

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

WRIT PETITION NO. 782 OF 2023

Kalpesh Ghevarchand Jain
Aged 37 years, Occupation: Business
Residing at 1st Floor, Sambhav Darshan CHS
Navroji Hill Road No. 7, Dongri,
Umerkhadi, Mumbai – 400 009

.Petitioner

Vs.

1. Union of India
Through the Secretary,
Ministry of Law and Justice,
Department of Legal Affairs,
Branch Secretariat, Aaykar Bhavan,
Annexe, 2nd Floor, New Marine Lines,
Mumbai – 400 020.

2. Senior Intelligence Officer,
Directorate of Revenue Intelligence,
Mumbai Zonal Unit,
13, Sir Vitthaldas Thackersey,
Marg, Opposite Patkar Hall,
Mumbai – 400 020.

3. State of Maharashtra

.Respondents

Mr. Brijesh Pathak for the Petitioner.
Mr. J. B. Mishra a/w. Mr. Ashutosh Mishra for Respondent Nos. 1
and 2-DRI.
Mr. Y. M. Nakhwa, APP for the State.

**CORAM : SUNIL B. SHUKRE AND
KAMAL KHATA, JJ.**

DATE : 23 MARCH, 2023

ORAL JUDGMENT : - (PER - SUNIL B. SHUKRE, J)

. Heard.

2. Rule. Rule made returnable forthwith. Heard finally by consent of the parties.

3. The Petitioner seeks relief in the nature of recording his statement under Section 108 of Customs Act, 1962 in visible but not audible distance of advocate. The Petitioner is also seeking de-sealing of his premises. Learned counsel for the Petitioner submits that in similar matters, this Court has permitted presence of the advocate of the party at visible distance but not audible distance. He also submits that there is no provision under the Customs Act, 1962 authorizing the Custom Officers to seal the premises.

4. Learned counsel for Respondent No.1 submits that the presence of the advocate at visible distance is something which does not come to a person involved in gold smuggling as a matter of right and in the present case, except for bald allegation of some alleged assault upon the Petitioner, there is no material brought on record by the Petitioner justifying the prayer for keeping his advocate present. He also submits that the sealing of

the premises has been done in view of the provisions made in Section 121 read with Section 110 of the Customs Act, 1962 and therefore, there is no need to make any interference in the matter.

5. The first prayer of the Petitioner, in our considered view, is harmless in nature. It only seeks presence of his advocate at a visible distance but not audible distance and there is a background to such a prayer. The Petitioner alleges that he has been assaulted by some of the officers of the Customs Department in the past. This allegation of course has been denied by Respondent Nos. 1 and 2. But, what remains on record, is clear and it is the apprehension entertained by the Petitioner. It is this apprehension, which is required to be taken care of by us in a best possible manner. The best possible manner to deal with it is to allow presence of the advocate at a visible distance but beyond the audible distance. This will also ensure transparency in the enquiry that Custom Officers propose to make with the Petitioner and this is what has been done by this Court in several similar cases in the past and some of them are as under:

- i) Writ Petition No. 4322 of 2022, decided on 12th April, 2022;

- ii) Writ Petition No. 3679 of 2022, decided on 12th April, 2022;
- iii) Writ Petition No. 2470 of 2022, decided on 11th April, 2022 and so on.

We, therefore, find that the first prayer to the extent, it seeks presence of advocate at visible distance but not audible distance deserves to be allowed.

6. As regards second prayer about de-sealing of the premises of the Petitioner, we find that there is no power available with the custom authorities to seal premises of any person, which are nothing but a form of immovable property. Under Section 110 or Section 121 of the Customs Act, 1962 what can be seized and confiscated is the “goods” or movable property. Section 110 and Section 121 respectively empower the customs authorities to seize the goods liable to confiscation and confiscate the sale proceeds of the smuggled goods, which are sold by the person, having knowledge or reasons to believe that the goods are smuggled goods. The word “goods” has been defined in Section 2(22) of the Customs Act, 1962 and it includes (a) vessels, aircraft and vehicles (b) Stores (c) baggage (d) currency and negotiable instruments and (e) any other kind of movable

property.

7. It is thus clear that the seizure of the goods contemplated under Section 110 or Section 121 is only of movable property which is not immovable property. Even otherwise no immovable property can be seized and confiscated, though it can be attached and sold for making recovery of loss to or dues of the government as for example, when done in exercise of the power under Section 142 (1) (c) (ii) of the Customs Act, 1962, but that stage, however, is yet to reach in this case. Therefore, even the second prayer made in the petition deserves to be allowed.

8. In view of above, we see no difficulty in partly allowing this petition and the petition is accordingly allowed.

9. It is directed that if any statement of the Petitioner is to be recorded in terms of Section 108 of Customs Act, 1962, same shall be recorded in the presence of advocate of the Petitioner kept at a visible distance but not audible distance during interrogation. The prayer for videography is, however, rejected.

10. We further direct that the seal affixed to the premises of the Petitioner as described in paragraph 4.1, be removed forthwith by the Respondent No.1.

11. Rule is made absolute in the above terms.

(KAMAL KHATA J.)

(SUNIL B. SHUKRE, J.)