their Lordships had noticed the difference of opinion of different High Courts in this connection and had rejected the submission made on behalf of the petitioners therein, that they were entitled to have lawyers present at the time of interrogation. Such prayer, therefore, was disallowed. Mr. Malhotra has also drawn our attention to the decision in Senior Intelligence Officer, Directorate of Revenue Intelligence v. Judgal Kishore Samra (2011) 12 SCC 362; wherein the decision in Poolpandi’s case (supra) was also referred to and, ultimately, having regard to the facts of the case, a two-Judge Bench of this Court directed as follows:

“Taking a cue, therefore, from the direction made in D.K. Basu and having regard to the special facts and circumstances of the case, we deem it appropriate to direct that the interrogation of the respondent may be held within the sight of his advocate or any other person duly authorized by him. The advocate or the person authorized by the respondent may watch the proceedings from

a distance or from beyond a glass partition but he will not be within the hearing distance and it will not be open to the respondent to have consultations with him in the course of the interrogation.”

In fact, the said direction is very direction that the petitioners are seeking in this criminal miscellaneous petition.

Apart from the above, this Bench and other Benches of this Court have also had occasion to deal with similar matters and we had passed similar orders to the extent that the petitioners’ counsel would be allowed to be present at the time of interrogation within visible distance, though beyond hearing distance.

In our view, the decision which was rendered in Poolpandi’s case (supra) by a Bench of Three Judges, was in the context of the direct involvement of the learned counsel during his actual interrogation where the lawyer assumed an active role during the interrogation. On the other hand, the order that has been sought, as passed in various matters, does not contemplate such an eventuality. In fact, in terms of the orders which we have earlier passed, a lawyer has no role to play whatsoever during the interrogation, expect to be at a distance beyond hearing range to ensure that no coercive methods were used during the interrogation.

Accordingly, we allow the criminal miscellaneous petition and direct that the petitioners’ advocate should be allowed to be present during the interrogation of the petitioners but that he should be made to sit at a distance beyond hearing range, but within visible range and the lawyer must be prepared to be present whenever the petitioners are called upon to attend such interrogation.”

The Division Bench of this Court vide order dated 06.02.2018 passed in W.P. (Crl.) 270/2018, titled **Mohit Jain vs. Union of India & Ors.** had

also considered the aforesaid precedents and in a petition seeking similar relief had permitted the presence of counsel at the time of interrogation. However, he would not be within audible range.

At this stage, the learned counsel for the DRI denies upon instructions, that the petitioner's employees were subjected to any oppressive or coercive measures during interrogation. He submits that the petitioner had not been cooperating in the manner the Division Bench ordered on 25.01.2019, although he has joined investigations on 16.01.2019; that he did not appear on 28.01.2019 and 04.02.2019. However, it is submitted that the case was listed on 01.02.2019 and was adjourned for today.

In view of the above, the petitioner shall appear before the I.O. tomorrow at 12 o' clock and on all such dates when he is so required by the I.O. He shall have the benefit of the presence of a counsel who may watch the proceedings from a distance but beyond the audible range. It is expected that questioning will be carried out during office hours.

The petition is disposed off in the above terms.

A copy of this order be given *dasti* to the parties, under the signature of the Court Master.

NAJMI WAZIRI, J

FEBRUARY 05, 2019/acm