

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 4779 OF 2019

Imran Latif Shirgawkar,]
Age : 36, Occ: Business,]
Residing at : 96/102, WadiManzil,]
3rd Floor, Room No.07,]
GhoghnanMohalla, Pydohonie,]
Mumbai - 400 003.]
Presently lodged in custody at JJ]
Hospital/ Central Prison, Arthur]
Road, Mumbai.] ..Petitioner.

Versus.

1. Directorate of Revenue Intelligence]
Through - Senior Intelligence]
Officer, UTI Building,]
New Marine Lines,]
Churchgate, Mumbai.]
2. Union of India,]
Through Dedicated Cell (Customs)]
New Custom House, Ballard Estate,]
Mumbai - 400 059.]
3. Chief Commissioner of Customs]
(Mumbai Zone-III),]
Terminal-2, Shivaji International]
Airport, Sahar, Andheri (East),]
Mumbai - 400 099.]
4. State of Maharashtra] ..Respondents.

Dr. Sujay Kantawala i/b Mr. Siddiqui Mohammed Arif for the
Petitioner.

Ms. Rebecca Gonsavlez for Respondent No. 1.

Ms. P. H. Kantharia for Respondent No. 2 and 3..

Coram : RANJIT MORE &
N. J. JAMADAR, JJ.
Date : **September 27, 2019.**

Judgment (Per Ranjit More, J.):

1. The present writ petition is filed under Article 226 of Constitution of India by the Petitioner who is presently in judicial custody in Remand Application No.161 of 2019 of Additional Chief Metropolitan Magistrate, 8th Court, Mumbai pursuant to his arrest under section 104 of the Customs Act, 1962, on the allegations of having committed an offence punishable under section 135(1)(i) of the said Act. There is no dispute on the fact that the said offence is “compoundable”.

2. While in custody, but before filing criminal prosecution in the said case, the Petitioner has preferred an application for compounding of the alleged offence before the compounding authority under section 137(3) of the Customs Act, 1962. Immediately thereafter, the Petitioner has filed the instant writ petition to safeguard his fundamental rights while interalia seeking following reliefs :

- (a) Issue a writ of mandamus, or any other appropriate writ, order or direction, restraining the Respondent No.1 from filing any criminal prosecution qua the Petitioner under the provisions of Customs Act, 1962 for alleged compoundable offence, in respect of which the Application for compounding as permitted under the Customs Act, 1962 read with section 320 of CrPC is already filed;
- (b) Issue a writ of mandamus, or any other appropriate writ, order or direction, directing the Respondent No.3 to expeditiously adjudicate and decide on merits by a speaking order, the Petitioner's application dated 18.09.2019 (at Exhibit-'B'), for 'Compounding' of alleged 'compoundable' offence/s punishable under the Customs Act, 1962, by exercising powers conferred under section 5(2) read with section 122 and 137(3) of the Customs Act, 1962, at this stage, i.e., before filing of any criminal prosecution qua the Petitioner.;
- (c) Issue a writ of mandamus, or any other appropriate writ, order or direction, directing the Respondent No.1 to take all necessary steps, to enable Respondent No. 3 to adjudicate and inform the amount, if any, legally due and payable by the Petitioner under the provisions of the Customs Act, 1962, as also the compounding fee that may be ascertained by him, in such time bound manner as may be directed by this Hon'ble Court, so as to enable the Petitioner to deposit such amounts to avail the statutory benefit of compounding;
- (d) Issue a writ of mandamus, or any other appropriate writ, order or direction, granting bail to the Petitioner in the R.A. No.161/2019 of ACMM, 8th Court, Esplanade, Mumbai."

3. Prior to his arrest, application for anticipatory bail preferred by the Petitioner was rejected by the Sessions Court and during the pendency of further anticipatory bail application

proceeding before this Court, the Petitioner was arrested on 13th September 2019. He was remanded to custody on 14th September 2019. In paragraph 10 of the remand application dated 14th August 2019, following averments are made :

“10. As there was reason to believe that Respondent No. 3 is guilty of offences punishable under section 135(1)(i) of the Customs Act, 1962, he was arrested on 13.09.2019 at 2030 hours. The offence committed by him is a cognizable and non-bailable offence under section 104 of the Customs Act, 1962.”

4. In view of the filing of instant petition, the bail application which was pending before the Sessions Court has been withdrawn by the Petitioner as not pressed. It is pertinent to note that other accused are on bail.

5. The petition was opposed by filing separate affidavits by the compounding authority as well as the DRI praying rejection of the instant writ petition.

6. We have heard the learned counsel appearing for the respective parties at length and have carefully perused the record. Dr. Kantawala, learned counsel for the Petitioner submitted that all the allegations levelled in the remand

application and the contention of the DRI in counter-affidavit show that the offence alleged under section 135(1)(i) of the Customs Act, 1962 is not only compoundable but also bailable offence. He relies upon the notification dated 13th May 2008 issued by the Central Government in exercise of power conferred under section 135(1)(4)(c) of the Customs Act, 1962, specifying fake Indian currency notes as goods falling in the category of “prohibited goods” for the purpose of said section. The learned counsel for the Petitioner invited our attention to sections 135, 104(6)(b) and 104(7) of the Customs Act, 1962, to claim that the alleged offence is classifiable under section 104(7) of the Customs Act, 1962, which is “Bailable”. He submitted that the Petitioner is willing to comply with the provisions of the “compounding” and would comply with the procedure for compounding and deposit the amount, if any, informed upon adjudication by the compounding authority. He invited our attention to the prayers as well as earlier orders passed by this Court in another matter wherein appropriate directions were issued to expedite the adjudication and the compounding procedure and bail was also granted. He, thus, sought relief as prayed, to safeguard the Petitioner’s fundamental rights.

7. Ms. Gonsalvez, learned counsel for the Respondent – DRI fairly submitted that clauses (a), (c), (d) and (e) of section 104(6) of the Customs Act, 1962 were not applicable, however, she vehemently contended that the alleged offence was classifiable as non-bailable under section 104(6)(b) of the said Act because they were prohibited goods notified under section 11 of the said Act. She relying upon notification dated 9th August 1969 issued by the Central Government under section 11(1) of the Customs Act, which prohibits the import of monkeys into India as stated therein, submitted that notification issued under section 11 of the said Act would fulfill the requirements of section 104(6)(b) of the Act, and no further notification under section 135(1)(i)(c) is required. On such consideration, she further submitted that offence under section 135(1)(i) would be non-bailable. She also submitted that exotic animals are not native to India. The seized animals are smuggled into India. Learned counsel for the Respondent-DRI, however, does not dispute that exotic animals are not covered by Schedule-II of the Indian Wildlife (Protection) Act, 1973 and that no offence under that Act is alleged. She invited our attention to the allegations levelled

against the Petitioner and submitted that import of exotic monkeys is prohibited under section 11 of the said Act in the light of notification referred to above.

8. Learned counsel for the Respondent- DRI submitted that in the alleged offence, the compounding application and instant petition is filed only to seek bail without admitting guilt and disclosing the *modus operandi* for the purpose of compounding. The investigation was not complete, neither the show cause notice was issued, nor adjudication has taken place. As per the form of settlement application, it is mandatory to have the show cause notice and adjudication order. According to her, application for the compounding of the offence was liable to be rejected. She submitted that the instant petition cannot be entertained as no exceptional case is made out as the Petitioner could have filed bail application. To drive home her contentions, learned counsel for the Respondent DRI relied upon following decisions :

- (I) Union of India v. Anil Chanana [(2008) 4 SCC 175];
- (ii) Om Prakash Bhatia v. Commr. Of Customs [(2003) 6 SCC 161];
- (iii) Roshina T v. Abdul Azeez K. T. [(2019) 2 SCC 329];

- (iv) Rajkumar Shivhare v. Assistant Director [(2010) 4 SCC 772];
- (v) Nazma v. Javed alias Anjum [(2013) 1 SCC 376];
- (vi) Saurabh Kumar v. Jailor Koneila Jail [(2014) 13 SCC 436.

9. Ms. Kantharia, learned counsel for the compounding authority adopted the submissions made by learned counsel for the Respondent-DRI.

10. As per the DRI itself, the case under investigation is of smuggling of exotic animals which are not native to India, in violation of provisions of the Customs Act. On 27th July 2019, from the possession of one Ashfaq, who was intercepted at Kalamboli Bus Stop, Navi Mumbai, DRI has seized an exotic albino monkeys and twenty exotic baby Siamese crocodiles which are not native to India. The said seizure is under reasonable belief that seized exotic animals are smuggled into India in contravention of the provisions of Customs Act. The exotic animals were handed over to the Forest Officers for safe custody. It is further case of the DRI that in follow-up investigation, they found that the Petitioner had purchased these exotic animals in market at Bangkok and was a key member of the syndicate. It is further alleged that on his instructions, the carriers have

smuggled into India, the exotic animals for monetary consideration and then transferred by road to Mumbai in a life-threatening conditions.

11. We have carefully perused the provisions of sub-sections (6) and (7) of section 104 of the Customs Act, 1962 which classify the offence under the Customs Act into bailable or non-bailable category which reads thus :

“104. Power to arrest.-(1).....

(2) ...

(3)

(4)

(5)

(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 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.** [Emphasis supplied]

12. We have considered the judgment of the Apex Court in Om Prakash Bhatia (supra) which is relied upon by the learned counsel for the Respondent-DRI. The said judgment is neither in the context of section 104(6) nor in the context of section 135(1) (i) of the Customs Act. The said judgment is in the context of section 113(d) of the Customs Act, applicable in the adjudication proceedings for the purpose of classification. Thus in the context of classification of offence under section 104 of the Customs Act, the said judgment has no application.

13. We have also seen the notification dated 13th May 2018 issued by the Central Government in exercise of powers under section 135(1)(i)(c) of the Customs Act specifying the fake currency notes as the goods following in the category of “prohibited goods” for the purpose of said section. We have also been shown by learned counsel for the Petitioner from the Customs Manual that for the purpose of various different sections of the Customs Act, the Central Government has issued separate

notifications. We have also perused the notification issued under section 11 of the Act, which has been relied upon by the learned counsel for the Respondent-DRI. **No notification could be produced by the Respondents to show that the exotic animals are specified as “prohibited” under section 135(1)(i)(c).**

14. Admittedly clauses (a), (c) and (d) of section 104(6) of the Customs Act, 1962 are not applicable. We are unable to accept the contention of learned counsel for the Respondent-DRI that even if prohibited goods are not those which are notified under sub-clause (c) of clause (i) of section 135(1) and are only notified under section 11, that would be sufficient to invoke sub-section (6) of Section 104. Such an interpretation would render the words **“which are also notified under sub-clause (C) of clause (i) of section 135(1)”**, in sub-section (6) as redundant and nugatory. Such an interpretation is contrary to all canons of law. The provisions which relate to personal and liberty and fundamental rights guaranteed under Article 21 of the Constitution of India cannot be interpreted in such a manner as is being suggested by the Respondents. We are, therefore, clear

that section 104(6)(b) is not attracted in the case of exotic animals. Consequently, we hold that the offence alleged against the Petitioner would fall under section 104(7) of the Customs Act and thus shall be bailable.

15. It is trite that in a bailable offence, the arresting officer is obliged to inform the arrestee that the offence is bailable and would be further obliged to release the arrestee on bail by virtue of provisions of section 104(3) of the Customs Act, 1962.

16. We find that the Petitioner is languishing in custody in a bailable offence since 13th September 2019; the remand has been obtained without disclosing that there is no notification under section 135(1)(i)(c) of the Act specifying the exotic animals as prohibited goods and the alleged offence is bailable. In a bailable offence, the question of Court / Magistrate remanding the citizen to judicial custody without offering bail does not arise. A clear case for breach of provisions of Articles 21 and 22 of the Constitution of India is, thus, made out. The aforesaid classification of the offence as bailable is based purely on the

interpretation of the provisions without involving adjudication of disputed questions of fact. In our considered view, the writ jurisdiction is always available to the citizens to enforce his / her fundamental rights and such right cannot be whittled down on mere technicalities. We, therefore have no hesitation in holding that not only the petition is maintainable but also the Petitioner is entitled to be released on bail.

17. None of the judgments which are relied upon by the learned counsel for the Respondent-DRI to oppose the petition on the ground of maintainability, are applicable in the peculiar facts and circumstances of the case where violation of Article 21 of the Constitution of India is writ large and relating to a case of continuing in custody in a bailable offence. Moreover, for seeking the directions against the Respondents, as sought in the writ petition, no other alternate remedy is available.

18. From the contentions of respondent-DRI in remand application, the counter affidavit and submissions advanced, we do not find any statutory bar in filing or entertaining an application for compounding under section 137(3) of the Act in

respect of exotic animals. The case of Anil Chanana (supra) is *ex-facie* distinguishable on facts where the Applicant had failed to account for his possession of diamond ear-rings and took self - contradictory steps, as narrated in the judgment . Here, no exotic animals have been recovered from the possession of the Petitioner. The learned counsel for the Petitioner has categorically stated that the Petitioner is not even claiming the seized ani9mals.

19. It is further seen that there is no seizure of exotic animals from the possession of Petitioner. The case *qua* the Petitioner is mainly on the strength of statements under section 108 of the Customs Act, 1962. Burden is on the department to give cogent material in adjudication proceedings. It is not mandatory that application for compounding can only be filed by admitting the guilt. This beneficial provision is also available to prevent needles proliferating of litigation.

20. Section 137(3) of the Customs Act, 1962 permits the filing of compounding application **at any stage** and provides that any offence under that Chapter may, either before or after

the institution of the prosecution, be compounded by the principal chief commissioner of customs or chief commissioner of customs on payment by the person accused of an offence, to the Central Government, of such compounding amount and in such manner of compounding as may be specified by the Rules. Proviso to the said provision contains the disability clauses for entertaining the application for compounding. It is not even case of the Respondent that the instant case falls under any of the disability clauses of said proviso. In the affidavit-in-reply filed on behalf of the Respondent-compounding authority, the main objection taken is that as per the respondents, the compounding application filed by the Petitioner under the provisions of the Customs Act is premature as the payment of duty / fine / penalty has not been determined so far. The affidavit of DRI further states that admittedly the show cause notice has not been issued and thus application is not maintainable and it is premature. It is also stated that as per Rule 4(3) of the Compounding Rules, the Petitioner's application for compounding, may or may not be allowed by the compounding authority; if it is allowed, the Petitioner may get immunity from the prosecution.

20. We have perused the application form. Column 9 to 12A only require the Applicant to disclose whether show cause notice is issued, if it is issued, the details of duty demanded, whether show cause notice is adjudicated, if it is adjudicated, to disclose the duty confirmed and fine and penalty imposed and whether paid or not. No bar on filing an application for compounding before issuance of show cause notice or adjudication thereof is contemplated in the Act. On the contrary, section 137(3) permits the filing of an application even before the filing of prosecution. It is not the case of the DRI that the prosecution cannot be filed before the issuance of show cause notice. Therefore, we are satisfied that there is no bar in filing the compounding application. The prayers of the Petitioner seeking direction regarding carrying out of adjudication and considering the application for compounding are reasonable. In our view, in the light of the express statutory provision permitting the compounding of offence and rule which prescribe the procedure for dealing with the application for compounding, the authorities cannot show disinclination to entertain and determine the application for compounding the offence alleged.

21. So far as the merits of the adjudication or compounding application are concerned, the said will have to be decided by the adjudicating or compounding authority in accordance with law and the contentions of both sides would be open.

22. In the light of above facts and circumstances, we allow the writ petition by passing following order :

(1) We hold that the alleged offence *qua* the Petitioner is bailable offence under section 104(7) of the Customs Act, 1962. The Petitioner, therefore, shall be forthwith released on cash bail in the sum of Rs.50,000/- to be deposited with the Jail Superintendent of Arthur Road Jail, Mumbai in Remand Application No.161 of 2019 of Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Mumbai.

(2) The Petitioner shall co-operate in the investigation and shall remain present as and when called by the investigating agency. The Petitioner is, however, permitted to have an advocate accompanying him at visible but not audible distance during his investigation by the officers of Respondent DRI - investigating agency and recording of his statement shall be video-graphed in terms of the decision of the apex Court in Vijay Sajjani v. Union of India [Cri. M. P. No. 10117 of 2012 in WP (Cri.)

No. 29 of 2012] and Rajinder Arora v. Union of India [WP (Civil) No. 389 of 2010 order dated 7th December 2010].

(3) The adjudicating authority, namely, the Commissioner of Customs (Preventive) shall give show cause notice to the Petitioner, if necessary, and quantify and determine the amount payable as expeditiously as possible so that the same can be paid by the Petitioner.

(4) The compounding authority, namely, the Chief Commissioner of Customs shall thereafter decide the Petitioner's application for compounding of the offence as expeditiously as possible and in accordance with law.

(5) All concerned shall act upon an authenticated copy of this judgment.

[N. J. JAMADAR, J.]

[RANJIT MORE, J.]

Ms. Gonsavlez, at this stage invited our attention to the order passed in the bail application filed by co-accused and submitted that the Petitioner be directed to attend the DRI office on every Monday between 11.00 a.m. to 2.00 p.m. till issuance of the show cause notice. She further submitted that the condition shall be imposed on the Petitioner that he shall not leave Mumbai without prior permission of this Court. So far as the first

condition is concerned, Dr. Kantawala, learned counsel for the Petitioner has no objection for the Petitioner attending DRI office. In that view of the matter we direct the Petitioner to attend the DRI office, Mumbai Zonal Unit on every Monday between 11.00 a.m. to 2.00 p.m. till issuance of the show cause notice. So far as the second condition is concerned, we are not inclined to grant the same since the Petitioner was arrested in a bailable offence in violation of the fundamental rights under Article 21 of the Constitution of India.

[N. J. JAMADAR, J.]

[RANJIT MORE, J.]