

\$~28

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.M.C. 2869/2022

DIRECTORATE OF ENFORCEMENT

..... Petitioner

Through: Mr. Zoheb Hossain, Counsel for ED

with Mr. Adit Khorana, Mr. Baibhav
and Mr. Vivek Gurnani, Advs.

versus

SATYENDAR KUMAR JAIN

..... Respondent

Through: None.

%

Date of Decision: 10th May, 2023

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (Oral)

1. The present petition has been filed with the following prayers:

“a) Set aside the impugned direction in order dated 31.05.2022 passed by the Ld. Addl. Sessions Judge/Special Judge (PC Act), CBI-24 (MPs/MLAs Cases) RADC, New Delhi in M.No.71/2022 and 72/2022, ECIR/HQ/14/2017, in as much as the Ld. Special Court has directed at Para 26 of the impugned order that “during the time of enquiry/interrogation from the accused, one Advocate

of the accused shall be allowed to remain present at a safe distance where from where he can see the accused but not hear him”.

2. This Court vide order dated 03.06.2022 has passed the detailed order which is reproduced as below:

“1. This petition is filed with the following prayer:-

“a) Set aside the impugned direction in order dated 31.05.2022 passed by the Ld. Addl. Sessions Judge/Special Judge (PC Act), CBI-24 (MPs/MLAs Cases) RADC, New Delhi in M.No.71/2022 and 72/2022, ECIR/HQ/14/2017, in as much as the Ld. Special Court has directed at Para 26 of the impugned order that “during the time of enquiry/interrogation from the accused, one Advocate of the accused shall be allowed to remain present at a safe distance where from where he can see the accused but not hear him”.

2. The learned Trial Court in para 26 of the impugned order dated 31.05.2022 has noted as under:-

“26. The Ld. Sr. Advocate for the accused had prayed that one counsel be assigned who shall be within visible distance of the accused but not audible distance during interrogation which was vehemently opposed by the Ld. SG. However, considering the facts and circumstances, it is directed that during the time of enquiry/interrogation from the accused one Advocate of the accused shall be allowed to remain present at a safe distance where from he can see the accused but not hear him.”

3. Heard.

4. The core issue raised in the matter is - *if the respondent has a right of presence of his lawyer during recording of his statements under Section 50 of PMLA, at a safe distance from him from where the lawyer can see the accused and not hear him.*

5. Both the learned counsels have cited various judgments on this issue.

6. In *Poolpandi and Others vs. Superintendent, Central Excise and Others* 1992 (3) SCC 259, the Court did not find force in the argument 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 shall be violated. The Court held 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 but that cannot be a ground for holding that he has a constitutional right to claim similar luxuries and company of his choice.

7. It was further held 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 are of the view such person should be disassociated

from the atmosphere and the company of person 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.

8. In *Sudhir Gulati vs. Union of India* 1998(45) DRJ (DB), the Division Bench of this Court held:-

*“In view of the aforesaid discussion, we are of the view that the petitioner is accused of an offence in respect of the FIR noticed hereinbefore within the meaning of Article 20(3) and cannot be compelled to be a witness against himself. But the scope of offence under the aforesaid FIR and scope of enquiry under Customs Act, 1962 is different. An enquiry under Customs Act primarily relates to the smuggling of goods. Section 108 confers upon a Gazetted officer of the Customs the powers to summon any person whose attendance he considers necessary to give evidence or to produce a document or any other thing in any enquiry which such officer is making in connection with the smuggling of goods. The person so summoned is bound to attend and to state the truth upon any subject respecting which he is examined or makes statements and produce such documents and other things as may be required. Therefore, the impugned summons cannot be set aside. The petitioner is required to appear and answer such questions and give such information regarding himself which do not tend to incriminate him. **In our view the petitioner is also not entitled to assistance of a lawyer at the time of recording of his statement under Section 108 of the Customs Act.***

9. In *Ramesh Chandra Mehta vs. State of West Bengal* (1969) 2 SCR 461, more specifically para 14 which is as under:

“14. xxx xxxxx In Kathi Kalu Oghad's case the Court merely set out the principles in the light of the effect of a formal accusation on a person, viz., that he stands in the character of an accused person at the time when he makes the statement. Normally a person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an Officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial the offence. xxx”

10. The learned ASG also referred to *Sudhir Gulati vs. Union of India* 1998(45) DRJ (DB); *Sudhir Kumar Aggarwal vs. Directorate General of GST Intelligence* 2019 SCC OnLine Del 11101; *Pawan Kumar @ Pawan Arora vs. Union of India and Others* in W.P.(CRL.)4424/2017 as also *Bhag Singh vs. Union of India and Anr.* 2018 (3) RLW 2102 (Raj.) and *Anant Brahmchari vs. Union of India and Ors.* ILR (2012) III Delhi 682 wherein during interrogation under The Customs Act; The GST Act, NIA Act, the presence of counsel was refused during investigation and recording of the statement. Reference was also made to *Senior Intelligence Officer, Directorate of Revenue Intelligence v. Jugal Kishore Samra* (2011) 12 SCC 362 which though relied on *Poolpandi's* case (supra) but granted permission only in the special facts and circumstances of the case viz the respondent in

such case was suffering from heart disease and his brother was subject to torture as alleged.

11. The learned senior counsel for the respondent, however, submitted this facility is allowed time in and time out and has referred to various cases viz. *Vijay Sajani and Another vs. Union of India and Another* (2019) 18 SCC 819; *Mahender Kumar Kundia vs. Union of India and Another* (2015) 15 SCC 419; *Rohit Sakhuja vs. Deputy Director, Directorate of Revenue Intelligence* (2019) 18 SCC 821; *Rajinder Arora and Ors. vs. Union of India and Others* passed in W.P.(Civil) 389/2010. However, these judgments did not consider Poolpandi's case (supra). Reference was though made to Assistant Director (PMLA) Directorate of Enforcement vs. Gagan Dhawan SLP (CRL.) Diary No.36376/2017 but it was primarily a *consent order*, as is evident from his first sentence of page 21 of the compilation of the respondent.

12. Reference was also made to *Rohit Wason vs. Additional Director General Directorate of Revenue Intelligence and Ors.* W.P.(Crl.) 342/2019, pronounced in *February, 2019* but in view of *Sandeep Jain vs Additional Director, DRI, Review Petition No.387/2019 in W.P. (C) No.9561/2019* decided on 10.12.2019; the law in *Rohit Wason* (supra) cannot hold the field. Even otherwise, in *Rohit Wason's* case serious apprehensions were raised as one of the employee of the company was made to take

off his shirt leading to humiliation and there was allegations of high handedness by the Investigating Agencies.

13. The learned senior counsel for the respondent also referred to *Anil Vasant Rao Deshmukh vs. Directorate of Enforcement through its Director and Others* 2021 SCC OnLine Bom 3641 but it does not consider the alternative statement of Mr. Salve as considered in *Poolpandi's case* in para 3 of the decision, was that he is entitled to insist upon presence of lawyer when he is questioned by the officers of the department, which was rejected by the Hon'ble Supreme Court in *Pool Pandi's case*. Even otherwise, *Anil Vasant Rao* (supra) has taken a contrary view from the Division Bench of this Court in *Sandeep Jain* (supra) and therefore the view taken by the Division Bench of this Court needs to be followed.

14. Thus in view of the above since there is neither any *FIR* nor a *complaint* against the respondent thus he *cannot* as a matter of right claim to have the presence of his lawyers during the course of recording of his statement per *Ramesh Chander Metra* (supra) and *Anant Brahmchari* (supra). Even otherwise, *admittedly*, his entire recording of statement is *videographed* and *audiographed* which certainly would dispel the apprehension of any coercion, threat to the respondent. Even otherwise, in *Sandeep Jain* (supra) the Division Bench of this Court held the apprehension of coercive measures being employed need to be *real* and *like so* that the principle of *presence of an advocate, at visible, but not audible*

distance be applied. *Sandeep Jain* (supra) has relied upon *Poolpandi* case and have also dealt with *Birender Pandey vs. UOI* in W.P.(CRL.) No.28/2012 and held the presence of the advocate was allowed in *Birender Kumar Pandey* (supra) during the recording the statement under Section 108 of the Act only because the petitioner therein was apprehensive that coercive attempts can be made to extort confession from them. *Sandeep Jain* (supra) rather went on to say if a litigant in a particular case is able to produce credible material to indicate the *real* and *live* apprehension of a possible threat, coercion being employed, while recording his statement, *this Court can always permit at visible, but not an audible range during the course of recording of the statement* but since there is no apprehension raised in the present matter, hence as a matter of right such direction ought not to have been given in the recording of statement. Thus, the impugned direction in para No.26 of order dated 31.05.2022 stands stayed. Crl.M.A.No.11846/2022 stands disposed of.

Crl.M.C.No.2869/2022

15. List on 24.08.2022.”

3. Learned counsel for the petitioner submits that as of now the investigation has been completed and the prosecution complaint has also been filed. It has also been submitted that even the respondent has not filed the counter in this case and not coming forward to contest the matter.
4. The detailed order has been passed by this Court on 03.06.2022 as

referred above citing the law and the facts. In view of the fact that the investigation has already completed and the respondent has chosen not to come forward to contest the same. I consider that there is no impediment in confirming the order dated 03.06.2022.

5. Therefore, the petition is allowed in terms of order dated 03.06.2022.
6. In view of the above, the present petition is disposed of.

DINESH KUMAR SHARMA, J

MAY 10, 2023/Pallavi

