(2017) 03 AHC CK 0041

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 4424 of 2017

Pawan Kumar @ Pawan Arora APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 30-03-2017

Acts Referred:

Constitution of India, 1950 — Article 20(3), Article 21
Customs Act, 1962 — Section 104, Section 108

Citation : (2017) 4 AllLJ 33

Hon'ble Judges : Ramesh Sinha and Krishna Pratap Singh, JJ.

Bench : Division Bench

Advocate : Mohit Singh, Advocate, for the Petitioner; G.A., A.S.G.I, for the Respondent

Final Decision : Dismissed

Judgement

Ramesh Sinha, J.—Heard Sri Mohit Singh, learned counsel for the petitioner, Sri Sanjay Kumar Singh, learned counsel for the DRI and Sri Ashish Pandey, learned A.G.A. for the State and perused the record.

2. The petitioner has come up before this Court with the following prayer:-

(i) A writ, order or direction in the nature of writ of mandamus to the respondent to allow the presence of counsel of the petitioner during recording of the statement under Section 108 of the Customs Act, 1962 on every occasion;

(ii) A writ, order or direction in the nature of writ of mandamus to the respondents to give 3 days prior notice, in case the respondents proceed to arrest the petitioner for that purpose.

(iii) Any further writ, order or direction as the Hon''ble Court may deem fit and proper to secure the ends of justice.

(iv) An order awarding the cost of the petition to the petitioner.

3. The brief facts of the case are that the petitioner Pawan Kumar @ Pawan Arora

is one of the partners of partnership firm M/s. Creative Brass, having its registered office at 2nd Floor, Shri Vallabh Complex, above Bank of Baroda, Near PMS School, Civil Lines, Moradabad which is running business activity of export of handicraft of brass and value addition of the brass. The said firm has two partners i.e. Shri Shrey Gupta and petitioner Pawan Kumar @ Pawan Arora who was added in the firm in July, 2013.

4. That during the course of some investigation the DRI Officers of NRU, Noida searched the office premises of the petitioner''s firm at 2nd Floor, Shri Vallabh Complex, Above Bank of Baroda, Near PMS. School, Civil Lines, Moradabad. The officers had taken some documents i.e. three files containing invoices and two other files containing loose papers and prepared a Panchnama at the premises of the petitioners which has been enclosed as Annexure-P5. Another search was carried out on 20.09.2016 at the factory premises of M/s. Creative Brass at 5th KM Milestone, Rampur Road, Near Park Moradabad and the factory was found engaging in packing of brass handicraft items. Some other items were also taken by the officer i.e. weight book, purchase invoice, shipment, creative road challan etc. Copy of the panchnama dated 20.09.2016 carried out at the factory premises has been annexed and marked as Annexure-P6.

5. Thereafter the DRI issued summons dated 20.09.2016 to the petitioner being the partner of the firm to give evidence and produce imports/export documents related with import under duty exemption schemes and exports under drawback schemes and to appear on 21.09.2016 at 11:30 at Noida DRI. By letter dated 21.09.2016 the petitioner informed the Senior Intelligence Officer that due to some personal work was away from the city and requested to give another date for hearing in the following week after 26.09.2016. On 26.09.2016 the DRI issued the summons to the petitioner directing him to present himself on 04.10.2016. Similar summons were also sent to the petitioner on 04.10.2016 to appear on 14.10.2016 by the DRI on the same date in respect of proprietorship firm of the petitioner i.e. M/s. Ria Exports. Meanwhile the petitioner''s partnership firm has deposited Rs. 1 Crore against the demand of customs duty and the said information has been supplied to the DRI vide letter dated 13.12.2016. Thereafter a summons dated 14.12.2016 has been issued in respect of M/s. Creative Brass and directed them to appear before the authority on 22.12.2016 along with the documents as mentioned in the summons dated 26.09.2016. It is submitted that substantial amount of documents in respect of the import and export made by M/s. Creative Brass has been deposited by the counsel of the partnership firm on 14.10.2016 and 20.10.2016 but the department did not consider the same. Meanwhile the partnership has deposited Rs. 40 Lacs against the customs duty. Again on 13.01.2017 summons were issued in respect of M/s Creative Brass as well as M/s. Ria Exports for appearance of petitioner before the authority on 24.01.2017.

6. It has been argued by learned counsel for the petitioner that due to his sister-in-law''s marriage, the petitioner was out of station and was not in a position to

appear on the said date and the same information has been supplied by the learned counsel for the petitioner through separate letters both dated 24.01.2017. In the said letter petitioner informed that all the documents with reference to M/s. Creative Brass has already been furnished on 14.10.2016 and 25.10.2016 and also deposited Rs. 1 Crore against Customs duty till date. It is submitted by learned counsel for the petitioner that repeated issuance of summons by the DRI, the petitioner apprehends use force and coercive action against him and requested to allow the presence of his counsel during recording his statement under Section 108 of the Customs Act. In support of his argument he has placed reliance of a judgment of the Apex Court decided on 25.04.2012 reported in 2017 (345) E.L.T. 323 (S.C.) wherein the Apex Court has allowed the presence of Advocate of a person whose statement under Section 108 of the Customs Act was to be recorded during interrogation for sitting within a visible distance, but beyond hearing range. He further urged that the petitioner when appears before the authority concerned for recording his statement under Section 108 of the Customs Act he apprehends that after recording the statement of the petitioner he may be arrested by the Customs Authorities hence prior notice may be given to him for his arrest after his statement under 108 of Customs Act has been recorded by the Customs Authorities. He further submitted one of the partners of M/s. Creative Brass and Shrey Kumar @ Shrey Gupta has approached this Court with a similar prayer and in Criminal Misc. Writ Petition No. 3842 of 2017 (Shrey Kumar @ Shrey Gupta v. Union of India And 4 Others) in which this Court had passed an order dated 10.03.2017 which is quoted herein below:-

"Heard Sri Ajay Bhanot, learned Senior Advocate assisted by Sri Mohit Singh, learned counsel for the petitioner, Sri Imran Sayed, learned A.G.A. for the State and perused the record.

Learned counsel for Union of India is not present though the matter has been called in the revised list.

By means of present petition, the petitioner has prayed following prayers :

(i) A writ, order or direction in the nature of writ of mandamus to the respondent to allow the presence of counsel of the petitioner during recording of the statement under Section 108 of the Customs Act, 1962 on every occasion.

(ii) a writ order or direction in the nature of writ of mandamus to the respondents to give 3 days prior notice, in case the respondents proceed to arrest the petitioner for that purpose.

Learned counsel for the petitioner at the very outset stated that he confines his argument with respect to prayer no. 2 only and does not want to press prayer no. 1.

Learned counsel for the petitioner submits that the petitioner is ready to co-operate with the investigation as his statement under section 108 of the Customs

Act is to be recorded but he apprehends that he may be arrested when he appear before the competent authority for getting his statement recorded. He submits that the in similar circumstances, one Nitin Manak had earlier approached this Court and filed Crl. Misc. Writ Petition No. 3335 of 2017 in which an order was passed by this Court on 3.3.2017, in his favour, hence, the petitioner may also be granted the same relief.

Copy of the order dated 3.3.2017 has been produced by learned counsel for the petitioner which is taken on record.

Considering the facts and circumstances of the case and the submissions advanced by learned counsel for the parties, we direct that the petitioner shall appear before the authorities concerned for recording his statement on 23rd March, 2017.

The competent authority may record his statement in accordance with law and in case his arrest is necessitated, he may be given three days prior notice thereafter.

With the aforesaid observations, the petition stands disposed of.

It is made clear that if the petitioner fails to appear on the date fixed above, the authority concerned will be at liberty to proceed against the petitioner in accordance with law."

7. He has stated that a similar order be passed in the case of the petitioner, hence the petitioner is also entitled a similar order from this Court.

8. Sri Sanjay Kumar Singh, learned counsel appearing on behalf of the DRI respondent nos. 4 and 5 has vehemently refuted the arguments advanced by learned counsel for the petitioner and has submitted that the prayer made in the present writ petition by the petitioner is wholly misconceived and cannot be granted by this Court in view of the judgment of the Apex Court Poolpandi & Others v. Superintendent, Central Excise & Others reported in 1992 (29) ACC 550 and has drawn the attention of the Court towards para-11 of the said judgment wherein the Apex Court has held that there is no statutory provision about the presence of the counsel at the time of recording the statement under Section 108 of the Customs Act. He further submitted that refusal of presence during interrogation/recording the statement of the petitioner under Customs Act would not be violative of Article 20 (3) of the Constitution of India. He submitted that the said judgment of the Apex Court has taking into account several earlier judgments of the Apex Court on the issue while judgment relied upon by the learned counsel for the petitioner in Vijay Sajnani v. Union of India (Supra) no earlier judgments of the Apex Court has been considered. So far as the prior notice of arrest of the petitioner is concerned and claiming parity with the order passed in Criminal Misc. Writ Petition No. 3842 of 2017 (Shrey Kumar @ Shrey Gupta v. Union of India and 4 Others) is concerned he pointed out that though the DRI through it''s Officers were impleaded as respondent nos. 3, 4 and 5 but notice of the same were wrongly and illegally given to the office of the State of

U.P. and as such said petitioner has obtained an order dated 10.03.2017 without placing the settled law laid down by the Apex Court in the case of Union of India v. Padam Narain Aggarwal and Others reported in (2008) 13 SCC 305. Hence the present petition is devoid of merit and is liable to be dismissed by this Court.

9. Considered the submissions advanced by learned counsel for the parties in order to appreciate the arguments of learned counsel for the parties, it is necessary to go through the relevant provisions of Section 104 of the Customs Act which laid down the power to arrest which is quoted herein below:-

"104. Power to arrest.- (1) If an officer of Customs empowered in this behalf by general or special order of the Principal Commissioner of Customs or Commissioner of Customs has reason to believe that any person in India or within the Indian customs waters has committed an offence punishable under section 132 or section 133 or section 135 or section 135-A or section 136, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a magistrate.

(3) Where an officer of customs has arrested any persons under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police-station has and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898).

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence relating to-

(a) prohibited goods; or

(b) evasion or attempted evasion of duty exceeding fifty lakh rupees, shall be cognisable.

(5) Save as otherwise provided in sub-section (4), all other offences under the Act shall be non-cognisable.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under section 135 relating to-

(a) evasion or attempted evasion of duty exceeding fifty lakh rupees; or

(b) prohibited goods notified under section 11 which are also notified under sub-clause (C) of clause (I) of sub-section (1) of section 135; or

(c) import or export of any goods which have not been declared in accordance with provisions of this Act and the market price of which exceeds one crore rupees; or

(d) fraudulently availing of or attempt to avail of drawback or any exemption from duty provided under this Act, if the amount of drawback or exemption from duty exceeds fifty lakh rupees,

shall be non-bailable.

(7) Save as otherwise provided in sub-section (6), all other offences under this Act shall be bailable."

10. Similarly the provisions under Section 108 of the Customs Act which lays down the provision to summon power to a person to give evidence and produce documents is quoted herein below:-

107. Power to summon persons to give evidence and produce documents.—(1) Any Gazetted officer of Customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act.

(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject, respecting which they are examined or make statements and produce such documents and other things as may be required:

Provided that the exemption under Section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indain penal Code (45 of 1860)."

11. It appears from the record that the petitioner being the partner of M/s. Creative Brass, having its registered office at 2nd Floor, Shri Vallabh Complex, above Bank of Baroda, Near PMS School, Civil Lines, Moradabad was issued summons repeatedly by the respondent nos. 4 and 5 but he had sent some letters also to the authorities concerned through his counsel some documents etc. and also deposited Rs. 1 Crore as towards Customs duty as has been claimed by him till date but has not appeared before the authority concerned for recording his statement under Section 108 of the Customs Act. From the perusal of the provisions contained under Section 108 of the Customs Act it is evident that the authorities concerned have power to summon a person for giving evidence and produce the documents and in view of Section 108 (3) all persons so summoned shall be bound to attend either in person or by an authorised

agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject, respecting which they are examined or make statements and produce such documents and other things as may be required:

12. Moreover Section 108 (4) further provides that every such inquiry as aforesaid shall be deemed to be a judicial proceedings within the meaning of Section 193 and Section 228 of the Indian Penal Code (45 of 1860).

13. So far as the power to arrest any person against whom the cognisable offence is made out after recording the statement under Section 108 of the Customs Act then he shall be arrested by the Customs Authorities in view of Section 104 (1) of the Act if evasion or attempted evasion of duty exceeding fifty lakh rupees. The said offence is non-bailable offence as is clear from Section 104 (6) (d) of Customs Act.

14. So far as the contention of the learned counsel for the petitioner is that the petitioner be allowed to appear before the authority concerned for recording the statement under Section 108 of the Customs Act in the presence of his counsel has no substance as there is no statutory provision which may allow a person to appear along with his counsel before the authorities concerned while his statement under Section 108 of the Customs Act is to be recorded. The case law which has been relied upon by learned counsel for the DRI the Apex Court in case of Poolpandi & Others v. Superintendent, Central Excise & Others (Supra) in which the earlier judgments of the Apex Court has been considered on the issue and the question which was raised and considered by the Court was-whether the witnesses had a constitutional right to the assistance of counsel during their interrogation as witness in the enquiry. The said contention was rejected by the Court that the witnesses had such a right. It was pointed out that the persons concerned were not accused and they could not claim the right available to an accused of being heard through his own counsel. The Apex Court further observed that 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 be of the view that such persons should be dissociated from the atmosphere and the company of persons 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. The relevant provisions of the Constitution in this regard have to be construed in the spirit they were made and the benefits thereunder should not be ""expanded"" to favour exploiters engaged in tax evasion at the cost of public exchequer.

15. Hence in view of the law laid down by the Apex Court in case of Poolpandi & Others v. Superintendent, Central Excise & Others (Supra) the presence of counsel refusal during interrogation/recording the statement of a person under the Customs Act would not be violative of Article 20 (3) and 21 of the Constitution of India.

16. So far as the contention of the learned counsel for the petitioner with regard to the notice prior to his arrest is concerned that too does not find force in view of the law laid down by the Apex Court in the case of Union of India v. Padam Narain Aggarwal and Others reported in (2008) 13 SCC 305 and the relevant paragraphs in this regard is required to be considered which are quoted herein below:-

"No such order could have been passed nor a direction as to prior notice before effecting arrest could have been issued by the High Court. Firstly, the order passed by the High Court was a blanket one and sought to grant protection to the respondents in respect of any non-bailable offence. Neither Section 438 Cr.P.C. nor any other provision of the Code authorities the grant of blanket anticipatory bail for offences not yet committed or with regard to accusations not so far levelled. Secondly, it illegally obstructed, interfered and curtailed the authority of the Customs Officers from exercising their statutory power of arrest by imposing a condition of giving ten days'' prior notice, a condition not warranted by law. There is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting anticipatory bail becomes operative. The respondents were only summoned under Section 108 of the Customs Act, 1962 (the Act) for recording of their statements. The High Court was conscious and mindful of that fact. It, therefore, held that the applications for anticipatory bail, in the circumstances, were premature. They were, accordingly, disposed of by directing the respondents to appear before the Customs Authorities. The High Court, however, did not stop there. It stated that if the Customs Authorities found any nonbailable offence against the appellants (the respondents herein), they would not be arrested without ten days'' prior notice to them. The order passed by the High Court to the extent of directions issued to the Customs Authorities is, therefore, liable to be set aside.

(Paras 14, 33, 45, 23 and 44)

"The safeguards/considerations against the abuse of power and the statutory character of Section 104 of the Customs Act, 1962 have to be kept in view while deciding the correctness or otherwise of the directions issued by a Single Judge of the High Court. On the one hand the power to arrest a person by a Customs Officer under Section 104 of the Act is statutory in character and cannot be interfered with, and on the other hand, the power to arrest is circumscribed by objective considerations and cannot be exercised on whims, caprice or fancy of the officer. Such power of arrest can be exercised only in those cases where the Customs Officers has "reason to believe" that a person has been guilty of an offence punishable under Sections 132, 133, 135 or 135-A of the Act. Section 104 of the Act also obliges the Customs Officer to inform the person arrested of the grounds of arrest as soon as may be. The law requires such person to be produced before a Magistrate without unnecessary delay. "Blanket" order of bail may amount to or result in an invitation to commit an offence or a passport to carry on criminal activities or to afford a shield against any and all types of illegal operations, which, can never be allowed in a society governed by the rule of law.

(Paras 36 to 38 and 22)

"The underlying object of Section 108 is to ensure that the officer questioning the person gets all the truth concerning the incident. The power is exercised by a gazetted officer of the Department. It obliges the person summoned to state truth upon any subject respecting which he is examined. He is not absolved from speaking truth on the ground that such statement is admissible in evidence and could be used against him. The provision thus enables the officer to elicit truth from the person examined."

(Para 39)

17. Learned counsel for the petitioner has trying to distinguish the said judgment of the Apex Court on the issue and stated that it was on the question of anticipatory bail under Section 438 Cr.P.C. the Apex Court has laid down the law but the said contention is wholly misconceived as is clear from the perusal of the judgment of the Apex Court the contention raised by Sri Sanjay Kumar Singh, learned counsel for the DRI respondent nos. 4 and 5 has substance and the said judgment is squarely covered on the issue of the prior notice of arrest.

18. In view of the foregoing discussions, we do not find any good ground to interfere in the present writ petition. The petition lacks merit and is, accordingly dismissed.

