(2011) 04 AHC CK 0011

In the Allahabad High Court

Case No : Bail No. 8233 of 2010

Kishan Lal Chawala — APPELLANT

Vs

Union of India (UOI) — RESPONDENT

Date of Decision : 13-04-2011

Acts Referred:

Customs Act, 1962 — Section 104, 108, 11, 111, 119
Penal Code, 1860 (IPC) — Section 193, 228

Citation : (2011) 268 ELT 480

Hon'ble Judges : Virendra Kumar Dixit, J

Bench : Single Bench

Judgement

Virendra Kumar Dixit, J.—Heard Sri G.K. Sarkar, Advocate assisted by Sri Saurabh Yadava, learned Counsel for the accused-applicant and Sri Dipak Seth, learned Counsel for the Union of India and perused the relevant documents on record.

2. The accused-applicant is involved in Case Crime No. 29 of 2010, Under Sections 132 and 135(1)(A) & (C)/and 104 of the Customs Act, 1962, DR1, Gomti Nagar, Lucknow.

3. According to the prosecution story, in brief, that the firm of the accused-applicant M/s. Ruby Impex, Jalandhar had imported 8 containers of Scrap from M/s. Durgesh International, USA, owned by Vicky Chawala, the son of the accused-applicant containing Lead Scrap a restricted item by mis-declaring the same as Zinc Scrap ''Saves'' and also huge quantities of used/empty cartridges casings and 3001 live cartridges for which there is absolute prohibition vide Notification No. 40 CUS dated 6-6-1970 issued u/s 11 of the Customs Act, 1962, as well as vide paragraph 2.32 of the Foreign Trade Policy 2009-2014.

4. Submission of the learned Counsel for the accused-applicant is that the accused-applicant is a bona fide importer having IEC issued by the DGFT by the competent authority under the Foreign Trade (Development and Regulation) Act, 1992. It is further submitted that earlier the firm M/s. Ruby Impex was in the

name of Vicky Chawala, the son of the accused-applicant and the accused-applicant was the authorized signatory of the said firm and on 12-4-2010 his son Vicky Chawala has transferred the firm in the name of accused-applicant and since then he has become the proprietor of the firm M/s. Ruby Impex. The accused-applicant was not the importer of the goods during the relevant time. It is also submitted that the accused-applicant at best may be alleged only in respect of one consignment for which Bill of Entry has been filed and the alleged violation of Section 111(m) and 111(f) of the Act cannot be sustainable in the absence of any Bill of Entry filed in respect of remaining 7 containers. The accused-applicant has filed only one Bill of Entry on 29-12-2009 in respect of one container. The said container was examined by the Customs Officers at ICD Loni and were allowed clearance after proper assessment to assessable value of Rs. 16,98,595/- and custom''s duty of Rs. 3,16,347/- on the goods. The goods in the import consignment was not loaded under the supervision of the importer or even by the exporter. The same was loaded directly from the stock yard and his inspection certificate in this regard has been issued by the DGFT (Govt, of India) approved authority (SI. No. 98 of the list of approved Agencies). Hence, the wrong description of imported goods cannot be attributed to the accused-applicant. The wild allegation of organized syndicate for importing prohibited goods like Lead Scrap, Live Cartridges and Empty Cartridges casings are beyond the evidences on record. The said goods, at best liable to confiscation u/s 111(d) of the Customs Act and for which the department could have passed adjudication order by imposing redemption fine and penalty for releasing the goods on payment of duty as had been done regularly in similar cases. In fact the customs authorities are well aware being confiscate of import of scrap in which many times cartridges, shells etc. are loaded by the exporters and in such cases no action has been initiated under the Arms Act. In this particular case for the best reasons known to them, the Department has also not taken any action against the accused-applicant under the Arms Act. It is also submitted that to attract the provisions for the punishment u/s 135(l)(i)(A) of the Act, the goods should have market value exceeding rupees one Crore. But the accused-applicant at best can be implicated for one container which is not valued for more than 20 lacs. It is also submitted that it is a well settled law that there cannot be a seizure or confiscation of goods for which reasons for amendment of IGM has already been made and pending. The provisions of Section 46 of the Customs Act requires Bill of Entry to be filed by the importer and if he does not file any Bill of Entry, the Department is at liberty to take action u/s 48 of the Customs Act. But there is no power with the Customs Officers to force anybody to file Bill of Entry. If the Officers are of the bona fide plea that there has been a violation of the Arms Act, the matter should have been forwarded to the concerned police authorities to take appropriate action under the Arms Act. But the so-called live cartridges were never forwarded to the police for investigation. The goods were cleared by the proper Officer of Customs under the provisions of the Customs Act, 1962, under a proper B/E on payment of appropriate duty and therefore the seizure of the goods and arrest of the accused-applicant is arbitrary, unreasonable and illegal. It is further submitted that the exporter of the goods in USA by the letter dated 8-1-2010 had intimated that the containers detained by the DRI as mentioned-above were meant for other destination but not for present accused-applicant. Hence, the exporter requested for return of the said containers. On receipt of this letter, the accused-applicant through his Advocate requested the Customs authorities verbally to allow re-export and change in IGM. But the customs authorities declined to such request and even decline to take request through letter in this regard and ultimately on 9-3-2010 the Advocate sent the request by post. In the event of exporter''s request for returning of the goods for which no payments were made by the accused-applicant, so it was not justified on the part of the DRI to seize the remaining 7 containers. The permission of re-export of the goods has not been agreed by the Customs authorities and they themselves examined the containers. It is further submitted that until Bill of entry is filed declaring the import of goods, there cannot be any allegation of mis-declaration and hence, the goods cannot be confiscated u/s 111 (d), & lll(m) of the Customs Act, 1962. Further the importer is required to file Bill of Entry u/s 46 of the Customs Act, 1962, but for that no time limit is prescribed and he cannot be forced upon to file B/E which the importer does not want to clear. It is further submitted that the accused-applicant has been falsely implicated in this case on the basis of fabricated and concocted story. The offences so alleged against the accused-applicant do not attract the case u/s 135(1)(A) & (C) and 104 of the Customs Act rather the nature of offence falls u/s 135(i)(ii) of the Act for which imprisonment prescribed is upto three years term and the said offence is bail able offence. The accused-applicant has received pre-shipping Inspection Certificate issued by the Overseas authority in terms of Para 2.32(i) of the Hand book of Procedure (Vol. 1) in respect of the container for which Bill of Entry has been filed. It is further submitted that the Panchnama dated 16-3-2010 when the Container No. HLXU 2208470 was first examined on 12-3-2010, revealed only one live cartridge. The said container was re-examined by the department on 12-7-2010 and carried on 13th, 14th, 15th, 16th, and 17th, July, 2010 in this regard, it is to be noted that only one Panchnama has been drawn on 17-7-2010 for which the proceedings took place on six consecutive days and in the said proceedings neither the applicant nor any of his representative was present. It is further submitted that the Panchnama does not mention the presence of any expert authority like Forensic Expert or officers of CRCL, then who has certified the goods to be live cartridges it is abundantly clear that in any way DRI officers cannot said to be expert to identify the same as ''live cartridges''.

5. It is further submitted that the accused-applicant cannot be held liable for the various reasons. Firstly, no Bill of Entry of 7 containers has been filed, so there is no mis-declaration. Secondly, the IGM and Bill of Ladings are the documents generated by the shipping line. Thirdly, the applicant vide his letter dated 9-3-2009 clarified to the customs authorities, while making request for re-export and the same was denied. Fourthly, a clear clarification by the exporter regarding direct loading of the containers from the shipyard absolves the applicant for mis-

declaration in the goods. Fifthly, it is clarified in foregoing paras, that DR Is claim of recovery of live cartridges in the scraps is not tenable because no cartridges found to be live, irregularities in the proceedings and drawls of Panchnama etc. and contradictory stands taken by DRI as revealed from various documents. Sixthly, the recovery of lead scraps instead of brass scrap is not a grave offence. Import of lead scrap is allowed provided the importer is having a license for that. It is further submitted that in compliance of the summons the accused-applicant appeared before the summoning authority on 14-9-2010 in the office of DRI and his statement was recorded u/s 108 of Customs Act, 1962, before the Senior Intelligence Officer and had to write the statement under duress and mal-treatment and was detained in the office overnight and has been shown arrest on the next day. The said statement u/s 108 of Customs Act was a dictated one tendered under duress. The applicant is a proprietor of M/s. Ruby Impex having valid IEC for import. The Bomb disposal Squad, Ghaziabad, has conducted the investigation and examination of containers from 12-7-2010 to 17-7-2010 (but drawn Panchnama only on 17-7-2010) and found that there was no explosive Bomb in the said container and has certified that no explosive material has been found in the Containers as averred in para 17 of the affidavit. The applicant has cooperated in the investigation and as dutifully complied orders/directions of the DRI officers. The subject goods have already been placed under seizure and the relevant documents/records are also in the custody of DRI, therefore, there is no apprehension of the accused-applicant influencing the investigation of the instant case in any manner. The accused-applicant is aged about 75 years and is suffering from various serious ailments as averred in para 32 of the affidavit. The accused-applicant has no previous criminal history as averred in para 33 and is languishing in jail since 15-9-2010 as averred in para 26 of the affidavit.

6. In support of his arguments learned Counsel for accused-applicant has relied upon the case laws; (1) Union of India and another Vs. Sampat Raj Dugar and another, (2) Joginder Kumar Vs. State of U.P. and others, (3) Mirah Exports Pvt. Ltd. Vs. Collector of Customs, (4) Union of India v. Pacific International Traders reported in 2002 (143) E.L.T. 187 (S.C). (5) Pacific International Traders Vs. Union of India (UOI), (6) Chandra I. Kriplani v. Commissioner of Customs ACC, Mumbai reported in 2002 (149) E.L.T. 537 (Tri. - Mumbai). (7) Court on its Own Motion v. C.B.I reported in ILR (2004) 1 Delhi 47 . (8) Subhash Choudhary Vs. Deepak Jyala, (9) Sita Ram Aggarwal Vs. Customs, (10) Commissioner of Customs and Excise, Goa v. Kabul Textiles (LLC) reported in 2006 (206) E.L.T. 1173 (Bom). (11) Alpesh Arvind Lal Gandhi and Ors. v. Union of India and Ors. reported in 2006 (75) RLT 5 (S.C). (12) Commissioner v. Kabul Textiles reported in (LLC) 2007 (218) E.L.T. 122 (S.C). (13) Sangit Krishna Kumar Agrawal v. Union of India reported in 2007 (219) E.L.T. 143 (Bom.). (14) Commissioner of Customs, Calcutta v. South India Television (P) Ltd. reported in 2007 (214) E.L.T. 3 (SC). (15) Avinash Bhosale v. Union of India arising out of SLP (Cri.) No. 4421 of 2007. (16) Commissioner v. Chandra I. Kriplani reported in 2008 (227) E.L.T. 68 (S.C). (17) Sultan Kamruddin Dharani Vs. The Union of India (UOI), The

Deputy Director, DRI and The State of Maharashtra, (18) Commissioner of Customs, Mumbai v. Foto Centre Trading Co. reported in 2008 (225) E.L.T. 193 (Bom.). (19) Lal Kamlendra Pratap Singh Vs. State of U.P. and Others, (20) Directorate of Revenue Intelligence Vs. Moni and Another, (21) 2010 (258) ELT 441 (22) Kulbhushan Goyal v. Joint Commissioner, Customs. (23) 2004 (92) ECC 709 (24) S.G. Steels v. Commissioner of Customs, New Delhi reported in 2007 (215) E.L.T. 64 (Tri.-Del.). (25) 2005 (186) ELT 575 (26) Sukarm Ispat Co. v. Commissioner of Customs, Kandla reported in 2009 (241) E.L.T. 122 (Tri-Ahmd). (27) Vinayaka Alloys Pvt. Ltd. v. Commissioner of Customs (Imports), Chennai reported in 2009 (246) E.L.T. 540 (Tri-Chennai). (28) Samsara Shipping P. Ltd. v. Commissioner of Customs, New Delhi reported in 2008 (227) E.L.T 206 (Tri-Del.). (29) Global Marine Agencies v. Commissioner of Customs, Jaipur reported in 2009 (243) E.L.T. 615 (Tri-Del). (30) 2007 (118) ECC 310 (31) Commissioner of Customs (ICD), New Delhi v. Valley Irona and Steel Co. Ltd. reported in 2006 (203) E.L.T. 55 (Tri-Del). (32) 2006 (108) ECC 633 (33) Arya Alloys Pvt. Ltd. v. Commissioner of Customs ICD, New Delhi reported in 2009 (235) E.L.T. 542 (Tri-Del). (34) Shree Extrusions Ltd. v. Commissioner of Customs, Kandla, reported in 2009 (238) E.L.T. 814 (Tri. Ahmd). (35) A.R. Casting Pvt. Ltd. v. Commissioner of Customs, New Delhi reported in 2006 (200) E.L.T. 411 (Tri-Del). (36) 2005 (99) ECC 509 (37) Commissioner v. Subhash Chandra Rastogi reported in 2010 (257) E.L.T. 135 (All). (38) Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar, (39) Anil Mahajan and Another Vs. Union of India (UOI) and Another, (40) G.L. Didwania and Another Vs. Income Tax Officer and Another, (41) Seiko Brushware (India) v. Directorate of Revenue Intelligence reported in 2009 (248) E.L.T. 156 (Del). (42) Medisphere Marketing Ltd. Vs. Inspector Customs Preventive, (43) Ashok Manufacturing Company Pvt. Ltd. Vs. C.K. Moorjani, (44) Apex Recycling Pvt. Ltd v. Commissioner of Central Excise, Delhi-I, reported in 2008 (230) E.L.T. 599 (Tri-Del). (45) 2005 (99) ECC 509 . (46) Commissioner v. Subhash Chandra Rastogi reported in 2010 (257) E.L.T. A135 (All.). (47) The Assistant Collector of Central Excise, Rajamundry Vs. Duncan Agro Industries Ltd. and Others, (48) Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and Another, (49) Asst. Collector of Customs (Pre.), Bombay v. Ahmed Abdulkarim reported in 2009 (247) E.L.T. 97 (Bom.). (50) Vinod Solanki Vs. Union of India (UOI) and Another, Raj Kumar Damani Vs. Union of India (UOI), . (52) Gipoint Development Limited Vs. Collector of Customs, Madras, Chaudhary International v. Collector of Customs, Bombay reported in 1999 (109) E.L.T. 371 (Tribunal). (54) J.B. Trading Corporation Vs. Union of India, (55) Ashwin S. Mehta v. Commissioner of Customs, Mumbai reported in 2006 (197) E.L.T. 386 (Tri.-Mumbai).

7. Learned Counsel for the Union of India has strongly opposed the prayer for bail and submitted that on the basis of Intelligence developed by the Officers of DR1, Zonal Unit, Lucknow that the accused-applicant, proprietor of M/s. Ruby Impex, Jalandhar, is engaged in illegal import of goods (Lead Scrap) a restricted item by mis-declaring the same as Zinc Scrap ''Saves'' in the documents

resulting in Consequential Under Valuation at ICD, Loni, Ghaziabad. He has mis-declared the goods imported by him from the exporter who is his own son Vicky Chawala, proprietor of the supplier firm M/s. Durgesh International, New Jersey, USA. It is further submitted that the firm of the accused-applicant i.e. M/s. Ruby Impex, Jalandhar had imported eight containers of Scrap from the aforesaid M/s. Durgesh International, USA containing Lead Scrap a restricted item for import in India. That the Bill of Entry No. 004686 dated 29-12-2009 pertaining to only one container Bearing No. UACU-3244414 was filed by the importer, accused-applicant, proprietor of M/s. Ruby Impex, at ICD, Loni along-with the relevant invoice, the bill of lading etc. and the description of the goods was declared as Zinc Scrap as per ISRI ''Saves'' in the special Bill of Entry and related documents. On examination the said container was found to contain lead scarp, mis-declared as Zinc Scrap ''Saves'' in the import documents. It is further submitted that despite repeated requests to persuade the importer/accused-applicant to file Bills of Entries of the remaining 7 containers and get the goods examined but neither the importer nor his authorized representative appeared for examination of the goods of the aforesaid remaining seven containers nor he filed any Bill of Entry in respect of the aforesaid containers. That on examination of remaining containers the Lead Scrap was found in the form of lead cables, sheets, weights etc. and the Zinc Scrap was present in a very small quantity meant only to conceal the Lead Scrap during first hand examination of the container. It is further submitted that on examination of one of the said Containers bearing No. HLXU 2208470 declared to contain Brass Scrap, huge quantities of used casings of cartridges and live cartridges of different bore and make were found kept concealed beneath the Brass Scrap layer. It is also submitted that the accused-applicant is fully aware of the fact that the contents of the containers imported by him were not Zinc Scrap but Lead Scrap which is restricted item and live cartridges/empty cartridges casings which are prohibited items for import and this fact has been admitted by the accused-applicant in his statement recorded u/s 108 of the Customs Act, 1962.

8. It is further submitted that in as much as in all the documents whether the Bill of Entry submitted by him or Bill of lading and the goods de-dared in IGM (Import General Manifest) by the exporter, the goods were shown as "Zinc Scrap" and ''Brass Scrap'' while in fact the goods illegally imported found in the containers were Lead Scrap and 3001 Live cartridges and 15,198.07 Kgs. empty shells of cartridges as detailed in paragraph 16 of the complaint for which there is absolute prohibition vide Notification No. 40-Cus., dated 6-6-1970 issued u/s 11 of the Customs Act, 1962, as well as vide paragraph 2.32 of the Foreign Trade Policy 2009-2014. The accused-applicant imported the Lead Scrap a restricted item and the same can only be imported after fulfilling certain conditions under Rule 13 of the Hazardous Wastes (Management, Handling and Trans-boundary Movement) Rules, 2008 the import and export of Hazardous Wastes for disposal from any country into India are prohibited. However, the import and export of Hazardous Wastes specified in Schedule-Ill for recycling, recovery and reuse is

regulated in accordance with the conditions laid down in the said Schedule. Hence, the pre-condition for importing the Lead Scrap as per Rule 14(2): Shall require prior informed consent of the country from where it is imported or exported to (ii) Shall require the license from the Directorate General of Foreign Trade and (iii) Prior written permission of the Central Government. Undisputedly none of the above conditions were fulfilled by the accused-applicant, Kishan Lai Chawala.

9. It is further submitted that the value of the goods so illegally imported is assessed as Rs. 1,18,73,165/- only. It is also submitted that the accused-applicant in his statement recorded u/s 108 of the Customs Act in reply to Question No. 17 he has stated that earlier the firm M/s. Ruby Impex was in the name of Vicky Chawala and he was the authorized signatory and from the last year his son has transferred the firm in his name. It is further submitted that the proceedings u/s 108 of the Customs Act are judicial proceedings within the meaning of Section 193 and 228 I.P.C. and the statement recorded u/s 108 of the Customs Act are admissible in evidence.

10. Learned Counsel for the Union of India has relied upon the case laws; (1) K.I. Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin, (2) Surjeet Singh Chhabra Vs. Union of India and others, and (3) Naresh J. Sukhawani Vs. Union of India,

11. The points pertaining to nature of accusation, danger of accused absconding or fleeing if released on bail, character, behavior and position of the accused, severity of punishment, reasonable apprehension of tampering the witnesses, prima facie satisfaction regarding proposed evidence and genuineness of the prosecution case were duly considered.

12. The allegations against the accused-applicant are that he had illegally imported the Lead Scrap a restricted item by mis-declaring the same as Zinc Scrap ''Saves'' in the documents and also the live cartridges as well as huge quantities of used empty cartridges casings. The Lead Scrap is liable to confiscation u/s 111(d) and lll(m) of the Customs Act, 1962, read with Section 119 of the Customs Act, 1962, and also read with the provisions of Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008, as listed in Schedule-Ill (Part A) A 1010 read with Para 2.32 of Handbook of Procedures Vol. I of Foreign Trade Policy 2009-2014.

13. The Live cartridges, blank cartridges and brass scrap are liable for confiscation under the provisions of the Customs Act, 1962 and Foreign Trade Policy 2009-2014 as the import of live cartridges is prohibited as per the Trade Policy of the Government of India, Para 2.32 of Handbook of Procedures Vol. 1 of Foreign Trade Policy 2009-2014 read with provisions at SI. No. 83 of Schedule A (Prohibition of Imports into India), as per Notification regarding specific Prohibitions and restriction of importation and exportations issued u/s 11 of Customs Act, 1962, and M.F. (D.R. & I.) Notification Number 40-Cus., dated

6-6-1970 and the import of empty cartridge casings is also prohibited in terms of Para 2.32 of Handbook of Procedures, Vol. 1 of Foreign Trade Policy 2009-2014 and as such the live cartridges and the empty cartridge casings are liable for confiscation in terms of Section 111(d), 111(f) and lll(m) of the Customs Act, 1962 and the Brass Scrap used for concealing the prohibited Live Cartridges and empty cartridges casings is liable for confiscation in terms of Section 119 of Customs Act, 1962.

14. It is also alleged that the Lead Scrap in form of lead covered cables, picas, of sheets of lead in mutilated form, lead weights etc., quantity 133.866 M.T. valued at Rs. 1,13,53,135/- and Zinc Scrap Saves used for concealment of Lead Scrap quantity 7.03 M.T. values at Rs. 5,20,030/-, totally valued at Rs. 1,18,73,165/- and Brass Scrap used for concealing the empty cartridge casings and live cartridges of different bores provisionally valued at Rs. 34,06,405.00.

15. Considering the facts and circumstances of the case, perusing the record and considering the nature of serious allegations levelled against the accused-applicant which attracts the provisions of offences punishable u/s 132 and Section 135(l)(i)(A) & (C) of the Customs Act, 1962, the case laws cited from both sides and the arguments advanced by the learned Counsel for the parties and without expressing any opinion on the merit of the case, I do not find it a fit case for bail, therefore, the prayer for bail is hereby rejected.

16. However, since the accused-applicant is said to be a senior citizen aged about 75 years, therefore, the learned trial court is directed to conclude the trail expeditiously in accordance with law.