

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 03rd January, 2022

IN THE MATTER OF:

+ **W.P.(CRL.) 1974/2021**
AIR CUSTOMS

..... Petitioner

Through Mr.Satish Kumar, Senior Government
Standing Counsel

versus

BEGAIM AKYNOVA

..... Respondent

Through Ms. Sangita Bhayana with
Ms. Aishwarya Dwivedi, Advocates

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This writ petition under Article 226 & 227 of the Constitution of India read with Section 482 Cr.P.C. is directed against Order on sentence dated 24.09.2021, passed by the learned ACMM-01, Patiala House Courts, New Delhi, in C.C. No. 2193/2020 sentencing the Respondent herein to undergo imprisonment for a period already undergone and pay a fine of Rs. 50,000/- for offences under Sections 132 and 135(1)(a) and (b) of the Customs Act, 1962, and Orders dated 27.09.2021 and 29.09.2021, passed by the Ld. CMM, Patiala House Courts, New Delhi, in C.C. No. 2193/2020 directing Customs/Petitioner herein to release the passport of the Respondent herein.

2. The facts, in brief, leading up to this petition are as follows:

- i. It is stated that on 11.09.2019, two passengers – Ms. Aida Askerbekova (Pax-1) and Ms. Begaim Akynova (Respondent

herein – Pax-2) were intercepted at T-3, IGI Airport, New Delhi by Customs Officers. When asked to pass through the Door Frame Metal Detector Door (DFMD), a hard beep sound was heard, and Ms. Askerbekova and the Respondent herein were consequently served a notice under Section 102 of the Customs Act, 1962, in the presence of independent witnesses.

- ii. It is stated that the Respondent consented to personal and baggage search, which was conducted by Ms. Ambika Rani, ACS. This search led to the recovery of the following items:
 - a) 3 yellow metal strips moulded into circular shape, total weighing 1875 grams appearing to be gold concealed inside the body around the waist and thigh with the help of strings;
 - b) Boarding Pass of Flight No. KC 907 dated 11.09.2019;
 - c) Kazakhstan passport no. N08622501 issued on 26.02.2013;
 - d) One old and used Mobile Phone of Samsung Brand;
 - e) Currency: INR-200, USD-520; and VI. Old and used personal effects.
- iii. It is stated that on examination from a jewellery appraiser who submitted an Appraisal Report dated 11.09.2019, according to which the yellow metal was found to be gold. The report for both the passengers is as follows:-

<i>Sr. No.</i>	<i>Description of Gold</i>	<i>Purity</i>	<i>Weight (in Gms.)</i>	<i>Value Appraised (in Rs.)</i>
1.	<i>Pax-1</i>			
	<i>04 gold strips moulded into circular shape</i>	995	3150	1,13,74,272/-
2.	<i>Pax-2</i>			
	<i>04 gold strips moulded into circular shape</i>	995	1875	67,70,400/-
<i>Total</i>			<i>5025</i>	<i>1,81,44,672/-</i>

iv. The rate of Gold as per Notification No. 62/2019 – Customs (N.T.) dated 30.08.2019 was USD 496 per 10 grams. Exchange rate of USD as per Notification No. 63/2019 – Customs (N.T.) dated 05.09.2019 was Rs. 72.80/-. Therefore, the total Tariff Value of the recovered gold came to be Rs. 1,81,44,672/-.

v. It is stated that both Pax-1 and Pax-2 (Respondent herein) claimed that the recovered gold belonged to them and that they did not have a copy of the Bill for purchase of the recovered gold. They also did not dispute description, quantity, weight, purity and value of the gold assessed by the Customs Department. It is stated that both Pax-1 and Pax-2 (Respondent herein) admitted to their involvement in the smuggling of gold deliberately, intentionally and knowingly with the intent to evade Customs

duty.

- vi. It is stated that the recovered gold was seized under Section 110 of the Customs Act, 1962 *vide* Seizure Memo dated 11.09.2019 and was liable to confiscation under Section 111 of the Customs Act, 1962. The gold recovered from Pax-2 (Respondent herein) was kept in a transparent plastic container wrapped with transparent adhesive tape and sealed with Customs Plier Seal 'Customs PA IGI' over a paper slip bearing signatures of the independent witnesses, both the Pax, the interpreter, the Air Customs Officer and the Air Customs Superintendent. This container was deposited under the Detention Receipt No. 46906 dated 11.09.2019.
- vii. It is stated that statements dated 11.09.2019 and 12.09.2019 of Pax-2 (Respondent herein) were recorded under Section 108 of the Customs Act, 1962, wherein it appeared that she knowingly, deliberately and intentionally tried to smuggle the gold. Thereafter, Show Cause Notice (SCN) *vide* C. No. VIII(AP)10/P&I/2566-A/Arrival/2019 dated 04.12.2019 was issued to both the Pax and in this SCN, the Adjudicating Authority ordered for total confiscation of the gold and also imposed a penalty of Rs. 20,00,000/- on Pax-1 and Rs. 12,00,000/- on Pax-2 (Respondent herein).

- viii. Investigation was carried out wherein it was found that the goods constituted as 'illegal import' in terms of Section 11A of the Customs Act, 1962, and that Pax-1 and Pax-2 (Respondent herein) had violated Sections 77 and 79 of the Customs Act, 1962, read with Section 11A of the Customs Act, 1962, and further read with the Baggage Rules, 1998. It is stated that from the facts and circumstantial evidence, it was established that both the Pax and had knowingly involved themselves in smuggling activities and were liable to be prosecuted under Sections 132, 135(1)(a) & 135(1)(b) of the Customs Act, 1962.
- ix. It is stated that Pax-1 and Respondent herein were enlarged on bail *vide* Order of the Ld. CMM, Patiala House Courts, New Delhi with the condition imposed that they would not travel abroad without the permission of the Ld. Trial Court. An application moved by Pax-1 and Respondent herein seeking permission to travel abroad was dismissed *vide* Order dated 10.12.2019. A revision petition filed against the same was dismissed by the Ld. Sessions Court *vide* Order dated 30.05.2020, and an appeal against this Order before this Court was dismissed *vide* Order dated 31.08.2020. However, Pax-1 had been granted permission to go abroad, subject to

conditions.

- x. It is stated that the Respondent herein filed a fresh application seeking permission to travel abroad before the Ld. CMM which was subsequently granted *vide* Order dated 06.01.2021. An appeal against this Order by the Petitioner herein was allowed by this Court *vide* Order dated 04.03.2021, and an SLP against this Order was dismissed by the Supreme Court *vide* Order dated 25.06.2021.
- xi. It is stated that an application under Section 265-B Cr.P.C. was moved by the Respondent herein on 02.09.2021 for plea bargaining. A Reply dated 22.09.2021 was filed wherein Air Customs (Petitioner herein) stated that the application for plea bargaining was maintainable. The Reply further recommended that the application for plea bargaining be dismissed and instead the accused (Respondent herein) should follow the procedure of compounding of offences under Section 137(3) of the Customs Act, 1862. However, as the accused (Respondent herein) was accepting the guilt, she could consider the option of pleading guilty.
- xii. It is stated that accordingly, the Respondent's statement, statement of Mr. Ulybek Tulekin, Second Secretary, Head of Consular Section from the Embassy of Kazakhstan, statement of Air Customs

Officer, Shri Anuj Kumar, and Statement of Senior SPP for the Customs Department, Satish Aggarwala was recorded. Consequently, the Mutually Satisfactory Disposition (MSD) dated 24.09.2021 stated as follows:

"Mutually Satisfactory Disposition

1. *That the accused shall plead guilty for the offences under Section 132 & 135(1)(a) & (b) of the Customs Act, 1962.*
2. *That the accused shall plead for a lenient view and suitable sentence from the Court on account of her pleading guilty.*
3. *That the department shall pray for deterrent sentence in view of the nature of offence."*

xiii. It is stated that the terms of the MSD were attested by the Ld. SPP for Customs, Sh. Satish Aggarwala, Sh. Anuj Kumar, Office of Commissioner of Customs, and the Respondent herein.

xiv. It is stated that in wake of the material placed on record, the MSD and the plea of guilt made by the Respondent herein, the Ld. Trial Court *vide* Judgement dated 24.09.2021, convicted Respondent herein for committing offence punishable under Sections 132 and 135(1)(a) & (b) of the Customs Act, 1962. In its Order on sentence dated 24.09.2021, the Ld. Trial Court sentenced the Respondent herein to imprisonment for a period already undergone, i.e.

43 days, and to pay a fine of Rs. 50,000/- for offences under Sections 132 and 135(1)(a) & (b) of the Customs Act, 1962. Further, in case of default of payment of fine, the Respondent herein was directed to undergo simple imprisonment for two months. Thereafter, *vide* Orders dated 27.09.2021 and 29.09.2021, the Ld. Trial Court directed for the Respondent's passport to be released by 29.09.2021.

xv. Aggrieved by Orders dated 24.09.2021, 27.09.2021 and 29.09.2021, passed by the learned ACMM-01, Patiala House Courts, New Delhi, in C.C. No. 2193/2020, the Petitioner has approached this Court by way of the instant petition.

3. At the outset, Mr. Satish Kumar, learned Senior Government Standing Counsel appearing for the Petitioner, submits that the instant case relates to socioeconomic offences and, therefore, the option of plea bargaining is not available as per Section 265-A Cr.P.C.. Mr. Kumar submits that, moreover, the Ld. Trial Court could not have proceeded with the application for plea bargaining without the consent of the Customs Department, i.e. the Petitioner.

4. Mr. Kumar submits that the quantum of punishment that has been imposed *vide* Order dated 24.09.2021 is contrary to Section 265-E Cr.P.C. He argues that the offence under which the Respondent has been convicted prescribes up to seven years of imprisonment with fine. He states that in the instant case, the Respondent's actions are squarely covered by Section 135(1)(a) & (b) of the Customs Act, 1862, because the total gold that has been recovered from both the accused needs to be considered, and as the total amount of the recovered gold exceeds one crore of rupees, the

Respondent herein is liable to be sentenced to imprisonment for a period up to seven years. He submits that the proviso states minimum period for imprisonment is one year, and even if the aspect of plea bargaining is taken into contention, the Respondent has not served the requisite period of imprisonment as per Section 265-E Cr.P.C.

5. The learned Senior Government Standing Counsel submits that the Ld. Trial Court has failed to comply with the procedure laid down in the provisions under Section 265-B and Section 265-C. He argues that no meeting was called and there was no notice issued for such a meeting. He states that for an MSD, there needs to be consensus and a perusal of the MSD dated 24.09.2021 reveals that there was no reference to consensus *ad idem*. He submits that the Petitioner never agreed to the aspect of plea bargaining and that, therefore, there was no basis for the Ld. Trial Court to proceed further.

6. He submits that, additionally, there was already a provision for compounding of offences under Section 137(3) of the Customs Act, 1962, and, therefore, the Respondent could have approached the competent authority for compounding. He states that the consent tendered by Shri. Anuj Kumar, Air Customs Officer, could not be fastened on the Customs Department legally. He further submits that the issuance of directions to the IO to release the passport of the Respondent herein was also bad in law as the Order on sentence itself was illegal on the grounds that the period of imprisonment was erroneous in nature and that due process had not been followed.

7. *Per contra*, Ms. Sangita Bhayana, learned Counsel for the Respondent herein, opposes Mr. Kumar's submission that the amount of the recovered

gold was more than one crore of rupees. She states that as per the Complaint, the Respondent was caught carrying four gold strips moulded into circular shape weighing 1875 grams. She states that the value of the gold recovered from the Respondent is Rs. 67,70,400/-. She submits that the Respondent is covered by Section 135(1) Clause (ii) and is, at the most, liable to be imprisoned for a term which may extend to three years or pay a fine, or both. Ms. Bhayana, therefore, argues that the submission of Mr. Kumar that the offence under which the Respondent is convicted is punishable with imprisonment upto seven years is contrary to the facts of the case and the mandate of the law. She further states that Chapter XXIA Cr.P.C. is applicable to offences under the Customs Act, 1962.

8. The learned Counsel for the Respondent argues that the consent for plea bargaining had been categorically given by the Office of Commissioner of Customs as well as the Special Public Prosecutor for Customs, and that the procedure for plea bargaining has been duly followed. She submits that after consenting to plea bargaining, the Customs Department cannot now state that the Air Customs Officer and the SPP were not authorized to give their consent. She submits that the proper procedure under Chapter XXIA of the Cr.P.C. has been followed and the Respondent has already deposited the fine that has been imposed on her by the Ld. Trial Court.

9. Ms. Bhayana, learned Counsel for the Respondent, relies on K.I. Pavunny v. Assistant Collector, (1997) 3 SCC 721, Vipin Kumar Kapur v. Shri. S.M. Ali, Intelligence Officer – DRI, (Crl.Rev.P.No. 420, 422, 435, 439, 441/2008) and Inder v. State of Maharashtra, (1979) 4 SCC 484 to submit that the Respondent should not be subjected to a greater penalty than what is prescribed by the law and that no *ex post facto* legislation would be

permissible for escalating the severity of the punishment.

10. Ms. Bhayana, learned Counsel for the Respondent, submits that the Respondent is a poor lady who has been falsely implicated in the instant case. She submits that despite that, the Respondent has already deposited Rs. 12 lakhs as a penalty, as well as the fine of Rs 50,000/- which was imposed by the Ld. Trial Court. She submits that the Respondent has already sold her house in Kazakhstan to pay the penalties, and that her husband and child are in critical medical conditions for which she wishes to go back to her home country at the earliest. Ms. Bhayana further submits that the co-accused of the Respondent, despite carrying gold weighing 3150 grams valued at Rs. 1,13,74,272/-, was permitted to go back to her country. She further submits that the Government is not acting as a fair litigant.

11. Heard Mr. Satish Kumar, learned Senior Government Standing Counsel for the Petitioner, Ms. Sangita Bhayana, learned Counsel for the Respondent, and perused the material on record.

12. The concept of plea bargaining was introduced in Indian criminal jurisprudence by way of amendment Act of 2005 in the Code of Criminal Procedure under Chapter XXIA. Chapter XXIA delineates the guidelines for a Mutually Satisfactory Disposition (MSD). The Chapter has been reproduced as under:-

"265-A. Application of the Chapter.—(1) *This chapter shall apply in respect of an accused against whom—*

(a) the report has been forwarded by the officer in charge of the police station under Section 173 alleging therein that an offence appears to have been committed by him other than an offence for which the punishment of death or of imprisonment for life or of imprisonment

for a term exceeding seven years has been provided under the law for the time being in force; or

(b) a Magistrate has taken cognizance of an offence on complaint, other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years, has been provided under the law for the time being in force, and after examining complainant and witnesses under Section 200, issued the process under Section 204,

but does not apply where such offence affects the socio-economic condition of the country or has been committed against a woman, or a child below the age of fourteen years.

(2) For the purposes of sub-section (1), the Central Government shall, by notification, determine the offences under the law for the time being in force which shall be the offences affecting the socio-economic condition of the country.

In exercise of the powers conferred under sub-section (2) of Section 265-A of the Code of Criminal Procedure, 1973, the Central Government hereby determine the offences under the following laws for the time being in force which shall be the offences affecting the socio-economic condition of the country for the purposes of sub-section (1) of Section 265-A of the said Act, namely,—

(i) Dowry Prohibition Act, 1961

(ii) The Commission of Sati Prevention Act, 1987

(iii) The Indecent Representation of Women (Prohibition) Act, 1986

- (iv) *The Immoral Traffic (Prevention) Act, 1956*
- (v) *Protection of Women from Domestic Violence Act, 2005*
- (vi) *The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992*
- (vii) *Provisions of Fruit Products Order, 1955 (issued under the Essential Services Commodities Act, 1955)*
- (viii) *Provisions of Meat Food Products Orders, 1973 (issued under the Essential Commodities Act, 1955)*
- (ix) *Offences with respect to animals that find place in Schedule I and Part II of the Schedule II as well as offences related to altering of boundaries of protected areas under Wildlife (Protection) Act, 1972*
- (x) *The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989*
- (xi) *Offences mentioned in the Protection of Civil Rights Act, 1955*
- (xii) *Offences listed in Sections 23 to 28 of the Juvenile Justice (Care and Protection of Children) Act, 2000*
- (xiii) *The Army Act, 1950*
- (xiv) *The Air Force Act, 1950*
- (xv) *The Navy Act, 1957*
- (xvi) *Offences specified in Sections 59 to 81 and 83 of the Delhi Metro Railway (Operation and Maintenance) Act, 2002*

(xvii) *The Explosives Act, 1884*

(xviii) *Offences specified in Sections 11 to 18 of the Cable Television Networks (Regulation) Act, 1995*

(xix) *Cinematograph Act, 1952*

265-B. Application for plea bargaining.—(1) A person accused of an offence may file an application for plea bargaining in the Court in which such offence is pending for trial.

(2) The application under sub-section (1) shall contain a brief description of the case relating to which the application is filed including the offence to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred, after understanding the nature and extent of punishment provided under the law for the offence, the plea bargaining in his case and that he has not previously been convicted by a Court in a case in which he had been charged with the same offence.

(3) After receiving the application under sub-section (1), the Court shall issue notice to the Public Prosecutor or the complainant of the case, as the case may be, and to the accused to appear on the date fixed for the case.

(4) When the Public Prosecutor or the complainant of the case, as the case may be, and the accused appear on the date fixed under sub-section (3), the Court shall examine the accused in camera, where the other party in the case shall not be present, to satisfy itself that the accused has filed the application voluntarily and where—

(a) the Court is satisfied that the application has been filed by the accused voluntarily, it shall provide time to the Public Prosecutor or the complainant of the case, as the case may be, and the accused to work out a mutually satisfactory disposition of the case which may include giving to the victim by the accused the compensation and other expenses during the case and thereafter fix the date for further hearing of the case;

(b) the Court finds that the application has been filed involuntarily by the accused or he has previously been convicted by a Court in a case in which he had been charged with the same offence, it shall proceed further in accordance with the provisions of this Code from the stage such application has been filed under sub-section (1).

265-C. Guidelines for mutually satisfactory disposition.—*In working out a mutually satisfactory disposition under clause (a) of sub-section (4) of Section 265-B, the Court shall follow the following procedure, namely:—*

(a) in a case instituted on a police report, the Court shall issue notice to the Public Prosecutor, the Police officer who has investigated the case, the accused and the victim of the case to participate in the meeting to work out a satisfactory disposition of the case:

Provided that throughout such process of working out a satisfactory disposition of the case, it shall be the duty of the Court to ensure that the entire process is completed voluntarily by the parties participating in the meeting:

Provided further that the accused may, if he so desires, participate in such meeting with his pleader, if any, engaged in the case;

(b) in a case instituted otherwise than on police report, the Court shall issue notice to the accused and the victim of the case to participate in a meeting to work out a satisfactory disposition of the case:

Provided that it shall be the duty of the Court to ensure, throughout such process of working out a satisfactory disposition of the case, that it is completed voluntarily by the parties participating in the meeting:

Provided further that if the victim of the case or the accused, as the case may be, so desires, he may participate in such meeting with his pleader engaged in the case.

265-D. Report of the mutually satisfactory disposition to be submitted before the Court.—Where in a meeting under Section 265-C, a satisfactory disposition of the case has been worked out, the Court shall prepare a report of such disposition which shall be signed by the presiding officer of the Court and all other persons who participated in the meeting and if no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of this Code from the stage the application under sub-section (1) of Section 265-B has been filed in such case.

265-E. Disposal of the case.—Where a satisfactory disposition of the case has been worked out under Section 265-D, the Court shall dispose of the case in the following manner, namely:—

(a) the Court shall award the compensation to the victim in accordance with the disposition under Section 265-D and hear the parties on the quantum of the punishment, releasing of the accused on probation of

good conduct or after admonition under Section 360 or for dealing with the accused under the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or any other law for the time being in force and follow the procedure specified in the succeeding clauses for imposing the punishment on the accused;

(b) after hearing the parties under clause (a), if the Court is of the view that Section 360 or the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or any other law for the time being in force are attracted in the case of the accused, it may release the accused on probation or provide the benefit of any such law, as the case may be;

(c) after hearing the parties under clause (b), if the Court finds that minimum punishment has been provided under the law for the offence committed by the accused, it may sentence the accused to half of such minimum punishment;

(d) in case after hearing the parties under clause (b), the Court finds that the offence committed by the accused is not covered under clause (b) or clause (c), then, it may sentence the accused to one-fourth of the punishment provided or extendable, as the case may be, for such offence.

265-F. Judgment of the Court.—*The Court shall deliver its judgment in terms of Section 265-E in the open Court and the same shall be signed by the presiding officer of the Court.*

265-G. Finality of the judgment.—*The judgment delivered by the Court under Section 265-G shall be final and no appeal (except the special leave petition under Article 136 and writ petition under Articles 226 and 227 of the Constitution) shall lie in any Court*

against such judgement.

265-H. Power of the Court in plea bargaining.—A Court shall have, for the purposes of discharging its functions under this Chapter, all the powers vested in respect of bail, trial of offences and other matters relating to the disposal of a case in such Court under this Code.

265-I. Period of detention undergone by the accused to be set off against the sentence of imprisonment.—The provisions of Section 428 shall apply, for setting off the period of detention undergone by the accused against the sentence of imprisonment imposed under this Chapter, in the same manner as they apply in respect of the imprisonment under other provisions of this Code.

265-J. Savings.—The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other provisions of this Code and nothing in such other provisions shall be construed to constrain the meaning of any provision of this Chapter.

Explanation.—For the purposes of this Chapter, the expression “Public Prosecutor” has the meaning assigned to it under clause (u) of Section 2 and includes an Assistant Public Prosecutor appointed under Section 25.

265-K. Statements of accused not to be used.—Notwithstanding anything contained in any law for the time being in force, the statements or facts stated by an accused in an application for plea bargaining filed under Section 265-B shall not be used for any other purpose except for the purpose of this Chapter.

265-L. Non-application of the Chapter.—Nothing in this Chapter shall apply to any juvenile or child as defined in clause (k) of Section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000).]" (emphasis supplied)

13. Section 256-A stipulates the application of Chapter XXIA. It states that the Chapter is not applicable to cases involving socio-economic offences under a law which has been notified by the Central Government or offences that have been committed against a woman, or a child below fourteen years of age. Section 265-B lays down the requirements for instituting an application for plea bargaining by an accused, and the process thereafter. Section 265-C lays down the procedure that must be followed by the Court for working out an MSD, and Section 265-D talks about how the MSD report is to be submitted before the Court. Section 265-E entails the manner in which the Court is to dispose of a case after a MSD has been worked out. Section 265-F states that the Court shall deliver its judgement in terms of Section 265-E in open Court and the same shall be signed by the Presiding Officer of the Court. Section 265-G states that the judgement will be final and no appeal shall lie against it (except an SLP or a writ under Article 136 and Articles 226 & 227 of the Constitution of India, respectively). Section 265-H delineates the power of the Court in plea bargaining. Section 265-I states that the period of detention undergone by the accused is to be set off against the sentence of imprisonment. Section 265-K notes that the statements or facts used by an accused in their application for plea bargaining shall not be used for any other purpose.

14. At the outset, it is pertinent to note that the Central Government has not notified the Customs Act, 1862, as a statute which does not attract

Chapter XXIA Cr.P.C. under Section 265-A(2). Therefore, the contention of Mr. Kumar, the learned Senior Government Standing Counsel that Chapter XXIA Cr.P.C. does not apply in the instant case does not hold any water. Orders have also been placed on record before this Court showcasing that plea bargaining is applicable to offences under Sections 132 and 135 of the Customs Act, 1862.

15. Furthermore, the contention of Mr. Kumar, the learned Senior Government Standing Counsel, that there is a provision for compounding of offences under the Customs Act, 1862, and therefore, Chapter XXIA is not applicable also does not have any merit. A person accused of offences under the Customs Act, 1862, has two options –

- (i). to compound the offences under Section 137(3) of the Customs Act, 1862, by following the procedure and punishment laid therein, or
- (ii). to file an application for plea bargaining under Chapter XXIA Cr.P.C.

Had the legislature intended to exclude the applicability of Chapter XXIA Cr.P.C. to those enactments where there are provisions for compounding the offence, then it would have explicitly mentioned the same in Chapter XXIA Cr.P.C. Chapter XXIA Cr.P.C. was introduced to include all statutes, save those that were specifically excluded under Section 265-A(2). It cannot be said that the legislature was unaware of the Customs Act, 1962, while devising the chapter on plea bargaining. Therefore, the presence of Section 137(3) of the Customs Act, 1862, will not take away the applicability of Chapter XXIA Cr.P.C. The contention of Mr. Kumar is contrary to the stand taken by the Petitioner in its reply.

16. The Reply of the Petitioner dated 22.09.2021 also categorically states

that the Respondent had the option of either compounding the offences under Section 137(3) of the Customs Act, or could consider the option of pleading guilty. The relevant portion is reproduced hereinunder:

" So it is prayed that in case the prayer of the applicant for plea-bargaining may be dismissed and instead the accused shall follow the procedure of Compounding of Offences specified under Section 137(3) of Customs Act, 1962. Moreover, as the accused is accepting the guilt, the accused may also consider the option of pleading guilty."

17. In the instant case, a perusal of the Application under Section 265-B Cr.P.C. filed by the Respondent herein, the Reply to the Application dated 22.09.2021, Statement of the Respondent dated 24.09.2021 as well as the Questions put to her, Statement dated 24.09.2021 of the Second Secretary, Embassy of the Republic of Kazakhstan, Statement of Senior SPP for the Customs Department dated 24.09.2021, the MSD dated 24.09.2021, and the consequent judgement dated 24.09.2021, indicates that the procedure that is to be adhered to for plea bargaining under Chapter XXIA Cr.P.C. has been astutely followed with nothing amiss.

18. Further, the argument that the Petitioner had not consented to the procedure also cannot be countenanced. The statement of the Air Customs Officer dated 24.09.2021 categorically stating that there was no objection if the plea of guilt of the accused was accepted is on record, along with statement of Senior SPP, Satish Aggarwala, for the Customs Department dated 24.09.2021 stating that he adopts the Reply dated 22.09.2021 and that deterrent punishment should be awarded to the Respondent if her plea for

plea bargaining is accepted. The consequent MSD dated 24.09.2021 has also been attested by the Senior SPP for Customs Department, the ACO, and the Respondent herein. It is egregious for the Petitioner herein to raise the argument at this juncture that consent was not given for the procedure of plea bargaining.

19. The offences under which the Respondent herein has been convicted are Sections 132 and 135(1)(a) & (b) of the Customs Act, 1962. Both the provisions have been reproduced as follows

*"132. False declaration, false documents, etc.—
Whoever makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document in the transaction of any business relating to the customs, knowing or having reason to believe that such declaration, statement or document is false in any material particular, shall be punishable with imprisonment for a term which may extend to 1 [two years], or with fine, or with both."*

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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 misdeclaration 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) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111 or Section 113, as the case may be;

or

(c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under Section 113; or

(d) fraudulently avails of or attempts to avail of drawback or any exemption from duty provided under this Act in connection with export of goods,

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) the evasion or attempted evasion of duty exceeding [fifty lakh] of rupees; or

(C) such categories of prohibited goods as the Central Government may, by notification in the Official Gazette, specify; or

(D) fraudulently availing of or attempting to avail of drawback or any exemption from duty referred to in clause (d), if the amount of drawback or exemption from duty exceeds 1 [fifty lakh] of rupees, 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." (emphasis supplied)

20. While Section 132 of the Customs Act, 1862, stipulates the punishment for false declaration, false documents, etc., Section 135 of the Customs Act, 1862, indicates the punishment for evasion of duty or prohibitions. Under Section 135(a) & (b), any person who knowingly is concerned with the misdeclaration of the value of any good or in any

fraudulent evasion of duty, or carries any good which he knows is liable to confiscation under Section 111 or Section 113 of the Customs Act, 1862, is liable to punishment as laid down under Section 135. The punishment in case of such offences, if the market price of the goods exceeds one crore of rupees, is imprisonment for a term which may extend to seven years and with fine. Further, this term cannot be less than one year in any case. However, as per Section 135(1)(ii), in any other case, the punishment would be imprisonment for a term which may extend to three years, *or* with fine, *or* with both. Therefore, if the market value of the goods recovered is less than one crore of rupees, then the accused is liable to punishment under Section 135(1)(ii) of the Customs Act, 1862. Additionally, as per Section 265-E(d) Cr.P.C., if the Court finds that the accused is not covered under Section 265(b) & (c), then the Court may sentence the accused to one-fourth of the punishment provided or extendable, as the case may be, for such offence.

21. In the instant case, the gold recovered from the person of the Respondent weighs 1875 grams, which amounts to Rs. 67,70,400/-. The contention of Mr. Kumar that the total value of the gold recovered from both the accused (including Respondent herein) is Rs. 1,13,74,272/- and that total value of the gold recovered from both the accused should be considered while deciding the quantum of punishment is without any merit. This Court finds weight in the submission that the punishment that is to be imposed on the Respondent should correspond to the gold that has solely been recovered from her. Section 34 of the Indian Penal Code, 1860, cannot be made applicable to the instant case. Each person must be made answerable to the recovery of gold found in their possession for the purpose of imposing the requisite punishment.

22. As the market value of the gold recovered from the respondent herein is Rs. 67,70,400/-, she is liable to be sentenced to imprisonment for a period that *may* extend to three years, *or* may pay a fine, *or* both. *Vide* impugned Order dated 24.09.2021, the Ld. Trial Court has directed for the Respondent to imprisonment for the term already undergone, i.e. 43 days, and to pay a fine of Rs. 50,000/- that has already been deposited by the Respondent. A combined reading of Section 135 of the Customs Act, 1862, and Section 265-E Cr.P.C. indicates that the Respondent has, therefore, fulfilled the conditions stipulated, and that quantum of punishment awarded by the Ld. Trial Court is not contrary to Section 265-E Cr.P.C.

23. Furthermore, the co-accused of the Respondent has already been granted the permission to travel to her home country. As a consequence of the Order on sentence dated 24.09.2021, the IO is obligated to adhere to the Orders dated 27.09.2021 and 29.09.2021 directing it to release the passport of the Respondent. The government is supposed to be a fair litigant. It cannot and should not resort to such legally untenable arguments in order to challenge orders of the Court which it finds to be unfavourable.

24. In view of the above, this Court finds no legal infirmities in the Order on sentence dated 24.09.2021, passed by the learned ACMM-01, Patiala House Courts, New Delhi, in C.C. No. 2193/2020 sentencing the Respondent herein to undergo imprisonment for a period already undergone and pay a fine of Rs. 50,000/- for offences under Sections 132 and 135(1)(a) and (b) of the Customs Act, 1962, and Orders dated 27.09.2021 and 29.09.2021, passed by the Ld. CMM, Patiala House Courts, New Delhi, in C.C. No. 2193/2020 directing Customs/Petitioner herein to release the passport of the Respondent herein.

25. In light of the above observations, this petition is dismissed, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J.

JANUARY 03, 2022

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