(2010) 04 OHC CK 0054

In the Orissa High Court

Case No : CRLMC No. 937 of 2010

Sri Purusottam Das Sharma — APPELLANT

Vs

Sri Manoj Kumar Pattnaik, Inspector, Central Excise, Customs and Service Tax and Another — RESPONDENT

Date of Decision : 09-04-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 13, 9(1), 9AA
Constitution of India, 1950 — Article 20 , 20(3)
Criminal Procedure Code, 1973 (CrPC) — Section 438, 482

Citation : (2010) 1 ILR (Ori) 889 : (2010) 1 OLR 674 Supp

Hon'ble Judges : Indrajit Mahanty, J

Bench : Single Bench

Judgement

Indrajit Mahanty, J.—In the present application u/s 482 of the Code of Criminal Procedure, 1973, prayer has been made by the Petitioner to set aside certain conditions fixed by the Inspector (Preventive) Central Excise, Customs & Service Tax, Bhubaneswar-II (Opposite Party No. 1) while granting bail to the Petitioner pursuant to an order dated 11.3.2010 passed by this Court in BLAPL No. 2887 of 2010, granting anticipatory bail to the Petitioner.

2. Shorn of unnecessary details, it appears that the Central Excise authorities conducted search and seizure on the premises of M/s. Seeta Integrated Steel & Energy Ltd. on 4th November, 2009 and on the basis of such search and seizure, a proceeding for enquiry for violation of the provisions of Central Excise Act, 1944 has been initiated thereunder. From the pleadings in the present application, it appears that the Petitioner pursuant to summons issued to him appeared before the Superintendent (Prev.), Commissionerate of Central Excise, Customs and Service Tax, Bhubaneswar (Opposite Party No. 2) on 5.11.2009, 15.1.2010 and 28.1.2010 and also produced certain documents and also had his statements recorded.

3. It is stated that the Petitioner had been issued with a further summon dated

19.2.2010 by which order, he was directed to produce some more documents mentioned in the schedule to such summons under Annexure-1. Apprehending arrest by the Central Excise Officers as well as apprehending that he may not be admitted on bail, an application u/s 438 Code of Criminal Procedure for anticipatory bail was filed by the Petitioner in BLAPL No. 2887 of 2010, before this Court and the same came to be disposed of on 11.3.2010 with the following directions:

Considering the submission of learned Counsel for the parties and keeping in view the nature and gravity of the offence alleged against the Petitioner, it is directed that in the event of arrest of the Petitioner in Central Excise Proceeding No. C. No. IV(6)15/CE/CPU/BBSR-II/2009, they shall be released on bail by the arresting officer on such terms an conditions as the arresting officer may deem just and proper. It is needless to say that in case of violation of any such terms and conditions, it is open or the authorities to proceed against the Petitioner, in accordance with law.

The Petitioner shall appear before the Superintendent (Prev.)- Opposite Party, on 25.3.2010 at 10.30 A.M.

The BLAPL is disposed of. Issue urgent certified copy as per rules.

4. It is further stated that the Petitioner appeared before Opposite Party No. 2 on 25.3.2010 and at about 2.00 P.M. of the said date, Opposite Party No. 1 arrested the Petitioner and passed orders directing the Petitioner to comply with the following conditions for being released on bail:

(i) Sri Purusotam Das Sharma shall immediately furnish a Bail bond for Rs. 50,000/- (Rupees Fifty Thousand) only, along with surety of equivalent amount, before the proper officer.

(ii) Sri Purusotam Das Sharma shall appear before the Superintendent (Prev.), Central Excise, Customes & Service Tax, Bhubaneswar-II Commissionerate, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-07, on all working days, for 3 weeks, starting from 26.3.2010 to give evidence and to submit records/ documents called for, as being relevant to the enquiry.

(iii) Sri Purosottam Das Sharma shall not leave the office of the Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar-II Commissionerate, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-07 on the aforesaid days, between 10.30 A.M. and 06.00 P.M. without the prior permission of the Superintendent/Inspector concerned.

(iv) Sri Surosottam Das Sharma shall not leave the country without the prior permission of the investigating officer.

(v) Sri Purosottam Das Sharma shall cooperate with the investigation in every possible manner.

Sd/- (Manoj Kumar Pattanayak), Inspector (Prev.), Central Excise, Customs &

Service Tax, Bhubaneswar-II.

5. Mr. L. Pangari, learned Counsel for the Petitioner, at the out set, submitted that the challenge has been made by the Petitioner to Condition Nos. (i), (ii) & (iii), contained in the order dated 25.3.2010 passed by the Arresting Officer (O.P. No. 1) inter alia, on the ground that, the Opposite Party has imposed such Conditions which are absolutely perverse, inhuman, capricious, unreasonable and devoid of justice. He further r state that imposing the aforesaid conditions were actuated by malafides and vindictive design of the Opposite Parties and was intended to completely nullify and frustrate the direction of this Hon''ble Court, by which order, the Petitioner had been directed to be released on bail.

He also submitted that the directions to the Petitioner to immediate furnish bail bond of Rs. 50,000/- along with surety of Rs. 50,000/- was imposed with the view that the Petitioner would not be in a position to arrange the said amount and, therefore, would not avail the benefit of bail. It is stated that the Petitioner was imposed with such conditions since the Central Excise Authorities considered the application u/s 438 Code of Criminal Procedure for anticipatory bail as an audacious act on the part of the Petitioner. It is stated that, it was with a great amount of difficulty, that the Petitioner could arrange the necessary funds for the purpose of meeting such requirement as imposed in Condition No. (i).

6. In so far as challenge to Condition Nos. (ii) & (iii) are concerned, learned Counsel for the Petitioner submitted that the whole object of the directions requiring the Petitioner to be present, on all working days for three weeks starting from 26.3.2010 and a further direction to the Petitioner, not to leave the office of the Commissioner between 10.30 A.M. and 06.00 P.M. would itself clearly indicate that they are intended to frustrate the order of bail granted by the High Court and have been imposed to cause harassment and physical strain to the Petitioner, who is the permanent resident of Rajgangpur in the district of Sundargarh and had to reside at Bhubaneswar, only to comply with the conditions under which he was released on bail by the Arresting Officer. Learned Counsel for the Petitioner, therefore, submitted that Condition Nos. (i), (ii) & (iii) may be quashed and such terms may be fixed in the interest of law and justice.

7. In this respect, learned Counsel for the Petitioner has placed reliance to the following judgments:

1. Keshab Narayan Banerjee and Another Vs. The State of Bihar,

2. 1995 Cri.L.J. 863 (Anwar Hussain v. State of Orissa)

3. A. Kokan Rao Vs. The State,

The aforesaid judgments cited by the learned Counsel for the Petitioner was to substantiate the plea that a heavy amount should not be demanded as surety amount and the guiding principles on which an accused can be released on personal bond without sureties. The Hon''ble Supreme Court in the case of Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, held that, the decisions regarding the amount of the bond should be an individualized decision, depending on the individual financial circumstances of the accused and the probability of his absconding and fixing the surety amount, condition should be taken of family ties and relationship, roots in the community, employment, status etc. and in appropriate cases, the Court ought to be released the accused on his personal bond. While the accused may be required to furnish cash security but such conditions of bail should not be harsh, oppressive and should not virtually result in denial of bail to an accused.

8. Mr. Ray, learned Counsel for the Central Excise Department, on the other hand, opposed the prayer for modification of the conditions of bail granted to the Petitioner and relied extensively on the averments made in the counter affidavit filed on behalf of Opposite Parties 1 and 2. He essentially contended that the Company, i.e. M/s. Seeta Integrated Steel & Energy Ltd. has clandestinely removed a huge amount of sponge iron produced at their plant, resulting in loss of more than Rs. 94 lakhs of Central Excise duty. He contended that none of the condition imposed by the Arresting Officer-Opposite Party No. 1 could be considered to amount to denying the Petitioner the benefit granted to him by the order of this Court in BLAPL No. 2887 of 2010. He further contended that white coller crime requires in depth investigation and putting a witness to continuous interrogation is very much required, in order to elicit the true facts in course of such enquiry.

9. In this respect, the learned Counsel for the Central Excise Department placed reliance on a judgment of the Hon''ble Supreme Court in the case of Dukhishyam Benupani v. Arun Kumar Bajoria, AIR 1998 SC 696. Sri P.K. Ray submitted that an Investigating Agency should be free to fix the venue, time and the manner of question to an accused persons involved in such crimes. Learned Counsel also placed reliance on various documents appended to the counter affidavit and in particular, Annexure-D to the counter affidavit. This statement itself contains the details of the time at which the Petitioner appeared before the Superintendent (Preventive), Commissionerate of Central Excise, Customs and Service Tax, Bhubaneswar-II (Opposite Party No. 2). It is stated on behalf of the Opposite Parties that since the date when the order was passed, i.e. 25.3.2010, the Petitioner has appeared before the authority concerned, only on five working days indicated therein. Apart from the same, my attention was drawn to the endorsement therein, i.e. in Annexure-D, that the Superintendent has been pleased to permit the Petitioner to use the "waiting room" and bath room from 10.30 A.M. to 6.00 P.M. till closing of the enquiry and was also "granted lunch-break" from 1.30 to 2.30 P.M. on the dates he appeared and that the departmental canteen has also been instructed to provide him lunch, if so desired by him, on payment for the same. Learned Counsel for the Central Excise Department submitted that the authorities have been thoroughly considerate of all the needs of the Petitioner. This, according to the learned Counsel, is indicative of the concern of the department for the well being of the Petitioner.

Apart from the above, he contended that the allegation that the Petitioner had faced untold difficulties in furnishing the bail bond of Rs. 50,000/- and surety amount of Rs. 50,000/- was baseless. Since the company had remitted the requisite amount to the Punjab National Bank, Bhubaneswar, on the same day on which, the Arresting Officer imposed such condition. Therefore, there existed no basis for the Petitioner to contend that the imposition of the condition for providing bail bond of Rs. 50,000/- and surety amount of Rs. 50,000/- could not have in any manner caused any mental or physical strain on the Petitioner.

10. In the light of the contentions raised by the learned Counsel for both the parties, at the out set, the case of Dukhishyam Benupani (supra) relied upon by the learned Counsel for the Excise Department requires to be dealt with the accused in the aforesaid case had sought for anticipatory bail before the Sessions Judge and the same had been granted by the learned Sessions Judge. The Hon''ble Calcutta High Court had modified, certain terms therein, by which order, specific directions had been issued by the Court fixing the dates on which the accused was to appear before the Foreign Exchange Regulatory Authorities. The Department had challenged the said order granting anticipatory bail before the Hon''ble Supreme Court and the Hon''ble Supreme Court had allowed the said challenge and had set aside both the orders passed by the learned Sessions Judge as well as the Calcutta High Court.

11. In the present case, while no challenge has been made by the Department to the order of anticipatory bail granted in favour of the Petitioner dated 11.3.2010 in BLAPL No. 2887 of 2010, even then the order of anticipatory bail granted by this Court, on the contrary, did not fix any term or condition and instead left it to the Arresting Officer to fix such terms and conditions on which the Petitioner would be released on bail. The Arresting Officer upon arresting the Petitioner imposed some conditions in his order dated 25.3.2010 under Annexure-3 to the present application, which is the subject matter of challenge.

Therefore, I am of the considered view that the judgment in the case of Dukhishyam Benupani (supra) has no application to the facts of the case.

12. The next issue relates to Condition No. (i), i.e. requirement of the Petitioner to furnish bail bond of Rs. 50,000/- and surety amount of Rs. 50,000/-. In this respect, I have perused the judgments relied upon by the learned Counsel for the Petitioner. No doubt the said judgments indicate the relevant circumstances which require consideration before fixing the amount of surety.

In the case of Keshab Narayan Banerjee (supra), the bail amount of cash security of Rs. 1 lakh with two sureties residing in the State of Bihar each for the like amount was held to be excessive and the Hon''ble Supreme Court modified the order directing bail bond of Rs. 25,000/- with two sureties for the like amount.

In the case of Anwar Hussain (supra), the Orissa High Court placed reliance upon the judgment of the Hon''ble Supreme Court in the case of Hussainara Khatoon (supra), wherein the Hon''ble Supreme Court has stated that, the individual financial circumstances of an accused and the probability of his absconding need be taken into account and condition relates to the sureties should not be excessive as it would virtually amount to denial of bail. Similar was the view in the case of Anwar Hussain (supra), in which Orissa High Court fixed the bail amount of Rs. 5000/- in place of Rs. 10,000/- that had been fixed by the learned S.D.J.M. since the accused-Petitioner therein is a an unemployed youth.

13. On consideration of the submissions made by the learned Counsel for the Petitioner and the Opposite Party, in so far as Condition No. (i) is concerned, it is a fact that the said condition was complied with by the Petitioner on the very date in which the order of bail was passed, by furnishing fixed deposit by Punjab National Bank both towards the bail bond as well as the surety and as stated by the learned Counsel for the opposite parties, the said money was provided by the Company, i.e. M/s. Seeta Integrated Steel & Energy Ltd.

I am of the considered view that fixation of such a condition was not excessive keeping in view the amount of revenue sought to have been evaded by the Company. Therefore, the contention of the learned Counsel for the Petitioner for quashing Condition No. (i) is not sustained and, therefore, fails.

14. In so far as challenge to Condition Nos. (ii) and (iii) are concerned, the same are quoted hereinbelow for convenience:

(ii) Sri Purusotam Das Sharma shall appear before the Superintendent (Prev.), Central Excise, Customes & Service Tax, Bhubaneswar-II Commissionerate, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-07, on all working days, for 3 weeks, starting from 26.3.2010 to give evidence and to submit records/ documents called for, as being relevant to the enquiry.

(iii) Sri Purosottam Das Sharma shall not leave the office of the Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar-II Commissionerate, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-07 on the aforesaid days, between 10.30 A.M. and 06.00 P.M. without the prior permission of the Superintendent/Inspector concerned.

Apart from the aforesaid conditions, it appears that some modification was made thereto by the Superintendent in Annexure-D to the counter affidavit which is quoted herein below:

Granted Bail as per the directions of the Hon''ble High Court of Orissa, vide Order No. 3 dated 11.3.2010 against BLAPL No. 2887 of 2010. You are requested to be present in the waiting area (room) from 10.30 A.M. to 6.00 P.M. tomorrow and on all working days for cross examination and production of records as directed, as the conditions imposed or till the conclusion of enquiry whichever is earlier. You will be granted lunch break from 1.30 P.M. to 2.30 P.M. on the days you appear. The department canteen has been requested to provide you lunch, if desired by you. You have to pay for the same. This is for your information.

15. On a conjoint reading of the aforesaid conditions, I am of the considered

view, that since the Petitioner has not only been directed to be present on all working days for three weeks starting from 26.3.2010 and has also been debarred from leaving the office of the Commissioner during the period from 10.30 A.M. to 6.00 P.M. on every date and during the said period, he has been directed to sit in the waiting room from 10.30 A.M. to 6.00 P.M. and also has been provided lunch in the department canteen, this Court is of the considered view that while the Opposite Party-Central Excise authorities are statutorily vested with the power to carry out an enquiry for any infraction of the Central Excise Act and no interference at all by any court is called, yet on a conjoint reading of Condition Nos. (ii) and (iii) as well as in Annexure-D, it clearly indicates that the Arresting Officer has confined the movement of the Petitioner for a period of three weeks starting from 26.3.2010, I am of the considered view that the same is clearly not only excessive but also effectively tantamounts to passing an order of detention in the guise of terms and conditions of bail.

16. At the closure of hearing, the learned Counsel for the Central Excise Department was directed to produce the file containing the inquiry being conducted and the statements made by the Petitioner in course of the inquiry. The same was duly complied with.

On a perusal of the file produced by the Central Excise Authority, it appears therefrom that pursuant to the order of anticipatory bail dated 25.3.2010 passed by this Court in BLAPL No. 2887 of 2010, when the Petitioner appeared before the Superintendent (Opposite Party No. 2), on the self-same date, the Petitioner was arrested by the Inspector (Opposite Party No. 1) and the following has been noted in the "Grounds of Arrest" dated 25.3.2010:

5. In spite of repeated summons by the investigating officer, Sri Purusottam Das Sharma has failed to produce documents/records necessary for furtherance of the investigation, without sufficient reason, thus have not cooperated with the investigation.

6. The above offence of clandestine removal of excisable goods without payment of Central Excise duties and non-cooperation with the investigation, is punishable under Clauses (b), (bb) and (bbb) of Section 9(1) of the Central Excise Act, 1944. It is evident from the above that this offence has happened with the knowledge, concern and active involvement of Sri Sharma, the employee in-charge of the Central Excise matters of SISEL. Such acts and omissions are also punishable u/s 9AA of the Act ibid.

7. Taking into consideration the gravity of the offence and the fact that Sri Purusottam Das Sharma is the person in-charge of Central Excise matters of SISEL, I have reasons to believe that Sri Purusottam Das Sharma was actively involved in the offence of clandestine removal as well as undervaluation of sponge iron, as discussed above, to evade payment of Central Excise, Customs and Service Tax, Bhubaneswar-II Commissionerate, Bhubaneswar, place Sri Purusottam Das Sharma, under arrest under Section-13 of Central Excise Act,

1944 at 14.00 hrs. on 25.3.2010.

From the aforesaid facts, it would be clear therefrom that the Excise Authorities after reaching a prima facie conclusion that the Petitioner is responsible for the clandestine removal of excisable goods and such offence is with the knowledge/ connivance of the Petitioner (the employee in-charge of the Central Excise matters of the said Company) and is liable for punishment u/s 9AA of the Central Excise Act, 1944.

17. In this respect, it becomes extremely important to take note of Article-20(3) of the Constitution of India:

Article 20(3) - No person accused of any offence shall be compelled to be a witness against himself.

In this regard it has become relevant to note of the judgment of the Hon''ble Supreme Court in the case of M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, , in which Hon''ble Supreme Court came to hold that, if a person has been named by the officers who are competent to launch a prosecution against him, as having committed an offence, the accused comes within the meaning of Clause-3 of Article 20 of the Constitution of India.

The Petitioner has been named by the Inspector of Central Excise (in the ground of his arrest), as a person who is liable for punishment u/s 9AA of the Central Excise Act and is therefore, clearly a person who is entitled to the protection guaranteed by the Constitution of India.

While, it is also a fact that in the judgment of the Hon''ble Supreme Court in the case of Poolpandi Vs. Superintendent, Central Excise and others etc. etc., , the Hon''ble Supreme Court came to hold that the protection of Article 20(3) of the Constitution of India is not available to a person while being "interrogated during investigation", under the provisions of the Customs Act or the Foreign Exchange Regulation Act (FERA), since such a person is not an "accused of an offence" and is therefore, not entitled to the protection under Article 20(3), yet, in the facts of the present case, since the Arresting Officer (OP. No. 1) has already stated in the grounds of arrest that the Petitioner was liable for punishment u/s 9AA of the Central Excise Act, the Petitioner is entitled to the benefit of protection guaranteed by Article-20(3) of the Constitution of India.

It is also well settled by the Hon''ble Supreme Court that for the operation of Article-20(3), no "formal" accusation by the issue of process of the Court is required and the immunity Article 20(3) of the Constitution of India would commence, from the moment the person has been named by the officers who are competent to launch the prosecution against him as having committed of an offence and from that moment, such a person become the "accused of an offence" within the meaning of Article 20(3) of the Constitution of India.

In the Case of Ramanlal Bhogilal Shah and Another Vs. D.K. Guha and Others, , a Five Judge Bench of the Hon''ble Supreme Court, has taken into consideration the fact that the Petitioner in the said case had been served with the "grounds of arrest" under the Foreign Exchange Regulation Act, 1947 and on perusing the said ground of arrest, while placing reliance on an earlier judgment in the case of M.P. Sharma and Ors. (supra), the Hon''ble Supreme Court came to hold that the Petitioner therein was a person "accused of an offence" within the meaning of Article 20(3) of the Constitution of India and that the only protection in Article 20(3) gives to him is that he cannot be compelled to be a witness against himself. But, this does not mean that he need not given information regarding matters which do not tend to incriminate him. Having so concluded, the Hon''ble Supreme Court refused to set aside the summons challenged before it and directed the Petitioner to appear before the Deputy Director and answer such questions, as do not tend to incriminate him as explained by the Hon''ble Supreme Court in the case of State of Bombay v. Kathi Kalu Oghad, AIR, 1961 SC 1808 is as follows:

In order that a testimony by an accused person may be said to have been self-incriminatory the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself.

18. Therefore, considering the facts of the present case and in particular, since the Petitioner has been "arrested" and the "grounds of arrest" as has been noted in Paragraph-16 hereinabove, have been served on him the mandate of law as settled by the Hon''ble Supreme Court referred to above, Condition Nos. (ii) and (iii) imposed by the Arresting Officer (Opposite Party No. 1) under Annexure-3 to the present application, are set aside and it is directed that the Petitioner shall appear before the authorities concerned as and when summons are issued to him and answer all questions as do not tend to incriminate him, as explained by the Hon''ble Supreme Court in the case of State of Bombay v. Kathi Kalu Oghad (supra).

19. With the aforesaid modification to the terms and conditions of bail granted to the Petitioner noted hereinabove, the Criminal Miscellaneous Case is disposed of.

Nothing stated in this order shall be deemed to be an expression of any opinion of this Court on the merits of the proceeding against the Petitioner and the authorities are free to proceed against the Petitioner and other accused persons, in accordance with law.