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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.4449 OF 2019

Mayank Dhakad] ..Petitioner.

v.

Union of India & Ors.] ..Respondents.

Dr. Sujay Kantawala i/by Ms.Aishwarya Kantawala for the
Petitioner.

Ms. A.S. Pai with Mr. Jitendra B.Mishra, for Respondent Nos.1
and 2.

**CORAM : INDRAJIT MAHANTY &
N.B.SURYAWANSHI, JJ.**

DATE : 29TH AUGUST, 2019.

P.C.

1] Upon praecipe, the matter is listed under the
caption "production".

2] Heard learned counsel for the respective parties.

3] This writ of habeas corpus has been filed by the
Petitioner seeking relief of his father viz. Arvindkumar Dhakad,

who has been arrested by Respondent Nos. 1 and 2, under Exhibit A on 27th August, 2019.

4] This matter was mentioned in the morning. Notices were issued to the respondents and the matter was taken up for hearing. The learned APP Mrs. A. S. Pai sought adjournment to enable her to obtain instructions and to file reply. The learned counsel for the Petitioner insisted for grant of interim relief. On this count, during the course of hearing, learned APP sought for short adjournment to enable her to obtain oral instructions and accordingly the matter stood adjourned till 5.00 p.m.

5] Various contentions were advanced by the learned APP opposing prayer for interim relief. The learned counsel for the Petitioner drew our attention to arrest memo (Exhibit A, at page 29) which reads thus:

“MEMORANDUM OF ARREST

Whereas, I, Shreeni Pillai, Intelligence Officer, Directorate of Revenue Intelligence, Mumbai Zonal Unit, have reasons to believe that you, Arvind Kumar Jain Dhakad, resident of 1101, Solitaire Apartments, D K. Sandhu Marg, Chembur, Mumbai 400071 have aided and abetted smuggling of foreign origin gold into India.

2. Evidences gathered by this office indicate

that being a Director of Ekdant Commercial Pvt. Ltd. You were aware of the activities of the company especially dealing and handling of smuggled gold. During your statement recorded on 27.8.2019 you have adopted a non-cooperative and disruptive attitude giving evasive answers.

3. Now, therefore, I, by virtue of the powers vested in me under the provisions of Section 104 of the Customs Act, 1962, place you under arrest today i.e. on 27.8.2019 at 23.35 hrs. for the offence committed under the Customs Act, 1962.

4. You are being made aware that you have a right to inform about your arrest to your relations or a friend or an advocate.

5. You shall be produced before the Hon'ble Additional Chief Metropolitan Magistrate, Mumbai at the earliest."

6] The learned counsel for the Petitioner submitted that arrest and custody of the detinue was in violation of Art. 22(1) of the Constitution of India and S. 104 of the Customs Act, 1962, and hence continued detention was illegal and the accused was entitled for release forthwith in terms of Art. 21 of the Constitution of India.

. The learned counsel for the Petitioner submitted that the said arrest memorandum is not in consonance with the provisions of S. 104 of the Customs Act, 1962 which mandates that the Customs Officer was required to record his “reasons to believe”, that the accused has committed an offence punishable under S. 132 or 133 or 135 or 135A or 136 and such “reasons to believe” and “grounds of arrest” have to be informed to the arrested person at the earliest.

7] The learned counsel submits that the accused had been summoned on 26.8.2019 by the respondents to appear before the authorities and in response to said summons, he had appeared before the authorities on 27.8.2019 and was arrested at 23.35 hrs. of the same night. The learned counsel asserts that the mandate of Art. 21(1) and 22 of the Constitution of India have been violated inasmuch as the grounds of detention have not been communicated to the detinue nor does it contain his “reasons to believe: the occurrence of any specific offence under the Customs Act, 1962.

8] Apart from raising such issues, he has also sought to challenge the order or remand passed by the learned Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Mumbai, dated 28.8.2019 in terms of which the detinue was remanded to magisterial custody till 9.9.2019 in terms of the prayer made by the prosecuting agency, on the ground that such remand order was passed in a mechanical manner

without considering various citations relied upon by the Petitioner.

9] The learned counsel for the Petitioner advanced several contentions to support his prayer for interim relief, and in particular, he drew our attention to the judgment of the Hon'ble Apex Court in the case of (i) In the matter of **Madhu Limiye & Ors. AIR 1969 SC 1014** and (ii) **Ram Narayan Singh Vs. State of Delhi**, reported in **AIR 1953 SC 277** wherein the Constitution Bench of the Hon'ble Supreme Court consisting of 5 judges allowed the writ of habeas corpus and directed release of the petitioner, who was in custody post remand therein. In para 4 of the said judgment, reads thus:

“4. ... This Court has often reiterated before that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law. That has not been done in this case. The petitioners now before us are therefore entitled to be released, and they are set at liberty forthwith.”

10] The learned APP relied upon various judgments in the matter and highlighted the fact that these matters essentially involve huge financial consequences, affecting the economy of the country and submitted for rejection of prayer for interim relief.

11] We have perused arrest memorandum (Exhibit A),

as also remand application filed by the prosecution at Exhibit I. The learned APP placed reliance on para 10, 11, 12, 13 and 14, which read as under:

“10. Investigations conducted thus far indicate that the syndicate has been smuggling gold into India since the year 2016; that more than 200 kgs. of foreign origin gold valued at Rs.60 Crores have been smuggled by Nisar Aliyar into India in one container cleared on 26.03.2019 concealing them inside imported metal scrap, part of which has been seized by DRI; that the syndicate had smuggled more than 3000 kgs. of gold from July, 2018 to March, 2019 alone which would be valued at more than Rs.1000 Crores.

11. Arvindkumar Dhakad, Director of M/s. Ekdant Commercial Pvt. Ltd.. and father of Happy Dhakad was summoned and his statement recorded on 27.08.2019 so as to ascertain his role in the gold smuggling racket. The statement was recorded in presence of his advocate as per order dated 01.07.2019 of the Hon'ble High Court of Bombay in Cr. WP No.2700/2019 filed by Arvindkumar Dhakad and 3 others. The proceedings were also videographed.

12. Arvindkumar Dhakad throughout the statement tried adopting a negative attitude right from his knowledge of English. His statement has therefore translated to Hindi. He has submitted a letter dated 27.08.2019 to DRI stating that he is just a namesake director in the company and is neither a shareholder nor drawing any salary from the company. On being asked about the 10 kgs. of smuggled gold out of 30 kgs. received by Happy Dhakad which is yet to be traced or accounted for, he has expressed his unawareness and stated that all

the activities pertaining to the company were looked after by Happy Dhakad. As per the call records, Muhammed Asif, a key member of the syndicate who is on the run, also appears to have spoken to Arvindkumar Dhakad from his mobile number twice on 29.03.2019, the day of seizure of gold and arrest of key persons including Happy Dhakad. However, he has denied knowing any Muhammed Asif and refused to divulge the conversation Asif had with him.

13. Being a Director of the company and father of the accused Happy Dhakad, it is highly unlikely that he was not aware of the surreptitious activities of dealing in smuggled gold going on in the company. In view of the above, it appears that Arvindkumar Dhakad is non-cooperative and deliberately shielding vital facts from the investigation. Thus, it appears that Arvindkumar Dhakad has aided and abetted the smuggling of gold through his company Ekdant Commercial Pvt. Ltd. and he needs to be restrained for a fair and hindrance-free investigation.

14. The offence committed by Arvindkumar Dhakad in the act of aiding and abetting of smuggling of gold attracts provisions of Section 135 of the Customs Act, 1962 which is punishable under Section 135(1)(i)(A) and is a non-bailable offence as per Section 104(6)(c) of the Customs Act, 1962. He has been arrested in terms of Section 104 of the Customs Act, 1962 on 27.08.2019. Hence, it is requested that he may be remanded to judicial custody for a period of 14 days so as to facilitate a free and fair probe.

12] On perusal arrest memorandum and the remand application, it clear that prosecution has noted that one Nisar Aliyar had smuggled gold valued at Rs. 60 Crores into India one container on 26.3.2019 concealing them inside imported metal scrap, part of which has been seized by DRI. It appears

that the present detenue's son by name Happy Dhakad, who had established a company by name M/s. Ekdant Commercial Pvt. Ltd. in which though the detenue was a Director, he has claimed that he was not actively participating in the operation of the business and was not a shareholder in the said company. It appears that the said Happay Dhakad had also been summoned and had been arrested. Both - Nisar and Happy Dhakad and several other accused have been released by the Advisory Board of COFEPOSA.

. It is important to note here that in para 13 quoted hereinabove, the prosecution have stated as follows:

“Being a Director of the company and father of the accused Happy Dakhad, it is highly unlikely that he was not unaware of the surreptitious activities”

. The aforesaid description made by the prosecution does indicate that the prosecution has acted on a presumption that the detenue Arvindkumar Jain Dhakad was aware of the surreptitious activities of his son Happy Dhakad. Prima-facie it does not meet the standard, as prescribed under S. 140 of the Customs Act, 1962.

13] In the meantime, present detenue has also appeared before the respondents for interrogation on 9th, 10th and 11th April, 2019 and had also filed Writ Petition No. 2700 of 2019 before this Court, claiming several reliefs. So far as relief under clause (a) and (c) are concerned, admittedly, the same

were not pressed and relief under clause (b) was allowed, permitting presence of the advocate at a visible, but not audible distance in relation to the interrogation. It appears that pursuant to the said direction of this Court, summons was issued to the detenue to appear on 26.8.2019 requiring him to appear before the I.O. on 27.8.2019 since it appears that thereafter arrest has been made and detenue has been remanded to judicial custody.

14] The learned APP submits that practice of DRI in such case is to seek judicial remand and thereafter seek liberty from the Court to obtain presence of the accused for recording statement under S. 108 of the Customs Act. She asserts that during the course of hearing one associate of the detenue has been arrested today and there is likelihood of further investigation in the matter. The learned APP also prayed that an opportunity be given to file reply affidavit.

15] Considering the submissions advanced before this Court and the judgments of the Hon'ble Supreme Court, as also the facts of this case, and in particular the grounds taken by respondent Nos. 1 and 2 in their remand application, we are prima facie satisfied that interim prayers ought to be granted, subject to further orders that may be passed on final adjudication of the matter. Accordingly, we direct as follows:

(a) The detenue Arvindkumar Jain Dhakad be released forthwith.

- (b) The detenu Arvindkumar Jain Dhakad shall appear before the DRI authorities, including jail authorities as and when required, subject to summons being issued to him.
- (c) The detenu Arvindkumar Jain Dhakad shall not leave the city limits of Mumbai without prior permission of this Court and shall appear before this Court on each and every date the case is adjourned.
- (d) It is made clear that any violation of this order shall be considered very seriously.
- (e) The detenu Arvindkumar Jain Dhakad shall not in any manner make any attempt to influence any witness or to contact any witness and or interfere in any manner the course of investigation.
- (f) It is made clear that nothing stated in this order shall prejudice either side and the parties shall abide by the final judgment in this case.

At this stage learned APP pray for stay of operation of this interim order. The learned counsel for the Petitioner submitted that every moment detention of the detenu amounts to violation of his constitutional rights. In view of this, prayer of the learned APP for

stay of above order stands rejected.

- (g) Parties to act on an authenticated copy of this order.
- (l) On the request of the learned APP, the matter be listed on 29.9.2019.

Sd/-
[N.B.SURYAWANSHI, J]

Sd/-
[INDRAJIT MAHANTY, J]