
(2023) 06 KL CK 0381

In the High Court Of Kerala

Case No : Bail Application No. 4602 Of 2023

Pulikkippoyil Sharafudheen

APPELLANT

Vs

Superintendent Of Customs (AIU)

RESPONDENT

Date of Decision : 27-06-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 439

Customs Act, 1952 — Section 104(1), 104(6), 104(6)(c), 104(7), 108, 132, 133, 135, 135A, 136

General Clauses Act 1897 — Section 3(42)

Citation : (2023) 06 KL CK 0381

Hon'ble Judges : Bechu Kurian Thomas, J

Bench : Single Bench

Advocate : P.Martin Jose, P.Prijith, Thomas P.Kuruvilla, R.Githesh, M.A.Mohammed Siraj, Ajay Ben Jose, Manjunath Menon, Sachin Jacob Ambat, Anna Linda Eden, Harikrishnan S., S.Sreekumar, Sreelal N. Warriar

Final Decision : Allowed

Judgement

Bechu Kurian Thomas, J

1. Petitioners are husband and wife. They face an indictment for the offence under section 135 of the Customs Act, 1952 (for short 'the Act') alleging import of gold, the market price of which exceeds Rupees One Crore. They were taken into custody on 18.05.2023 and hence seek enlargement on bail under section 439 of the Code of Criminal Procedure, 1973 (for short, 'the Code').

2. Information was received by the Air Intelligence Unit of the Air Customs, International Airport, Calicut, that one Amjad Mihran was indulging in smuggling of gold into India using carriers, including family members. A strict vigil was therefore maintained over the passengers. Based on the intelligence input, petitioners, who were travelling from Dubai to Calicut by Spicejet Flight SG 54, were intercepted at the exit gate of the baggage hall at Calicut Airport on 16-05-2023. As mentioned earlier, they are husband and wife. Upon a thorough

personal search, the Customs Officers seized 950 gms of gold in a compound form concealed in four capsules in the rectum of the first petitioner and a further 1198 gms of gold concealed in a compound form inside the panties worn by the second petitioner. The total quantity of gold seized from the petitioners was 1977.18 gms having a value of Rs.1,20,90,456/- in the domestic market. After recording petitioners' statement under section 108 of the Act, a crime was registered and Sri.Amjad Mihran was arrayed as the first accused, while petitioners were arrayed as accused 2 and 3. Petitioners were thereafter arrested. The bail applications filed before the Magistrate Court as well as the Sessions Court were rejected, and hence recourse to this Court, seeking regular bail.

3. Sri.S.Sreekumar, the learned Senior Counsel duly instructed by Sri. Martin Jose, the learned counsel for the petitioners, contended that the offences under the Act are generally bailable, except those that are specified as non-bailable. It was further submitted that the quantity of gold seized individually from petitioners 1 and 2 alone can be reckoned and so viewed; the offence alleged against them is bailable and therefore they ought to have been released by the customs authorities themselves. The learned Senior Counsel also submitted that the second petitioner is a lady and both of them have four children, of which the youngest is only four years and the presence of the parents at home is indispensable. It was also argued that there are no antecedents against them and hence considering the period of detention already undergone, petitioners ought to be released on bail.

4. An objection was filed by the respondent opposing the bail application. Sri.Sreelal N. Warriar, the learned Standing Counsel for the Customs Department contended that the offences under section 135 of the Act are non-bailable if the market price of the goods that are imported illegally is above Rupees One Crore and that the petitioners, being husband and wife, had together imported gold worth more than Rupees One Crore and therefore the offence cannot be treated as bailable. Relying upon the objections to the bail applications filed, it was pointed out that in the voluntary statement before the Superintendent of Customs, the petitioners had admitted their role in smuggling gold and that they had done it as per the direction of the first petitioner's cousin - Sri.Amjad Mihran, for a remuneration and also that the gold was handed over to them by one Sharafudeen at Dubai, an acquaintance of Sri.Amjad Mihran. The objections further averred that the consequent search conducted at the residence of Sri. Amjad Mihran revealed incriminating documents, which have also been seized and that the petitioners are not cooperating with the investigation and are not revealing the entire circumstances. It was further pointed out that petitioners are part of a smuggling gang involving high volume of gold using family passengers as carriers to evade serious offences and that considering the gravity of the offence, attempts to overcome the rigour of the statutory provisions ought to be discarded.

5. I have considered the rival contentions.

6. Section 135 of the Customs Act, 1952, to the extent it is relevant, reads as below:-

"135. Evasion of duty or prohibitions

(1) Without prejudice to any action that may be taken under this Act, if any person—

(a) is in relation to any goods in any way knowingly concerned in mis-declaration of value or in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods; or

(b) xxx

(c) xxx

(d) xxx

(e) xxx

he shall be punishable,—

(i) in the case of an offence relating to,—

(A) any goods the market price of which exceeds one crore of rupees; or

(B) xxx

(C) xxx

(D) xxx

(E).xxx

with imprisonment for a term which may extend to seven years and with fine:

PROVIDED that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, such imprisonment shall not be for less than one year;

(ii) in any other case, with imprisonment for a term which may extend to three years, or with fine, or with both.

7. The question as to whether the offences under the Act are bailable or not is specified under section 104(6) of the Act. Since section 104(1), (6) and (7) of the Act are relevant, they are extracted as 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 has committed an offence punishable under

Section 132 or Section 133 or Section 135 or Section 135A or Section 136, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

(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 the 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 extension from duty exceeds fifty lakh rupees; or

(f) fraudulently obtaining an instrument for the purposes of this Act or the foreign Trade (development and Regulation) Act, 1992 (22 of 1992), and such instrument is utilised under this Act, where duty relatable to such utilisation of instrument exceeds fifty lakhs rupees, shall be non-bailable.

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

8. A perusal of the above statutory provisions make it abundantly clear that if the goods, which have been misdeclared or its duty evaded or imported illegally, have a market price of more than One Crore of rupees, the offence becomes non-bailable.

9. Admittedly, on search of the first petitioner's body, he was found to possess 950 gms of 24-carat gold, while the second petitioner possessed 1198 gms of 24-carat gold. Collectively the gold seized from the petitioners have a value of more than Rs.1.20 Crores while individually, the value of the gold recovered from each of them stands less than rupees One Crore.

10. Concededly, petitioners are husband and wife and were travelling with their children on the same flight. Innovative methods are adopted by those indulging in smuggling to overcome the rigours of law. The contention of the respondent that smugglers are now utilizing family members as carriers to transfer gold of high value, by splitting the gold into quantities which would fall less than the value of Rupees One Crore, cannot be brushed aside as insignificant.

11. Until 2013, all offences under the Act were bailable. This was evident from the erstwhile sub-clause (6) of section 104 of the Act which stated that “Notwithstanding anything in the Code of Criminal Procedure, 1973, all offences under the Act shall be bailable”. However, by the Finance Act, 2013 (Act 17 of

2013) dated 10.05.2013, the aforesaid sub-clause (6) was substituted by the present clause (extracted earlier). Thus after the amendment, offences other than those excepted under Sec.104(6) of the Act alone are bailable. Section 104(6)(c) provides that if goods have been imported without declaration in accordance with the provisions of the Act, and the value of the goods exceeds one crore of rupees, then the offence is non-bailable.

12. Smuggling of gold has a deleterious effect on the country's economy. Curbing the menace of smuggling is essential for the economic progress of the country. The cut-off value fixed through the amendment of 2013 for the purpose of treating the conduct of illegal import or export above that value as a non-bailable offence is with an avowed purpose. Hence while dealing with innovative attempts to override the rigour of statutory prescriptions, courts cannot be oblivious to the amendment and the statutory intent behind such changes in the law.

13. If the quantity of gold illegally imported was split into different parts and carried by different persons, all of whom had the common intention, then the acts done by such persons collectively can be treated as an act done by each person individually. Such an approach is necessary, especially when a common thread, such as that of a family, runs through those body of persons, apart from the common intention that binds them together. Since during import, the goods were allegedly split into different parts but carried by family members, all of whom had presumably a common intention, the cumulative value of the goods can be taken for identifying whether the goods were of a value higher than the cut-off value prescribed. In such circumstances, the word 'person' appearing in section 135 of the Act should not be given a narrow interpretation to defeat the legal provision. Thus, if more persons than one act in concert with each other to evade or attempt to evade customs duty, the combined value of the articles can be treated as the value of goods imported by each such person. The collection of such persons will have to be treated as falling within the term 'any person' in section 135 of the Act.

14. Apart from the above, the General Clauses Act 1897, defines 'person' in section 3(42). The definition clause reads as follows: —

"S.3. Definitions - In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,—

(42) "person" shall include any company or association or body of individuals, whether incorporated or not."

15. It is apposite to notice that the aforesaid definition contemplates 'a body of persons' also as 'a person'. The cardinal principle of interpretation of statutes that If an interpretation defeats the purpose of the Act, such an interpretation ought to be avoided is also to be borne in mind in this context. Thus the definition of the word person as appearing in section 135 of the Act must be given a contextual interpretation.

16. The decision relied upon by the learned Senior Counsel for the petitioners in Mohd. Tufial v. Union of India and Another (2023 SCC Online All. 98) is, according to me, distinguishable. In the said decision, the persons from whom the contraband was recovered were not family members but persons travelling together on a train. The concept of common intention of the passengers was not borne in mind by the court while rendering the said judgment. On the other hand, in the decision in Amal Mubarak Salim Al Reiyami (Smt.) and Others v. Union of India (2015 SCC Online Raj. 486) it was held that a pragmatic and realistic view has to be taken in the light of the amendment made to the Act making the offences above the value of Rupees One Crore to be non-bailable. The Court observed that the word 'any person' does not mean only one person but even more than one person, if they had jointly and knowingly involved themselves in fraudulent evasion or attempted evasion of customs duty chargeable. It was also observed that if more than one person acts in concert with each other to evade or attempt to evade customs duty, all of them together can be treated as 'any person' within the meaning of section 135 of the Act. I am in agreement with the aforesaid proposition of the Rajasthan High Court.

17. Thus, the quantity collectively carried by the petitioners can be treated as the quantity carried by each of them individually for ascertaining the value of goods imported. Considering the circumstances of the case, it is held, for the purpose of this bail application, that petitioners were carrying gold individually worth more than Rs.1.20 Crores, and hence the offence alleged against them is a non-bailable offence.

18. Be that as it may, petitioners were arrested on 18.05.2023, and they have been in custody since then. The interrogation of the petitioners ought to have been completed by now. The second petitioner is a lady and is the mother of four young children. She claims to have been induced by her husband and his cousin to act as a carrier for remuneration. Both parents of those four children are under custody. The youngest of the four children is a four-year-old. Taking into reckoning the aforesaid circumstances and the period of detention already undergone from 18-05-2023, this Court is of the opinion that further detention of the second petitioner is not essential for the purpose of an effective investigation. Therefore the second petitioner is entitled to be released on bail.

19. However, as far as the first petitioner is considered, though the investigation has proceeded significantly, he is stated to be not cooperating. The first petitioner is the person who allegedly induced the second petitioner also to act as a carrier. The first accused is allegedly a cousin of the first petitioner. The first accused is stated to be involved in several smuggling activities. More information is yet to be obtained regarding the antecedents of the first accused. Non-cooperation of the first petitioner is prejudicing the investigation. Taking note of the circumstances of the case, I am of the view that the first petitioner is not entitled to be released on bail at this juncture.

20. In the result, the bail application of the first petitioner is dismissed, and that

of the second petitioner is allowed on the following conditions.

(a) 2nd petitioner shall be released on bail on her executing a bond for Rs.1,00,000/- (Rupees One Lakh only) with two solvent sureties each for the like sum to the satisfaction of the court having jurisdiction.

(b) 2nd petitioner shall appear before the Investigating Officer as and when required and cooperate with the investigation.

(c) 2nd petitioner shall not intimidate or attempt to influence the witnesses; nor shall she tamper with the evidence.

(d) 2nd petitioner shall not commit any similar offences while she is on bail.

(e) 2nd petitioner shall not leave Kerala without the permission of the Court having jurisdiction and shall surrender her passport before the jurisdictional Court.

21. In case of violation of any of the above conditions, the jurisdictional Court shall be empowered to consider the application for cancellation, if any, and pass appropriate orders in accordance with the law, notwithstanding the bail having been granted by this Court.

In the result, this bail application is allowed in part. The application of the first petitioner is dismissed and that of the second petitioner is allowed.