

(1988) 12 BOM CK 0057

In the Bombay High Court

Case No : Criminal Application No's. 2393 to 2397 of 1988

Chenaji Narsingji

APPELLANT

Vs

Addl. Collr. of Cus. (Preventive)

RESPONDENT

Date of Decision : 27-12-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 438
Penal Code, 1860 (IPC) — Section 465, 471

Citation : (1989) 43 ELT 234

Hon'ble Judges : V.S. Kotwal, J

Bench : Single Bench

Judgement

1. Heard Shri N. H. Gursahani, the learned Sr. counsel for the petitioners, Shri M. K. Patwardhan, the learned senior counsel for the Customs Department and Smt. K. D. Ranadive, the learned Public Prosecutor for the State, in all the five petitions.

2. Perused the relevant papers and various affidavits filed by parties.

3. For obvious reasons all the five petitions can be disposed of by this common order without causing prejudice to either of the sides because practically identical allegation and identical arguments are advanced and the reasons in respect of all the matters would also be more or less identical. The learned counsel for both the sides are also agreeable to this process being adopted. The petitioners in all the petitions are Bullion Merchants having their jewellery shops located, in different areas of this metropolis. They are doing their business for several years and that has become practically family business from generations. They possess the requisite licences under the Gold Control Act and other licences. During the course of business they have been purchasing gold ornaments from various customers for which they have been issuing vouchers, receipts, etc. as also making requisite payments towards the gold ornaments which on many occasions used to be melted and those entries are made in various registers. In effect, it is alleged that on November 4, 1988 the officers attached to the Gold

Control Wing of Customs Department visited all these shops and verified the record and actually took charge of the entire record containing registers, vouchers, etc. This was on the intelligence received and the suspicions generated that these people have been indulging in clandestine activities by purchasing gold from dubious sources and creating camouflage by showing that ornaments have been purchased from various customers and those have been melted and for that purpose according to the Department some bogus vouchers have been prepared and there has been flagrant breach of the rules and the provisions of the Act in the matter of identification of these customers and a practice has been adopted of not making payments through cross cheques so that these payments are shown to have been made but actually siphoned back to themselves and it is apprehended that many of the persons mentioned in the said vouchers may even be non-existent or fictitious. It is on the basis of this apprehension that preliminary examination is in progress and the Department insists to verify all the angles whereafter a conclusion one way or the other would be reached.

4. The petitioners on the other hand apprehend that their arrest even at this stage especially because of the experience in respect of other gold merchants similarly situated who have been arrested earlier though they have been granted bail by this Court after they have been detained in custody for quite some time.

5. The learned counsel for the petitioners strenuously contended that in the first instance only preliminary inquiries are in progress and at present there is not tangible material to justify the arrest. Secondly it would take quite a substantial period even months together to get some clarity in the picture even for the Department and it would be unfair to detain the petitioners in custody. A grievance was made that false allegations are levelled against the petitioners because all the persons named in the vouchers are not non-existent and if given an opportunity the petitioners would co-operate with the officers and make them to contact those persons and therefore ultimately even if an offence is disclosed it would be technical. All these contentions were countered by Shri Patwardhan, the learned counsel on behalf of the Department, who has filed certain charts and also affidavits and sought to place reliance on certain circumstances.

6. The structure of the allegations is indicated and therefore need not be repeated. Even looking to the nature of the allegations it becomes manifest that the inquiry is only at the preliminary stage because except a bold suspicion there is not tangible material worth the name available before the officers even to prima facie indicate the involvement of the petitioners and to hold that all the transactions as reflected in the vouchers and registers are manipulated. This is more so, since everything is yet to be rectified and is practically in nebulous form. It is also stated even on behalf of the Department that they would make endeavours to contact those persons whose names are verified in the vouchers and registers and in some event summonses will have to be issued to them to appear before the officers and it is thereafter that even some tentative opinion can be formed as till then it cannot be even opined that those persons are

fictitious. If that be, then in the nature of things this is a time consuming process because if the summonses are issued it may be that in some cases the persons though in existence may not be available or may not receive the summonses and therefore there will have to be repeat performance of re-issuance of summonses. There are several vouchers involving several persons and vast extent indicates an equally vast span of time that would be consumed in this exercise and unless that is complete nothing would be done even as per the Department.

7. It is then worth noting that in some case the Department itself comes out with the story that at least a few out of those persons who were tried to be contacted had appeared before the officers and made categorical statements affirming the genuineness of those transactions and thereby conceded that they did sell the ornaments to these petitioners. This is boldly reflected in the affidavit filed by the Superintendent of Customs. Thus in one petition it is mentioned that attempts were made to serve summonses on 133 sellers when it is indicated that 22 sellers are yet not contacted and may be fictitious whereas 7 sellers came to the Department and confirmed the transactions as reflected in the vouchers. In another case it is mentioned that attempt was made to serve summonses on 32 sellers when 4 were found to be non-existent. However, one came forward and confirmed the transaction. Similar pattern is followed in all other cases. The vast extent is indicated when it is mentioned in one case that there are more than 5000 vouchers in one bunch and now all these persons are to be contacted either by issuance of summonses or personally and this is bound to consume several months. This pattern therefore strongly indicates that the allegations about the persons being fictitious cannot be accepted at this stage especially when it is contra-indicated in some matters when some of the persons actually came forward and confirmed the transactions. Merely because in one round a few of the customers are not contacted that ipso does not justify practically jumping to the conclusion that they are non-existent.

8. Reliance is placed by Shri Gursahani, the learned counsel, on the provisions of Section 100 of the Gold (Control) Act and the Rules thereunder when he submitted that the prescription under the said provision would in the first instance be imperative so as to give opportunity to the petitioners to establish the genuineness of the transactions even by producing those persons before the officers and it was also indicated as an alternate plank that even de hors thereof an opportunity of this kind is deserved to be granted to the petitioners in the interest of justice. This Court in another petition has indicated that apart from the technicality as to whether the said prescription is mandatory or not still fair play and justice requires that such an opportunity should be given to such accused persons which on the contrary would serve the ends of justice rather than hampering and by such demonstration the genuineness of the transaction can well be established. This appears to be the spirit of the said provision and nothing would be lost to the Department if such an opportunity is given to the petitioners. The observations made in those petitions in this field are being reiterated and relied upon and can be read in this proceedings also which

therefore need not be reproduced in details.

9. In that behalf it is mentioned positively in the affidavits filed by all the petitions that they are even now prepared to demonstrate the genuineness of those transactions and can even endeavour to produce all those persons who are available before the officers who would confirm the transactions and if such an opportunity is given the entire cloud of suspicion can be wiped out. That offer is very boldly reflected in the affidavits and the bona fide of that plea can hardly be doubted at this stage and in fact those are not doubted by the Department also.

10. It is also apparent that all the relevant documents were seized on 4th of November 1988 and enough time has elapsed in between to examine and scrutinise the documents. In the nature of things the investigation can well be progressed in more effectiveness without the custody of the petitioners whereas the custody of the petitioners would be more or less a formality. It is accepted that the offences under the Gold (Control) Act by themselves normally would not require the custody of the petitioners and it is only in an exceptional case that the Department would insist on such custody. No such exceptional ground has been spelt out under the circumstances. Especially when the petitioners are very much willing to co-operate with the Investigating Officers as accepted by them on oath in every manner and therefore their remaining out would not hamper the investigation but the same effectively can well be achieved. The only ground therefore alleged is that they are likely to tamper with the evidence. This is too spacious a ground to be accepted under the thrust of circumstances which hardly requires any further probe. The petitioners obviously cannot afford to abscond because they have landed property in Bombay and they have deep and expanded roots in this metropolis. They are staying with their families and they are permanent residents of Bombay. They are doing this business for generations.

11. It is true as contended by the Department that provisions under certain Rules under the Gold (Control) Act including Rule 3 have not been complied with inasmuch as it is prescribed that the payment should be made by cross cheque and if it is not followed then certain precautions are to be taken regarding the identity of the customers and on both the counts there has been a breach. According to the Department this was done deliberately because the amounts are siphoned back to them. This would however very much depend on the basic foundation about the genuineness of the transaction which is yet to be explored. In countering, it is indicated on behalf of the petitioners that they have taken all the necessary precautions and they can demonstrate by physical verification of the various transactions, though according to them by chance some such persons if not actually available now, it may not be presumed about the non-genuineness of the transactions. It cannot be said at this stage that officers of the Department are proceeding on a wrong track in probing into this angle because they apprehend that this gold could have been acquired through dubious models and from dubious sources and if that be then the purchasers are equally guilty as the sellers and according to the Department the camouflage is to be un-masked

and they further contend that it is not a case of mere technical or accidental breach of the Rules but it is deliberate so as to facilitate to achieve the object. This no doubt would require anxious consideration though at a later appropriate stage and not at the inception of the proceeding, especially because it would require adequate and full data to conclude one way or the other. However, notwithstanding that feature that aspect cannot be assumed but is yet to be established and for establishing the same several hurdles are to be crossed with a time consuming exercise and further for that purpose also the custody of the petitioners may not be necessary. As stated, it is repeatedly indicated even by the Department that only preliminary inquiries are in progress and it will have its own impact. Any way, it would not be proper to express any opinion in this field at this stage which is still at the threshold especially when no opportunity is yet afforded to the petitioners to explain that situation. Even the Scheme of the Act and the Rules thereunder suggests about the requirement of affording opportunity to the petitioners at different stages and may be even at the threshold and even on first principle such necessity can be upheld.

12. Shri Patwardhan, the learned counsel for the Department, made a grievance that in some cases out of these five, a common pattern is followed which has a dubious feature inasmuch as though cheques have been issued in the name of some of the customers still all the cheques are lodged in the account of one particular firm and this according to the learned counsel could not be just a coincidence but it is a part and parcel of the strategy which had siphoned back the amounts to the petitioners' firm. This no doubt would require a serious consideration but its dimensions are diluted by an affidavit which makes the position clear though in favour of the petitioners. It is asserted that the said firm has been dealing in such exercise by making cash payment to the persons as certain cheques are assigned to them and lodged the said cheques in their own account and for which purpose certain commission is deducted and it is for that reason that many of the cheques are lodged in the account of that firm. It is then very striking to note that this is not based on any theoretical assumption or any verbal statement but that firm has been maintaining accounts and registers wherein each transaction of such deposit in the bank has been entered and those have been audited and the bank accounts are also available in that behalf. Even the amounts of granting commission have also been mentioned and the details indicate the names of the customers and the amounts in question. It can not be said that these documents were manufactured subsequently because they are running accounts for years together and the genuineness of the same has not been doubted at least at this stage on behalf of the Department. The contention of the Department that the said firm is a sister concern of the firms of some of the petitioners and some of the partners being common is stoutly denied on affidavit and the names of partners qua different firms make the position clear that the said firm is not associated with the firms of the petitioners. Consequently, the sinister implication sought to be contributed on account of such mode of negotiating the said cheques loses all its significance. The

contention of the petitioners in that behalf at least at this stage would be acceptable though the Department cannot be precluded to further investigate in that field.

13. It is not necessary to have a further probe in that behalf. Consequently without undermining the seriousness of the offences and even without discarding the thinking process as adopted by the Department in order to carry the investigation to achieve the particular object for reaching the conclusion, still the thrust of circumstances is such that it would not warrant taking the petitioners in custody. It is true that bail is claimed in anticipation of arrest and the Department does not get even one day's custody. Normally in serious offences the custody at least for some period would obviously become necessary and the offences under this Act in exception cases also may justify the same. However, this depends on the facts and circumstances of each case and no principle can be placed in straight jacket. Practically the entire material including the relevant documents are already in possession of the Department. They are also posted with the knowledge of the petitioner's main contention qua the said documents. They have started investigating on that basis and examining the documents. Consequently therefore all the necessary data is made available and the effective investigation under the circumstances and in view of the said material can be carried and actually is being carried without there being any necessity for the custody of the petitioners. Restricting to the facts and circumstances of those cases in my opinion a sound case for bail in anticipation of arrest u/s 438 of the Code of Criminal Procedure has been made out.

14. All the points are left open and there is no final expression of opinion on merits.

15. It is contended on behalf of the Department that in that event some restrictions should be imposed which requested which request is quite reasonable and can well be granted which is to the petitioners which would protect the interest of the Department and would also serve the interest of justice. The various charts and the affidavits as also the documents which really embrace all these contentions need not be discussed in details any further in this proceeding.

16. In the event of their arrest in respect of the inquiry and/or investigation that is being carried on by the Customs Department attached to the Gold Control Wing Bombay relating to the offences under the Gold (Control) Act and Rules thereunder as also Sections 471, 465 and allied offences under the Indian Penal Code relating to certain sale transactions as reflected in various vouchers and registers purporting to the sale of ornaments which documents have been attached by the Department on 4th of November 1988 from their respective shops, all the petitioners in all the five petitions shall be enlarged on bail each in the sum of Rs. 1,00,000/- with one solvent surely for the like amount with an option of furnishing two sureties of Rs. 50,000/- each.

17. The following conditions would be annexed to be order, viz. -

(i) All the Petitioners shall co-operate with the Investigating Officers in the matter of investigation of these cases in all reasonable manner.

(ii) All the petitioners shall attend the office of the Collectorate of Customs (Preventive), Gold Control, Bombay, on every Friday during office hours for the purpose of investigation of these cases.

(iii) In addition thereto all the Petitioners shall make themselves similarly available before the Investigating Officer at all other reasonable time during office hours if so strictly required for the purpose of investigation of these cases.

These two conditions about reporting before the Investigating Officer shall remain in force only for a period of two months.

(iv) All the Petitioners shall not leave the city limits of this metropolis without the permission of the Investigating Officers and if an emergency arises then they shall before leaving intimate to the concerned Officer. This condition shall remain in force only for a period of one month.

(v) They shall not indulge in any manner to tamper with the prosecution evidence.