

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

CRIMINAL WRIT PETITION NO. 649 OF 2023

1. Manishbhai Narshibhai Talaviya
Age : 44 years, R/o Plot No.3213,
Pancha Vati Bungalows, GIDC
Ankleshwar-393002
2. Ravindrabhai Manharbhai Zalavadiya
Aged : 36 years, 8, Dwarkesh Soc,
Mota Varachha, Surat, 394101 ... Petitioners

Versus

1. Union of India
through Dedicated Legal Cell (Customs),
New Customs House, Ballard Estate,
Mumbai 400059
2. Directorate of Revenue Intelligence
Through its Additional Director General,
F Cell, Mumbai Zonal Unit,
13 SIR Vithaldas Thackersay Marg,
New Marine Line
Mumbai – 20
3. State of Maharashtra
High Court, Mumbai ... Respondents

Dr. Sujay Kantawala a/w Ms. Aishwarya Kantawala, Mr. Diya Jayan,
Ms. Diksha Kukrety for the Petitioner.
Mr. Advait Sethana a/w Ms. Ruju Thakkar, Mr. Rangan Majumdar,
Ms. Prerna Thakkar, Ms. Poushali Roychoudhary for the Respondent
Nos.1 and 2.

Mr.S.S.Pednekar, APP for the Respondent–State.

**CORAM : REVATI MOHITE DERE &
SHARMILA U. DESHMUKH, JJ.**

DATE : APRIL 28, 2023

ORDER - (Per : Sharmila U. Deshmukh, J.):

1. Rule. Rule made returnable forthwith with the consent of the parties and taken up for final disposal.
2. By this petition, the Petitioners seek direction to the Respondent No.2-Directorate of Revenue Intelligence (DRI) and its officers to permit the presence of their Advocate during the interrogation and recording of statements at visible but not audible distance and for video-graphing the interrogation, the cost of videography to be borne by the Petitioners.
3. Heard Dr. Sujay Kantawala, learned counsel for the Petitioner, Mr. Advait Sethana, learned counsel appearing for the Respondent Nos.1 and 2 and Mr. Pednekar, learned APP for the Respondent–State
4. Learned counsel appearing for the Petitioners submits that

on 18th January, 2023, when the officers of Respondent No.2 came to their residences, the Petitioners were not present; that on 20th January, 2023, the officers of the Respondent No.2 has seized certain goods, some of which were belonging to the Petitioner No.1 and a *supurdnama* for the safe custody of the goods was given to the Petitioners' relative viz. Ramniklal Laljibhai Patel and the relative was directed to inform the Petitioners to appear before the office of the Respondent No.2 in Mumbai. He further submits that the *supurdnama* does not mention any file number or case number and that they have not received any summons for their appearance. He would further submit that a request was made *vide* letter 3rd February, 2023 to the Respondent No.2 for issuance of summons for their appearance and for permission for the presence of their Advocate at visible but not audible distance during the interrogation and for video-graphing of their statements. He would further submits that various decisions of the Apex Court as well as this Court has permitted the presence of the Advocates during the interrogation at visible but not audible distance, the copies whereof have been annexed from pages 23 to 89 of the petition. In support of his submissions, he relies on the following decisions:

- (a) **Kalpesh Ghevarchand Jain vs. Union of India and Ors.** [in Writ Petition No.782 of 2023, delivered by this Court on 23 March, 2023];
- (b) **Mayur Chavda s/o Deepakbhai Chavda vs. The State of Maharashtra and Anr.** [in Criminal Writ Petition (ST) No.6697 of 2023, delivered by this Court on 10th April, 2023];
- (c) **Kamlesh Kumar Mishra s/o Brijabhooshan Mishra vs. The State of Maharashtra and Anr.** [in Criminal Writ Petition No.1313 of 2023, delivered by this Court on 10th April, 2023];
- (d) **Navin Kumar Jain s/o Kantilal Jain vs. The State of Maharashtra and Anr.** [in Criminal Writ Petition (ST) No.6418 of 2023, delivered by this Court on 10th April, 2023];
- (e) **Gautam Ghevarchand Jain vs. Union of India and Anr.** [in Writ Petition No.883 of 2023, delivered by this Court on 23 March, 2023];
- (f) **Deputy Director, DRI, Mumbai Zonal Unit vs. Raja Abdul Hameed and Another [2019 SCC OnLine Bom 5363].**

5. Per contra, learned counsel for Respondent No.2 submits that the presence of lawyers during interrogation cannot be claimed as a matter of right. He has taken this Court through the affidavit-in-reply dated 22nd February, 2023 filed by Shri Vibhore R. Goyal, Deputy Director, Directorate of Revenue Intelligence. He would contend that it is only in exceptional circumstances that the presence of lawyers may

be permitted during the course of recording the statement under Section 108 of the Customs Act, 1962 (for short, “**the Act**”). He would further submit that the summons dated 1st February, 2023 under Section 108 of the Act was served upon the Petitioner No.1 through speed post and on its official email id to appear in the DRI office on 7th February, 2023. As the Petitioner No 1 failed to co-operate and comply with the summons, fresh summons dated 7th February, 2023 was issued and served to appear on 15th February, 2023. He would submit that similarly, a summons dated 1st February, 2023 was served upon the Petitioner No.2 to appear in the DRI office on 6th February, 2023 which were also sent by speed post and also on its official email. He would further submit that the Petitioners have to make out a case to justify their apprehension of use of coercive methods. In support of his contentions, he relies upon the decisions on the followings cases:

- (a) **Poolpandi and Ors. vs. Superintendent, Central Excise and Ors.** [MANU/SC/0339/1992];
- (b) **Sudhir Kumar Aggarwal vs. Director General of GST Intelligence** [MANU/DE/3757/2019];
- (c) **Sandeep Jain vs. Additional Director DRI (Directorate of Revenue Intelligence) and Anr.** [in Review Petition No.387/2019 in W.P.(C) 9561/2019, delivered by High Court of Delhi on 10th December, 2019];
- (d) **Amit Joshi vs. Commissioner of Cest & Sr, Cgst (East)**

& Anr. [in W.P.(CRL) 766 of 2020 & CRL.M.A. 5730 of 2020 D/d on 20.3.2020];

- (e) **Saurabh Mittal vs. Union of India, Department of Revenue & Ors.** [in CRL.M.C. 644 of 2022, D/d. 11.02.2022];
- (f) **Pawan Kumar vs. Union of India and Ors.** [MANU/UP/0629/2017];
- (g) **Enforcement Directorate vs. Partha Chatterjee** [MANU/WB/1092/2022];
- (h) **Bhag Singh vs. Union of India and Anr.** [in Civil Writ Petition Nos.11173, 11174, 11175, 11176 and 11177 of 2018, D/d. 8.6.2018];
- (i) **Vigin Verghese s/o. Shri K.V. Verghese vs. Union of India and Anr.** [in Criminal Writ Petition No.580 of 2023, delivered by this Court on 3rd March, 2023];
- (j) **Kalpesh Ghevarchand Jain vs. Union of India and Ors.** [in Writ Petition No.782 of 2023, delivered by this Court on 23 March, 2023].

6. An affidavit-in-rejoinder has been filed on behalf of the Petitioner placing on record, the summons issued by the Respondent No.2's office Kolkata Zonal Head, under Section 108 of the Act to one Shri Chandraprakash Wadhwani and the summons issued by the Respondent No.2's office at Nhava Sheva Unit to one Shri C.R. Unnikrishnan. Learned counsel for the Petitioner submits that in both these cases Respondent No.2 has permitted the presence of the lawyer during the interrogation.

7. Next, we have an affidavit-in-sur-rejoinder dated 24th March, 2023 filed by Shri Vibhore Goyal, Deputy Director, DRI stating that the facts of the case wherein the presence of the lawyer was permitted are materially distinct and different from the present case, inasmuch as, the summons of DRI Kolkata is related to a case of ‘Duty Free Import Authorisation’ and the summons of DRI Nhava Sheva mentioned at Exhibit-J related to “Misuse of Drawback Scheme”.

8. Considered the submissions of the parties and perused the papers with the assistance of learned counsel for the parties. For the purpose of the present case, it is not necessary for us to go into the facts of the case leading to issuance of the summons to the Petitioners under Section 108 of the Act. The limited prayer which has been sought by the Petitioners is the presence of their lawyer at visible and not audible distance during the interrogation and video-graphing of the same at the costs of the Petitioners. This issue is no longer *res integra* and has been settled by catena of decisions of the Apex Court as well as by this Court. In the case of **Vijay Sajnani vs. Union of India & Ors.** (CRL MP.No.10117 of 2012 in Writ Petition No. (Crl. No.29 of 2012), the Apex Court has directed that during the interrogation of the Petitioners therein, their counsel would be allowed to be present within visible distance but beyond hearing range. The Apex Court while disposing of the writ petition directed that in similar cases, in the event the 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 the learned counsel, as indicated hereinabove. Subsequent decisions of the Apex Court, on which the reliance has been placed by the learned counsel for the Petitioner, has permitted the presence of the Advocate during the interrogation of the Petitioner at visible but not audible distance. To the same effect are the various decisions of this Court relied upon by the learned counsel for Petitioners wherein this Court has permitted the presence of the lawyer during interrogation. Recently, a co-ordinate Bench of this Court in the case of **Kalpesh Ghevarchand Jain** (supra), *vide* order dated 23rd March, 2023 had permitted the presence of the advocate during the interrogation at visible but not audible distance. While permitting the presence of the lawyers the co-ordinate Bench had taken into consideration the orders passed in Writ Petition No.4322 of 2022, Writ Petition No.3679 of 2022 and Writ Petition No.2470 of 2022, permitting presence of lawyers at visible but not audible distance.

9. Pertinently, the Respondent No.2 has selectively permitted the presence of lawyers at visible but not audible distance, which is revealed from the summons annexed at Page 157 and 158 of the Petition. The explanation sought to be given that the facts of those cases

were materially different do not appeal to us for the reason that the summons in those cases was also issued under Section 108 of the Act for the purpose inquiry. The reason for the inquiry is not material and the department cannot selectively decide to permit the presence of lawyers.

10. As far as the decisions relied upon by the learned counsel for the Respondent No.2 is concerned, the decision in the case of **Poolpandi** (supra), was distinguished by the Apex Court in the case of **Birendra Kumar Pandey vs. Union of India (Cri. Writ Petition No. 28/2012)**. The Apex Court held that the decision rendered in the case of **Poolpandi** (supra), was in the context of the direct involvement of the learned counsel during the actual interrogation where the lawyer assumed an active role during the interrogation. As regards the decisions in the case of **Sandeep Jain vs Additional Director DRI** (supra), **Amit Joshi** (supra), **Pawan Kumar** (supra) and **Bhag Singh** (supra), the Delhi High Court, Allahabad High Court and Rajasthan High Court followed the decision rendered in the case of **Poolpandi** (supra) and has not permitted the presence of the Advocate. In the case of **Saurabh Mittal** (supra), the Delhi High Court held that the relief regarding the presence of lawyer at visible but not audible distance is to be granted sparingly, in exceptional circumstances, where it appears *prima facie* that the apprehension of the person is sincere and bonafide.

The Calcutta High Court in the case of **Enforcement Directorate vs Partha Chatterjee** (supra), followed the decision of the Delhi High Court in the case of **Directorate of Enforcement vs Satyendra Kumar Jain** (CRL.M.C 2869/2022 and CRL.M.A 11846/2022) and held that the allegation against the E.D. that the Advocate of the accused was not allowed to be present at the time of raid is found to be false and the order permitting the presence of lawyer was set aside.

11. The decisions of the other High Courts have taken a view that the presence of lawyer cannot be insisted as a matter of right. However, the decisions have a persuasive value and is not binding upon this Court. We are respectfully bound by the decision of the Apex Court in the case of **Vijay Sajnani vs. Union of India & Ors.** and **Birendra Kumar Pandey vs. Union of India** as well as the decision of Coordinate Benches of this Court which have permitted the presence of a lawyer at visible but not audible distance. As indicated above the decision in the case of **Poolpandi** (supra) was distinguished on facts by the Apex Court in the case of **Birendra Kumar Pandey** (supra). This Court in the case of **Mayur Chavda s/o Deepakbhai Chavda vs State of Maharashtra** (Criminal Writ Petition (St) No.6697 of 2023); and **Kamlesh Kumar Mishra s/o Brijabhooshan Mishra vs. State of Maharashtra** (Criminal Writ Petition No. 1313 of 2023) has permitted the presence of lawyers at visible but not audible distance during recording of the statements

under Section 70 of Maharashtra Goods and Service Tax Act, 2017.

12. In our opinion, the direction which has been sought by the Petitioners as regards the presence of the lawyer at visible but not audible distance is an aspect of fair investigation and we do not find any reason to take a different view from the view taken by the Coordinate Benches of this Court. We, however, do not deem it fit to grant the relief of video-graphing.

13. Considering the above, writ petition succeeds. The presence of the Petitioners' advocate during the interrogation of the Petitioners is permitted at a visible but not audible distance. However, we make it clear that it is for the Petitioners to ensure the presence of their lawyer, whenever the Petitioners are called for interrogation and the non-availability of the lawyer cannot be a ground to seek exemption from the interrogation as and when called.

14. Rule is made absolute in the above terms.

15. Writ Petition is disposed of accordingly.

16. All concerned to act on the authenticated copy of this order.

SHARMILA U. DESHMUKH, J.

REVATI MOHITE DERE, J.