

IN THE HIGH COURT OF KERALA AT ERNAKULAM



PRESENT

THE HONOURABLE MR. JUSTICE ASHOK MENON

WEDNESDAY, THE 28TH DAY OF OCTOBER 2020 / 6TH KARTHIKA, 1942

Bail Appl..No.6887 OF 2020

(OR NO.7/2020 OF CUSTOMS (PREVENTIVE) COMMISSIONERATE, COCHIN)

PETITIONER/ACCUSED:

M. SIVASANKAR
AGED 57 YEARS
S.O. N.D. MADHAVAN NAIR,
DEVADARSANA,
KATTUROAD, POOJAPPURA,
THIRUVANANTHAPURAM - 695012.

BY ADVS.
SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN
SRI.V.VINAY
SRI.M.REVIKRISHNAN
SRI.K.ANAND (A-1921)
SRI.P.VIJAYA BHANU (SR.)

RESPONDENT/S:

- 1 SUPERINTENDENT OF CUSTOMS
CUSTOMS PREVENTIVE COMMISSIONERATE, COCHIN.
REPRESENTED BY STANDING COUNSEL FOR CUSTOMS,
HIGH COURT OF KERALA, ERNAKULAM - 682031.
- 2 ASSISTANT COMMISSIONER
CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS,
OFFICE OF THE ASSISTANT COMMISSIONER OF CUSTOMS,
AIR CARGO COMPLEX, SHANGHUMUGHOM, PIN - 695008.

R1-2 BY ADV. SRI.P.VIJAYAKUMAR
SRI.K.RAMKUMAR, SR.COUNSEL

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
23.10.2020, THE COURT ON 28.10.2020 PASSED THE FOLLOWING:



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O R D E R

Dated this the 28th day of October 2020

This is an application filed for anticipatory bail under Section 438 Cr.P.C by the applicant who is apprehending arrest in OR No.7/2020 Customs (Preventive) Commissionerate, Cochin.

2. The applicant claims to be one of the Senior most civil servant who was working as Principal Secretary (Information Technology) and also as Secretary to the Chief Minister of Kerala. He has been placed under suspension and is now apprehending arrest in connection with the aforesaid OR No.7/2020 registered by the Customs (Preventive)



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Commissionerate, Cochin. The events which led to apprehension of arrest entertained by the applicant are thus:-

The applicant claims to have an unblemished service record of more than three decades. The aforesaid Crime was registered by the Customs Commissioner ATC based on an allegation that the persons named Sarith, Swapna and Sundeep along with several other accused smuggled primary gold from abroad through diplomatic channel of UAE consulate. Consequently, other investigating agencies like the NIA, and the Enforcement Directorate also registered Crimes against the aforesaid accused persons and the present Crime is being investigated. The Enforcement Directorate as well as the NIA also had questioned the applicant several times. It is stated that he has



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been interrogated for more than 90 hours by all the three agencies together. Yet, none of the aforesaid investigating agencies could collect any incriminating materials against him even after hundred days of investigation. However, the applicant apprehends that he may be arrested and subjected to harassment and humiliation and therefore, he has approached this Court for a pre-arrest bail. During the marathon questioning by the Customs Department and also by the other investigating agencies, he has never disobeyed the directions given by any of those investigating agencies and has appeared before them without fail on each and every occasion, even ignoring his physical ailments and difficulties to travel such long distances. The applicant states that the ED had



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questioned him extensively at Kochi on 15.10.2020; and was relieved from that office only late at night. He was unable to travel back to Thiruvananthapuram on the same night and hence, returned only on 16.10.2020 by about 5.30 p.m. At about 5.50 p.m., two officers came to him with Annexure-I summons issued by the Assistant Commissioner, Customs House, AIR Cargo Complex, Thiruvananthapuram directing the applicant to appear before them at 6 p.m. The applicant was totally exhausted due to the constant and continuous travel from Thiruvananthapuram to Cochin and back, also due to extensive questioning till late night. However, ignoring the health of the applicant the customs officials took him along with them in their car. On the way to their office he developed



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chest pain, and the officers themselves rushed him to the nearby hospital. He was admitted there and underwent treatment in the Cardiac ICU. The applicant was referred to the Medical College Hospital, Thiruvananthapuram and is undergoing treatment for radiating pain to his lower back and legs. The applicant states that he has complied with all directions so far and there is no possibility of his evading from the process or absconding. He is prepared to appear before the respondents as and when directed by them or by this Court. One of the accused, in the aforesaid Crime, namely Sarith, was brutally manhandled by the Customs officials so as to extract statements in tune with their investigation. When the said accused was produced before the Additional Chief



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Judicial Magistrate (Economic Offences), he gave a statement to the Magistrate to that effect. A copy of the statement is at Annexure-3. The applicant apprehends that in case he is arrested, he too may be subjected to third degree methods of questioning, which would jeopardise his health. The officials had deliberately come to pick him up on a Friday evening, so that he could be very conveniently lodged by them during the two intervening holidays and subjected to torture. The applicant is willing to cooperate with the investigation and there is no reason to believe that he may abscond. Custodial interrogation is therefore not required. He has no other disclosures to make. He is willing to abide by any condition that may be imposed by this Court and therefore, he may be



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granted pre-arrest bail.

3. The bail application is vehemently opposed by the Customs Department and it is stated that the applicant has the obligation to appear before the officials in compliance with the notice that he receives under Section 108 of the Customs Act. He has not yet been made an accused. But, he has to provide very important information regarding the smuggling of Gold through diplomatic channel. Swapna Suresh who is one of the prime accused in the aforesaid Crime was working as the Secretary to the Consulate General and was in constant contact with the applicant. He had the knowledge of her involvement in the smuggling activities and therefore, he is not entitled to the exceptional remedy of pre-arrest bail in this case.



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4. Heard learned Senior Counsel Sri.P.Vijayabhanu, appearing for the applicant and learned Senior Counsel Sri.K.Ramkumar appearing for the respondents.

5. The learned Senior Counsel appearing for the applicant would submit that there is no embargo under the Customs Act from seeking pre-arrest bail. On the fact that the applicant has been constantly harassed and questioned for more than 60 hours by the respondents and the Customs officials indicating that that they are bent upon creating materials to implicate the applicant as an accused, and therefore, he is entitled to pre-arrest bail.

6. *Per contra*, the learned Senior Counsel Sri.K.Ramkumar, appearing for the Customs Department



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submits that the applicant has not even made it clear as to the offences for which he is likely to be arrested by the Customs Department. Since there are sufficient materials to indicate that the applicant has been in constant contact with the prime accused Swapna Suresh, he is to be subjected to interrogation, which the respondents are entitled to as per the law. The learned Senior Counsel appearing for the respondents relies on three decisions in support of his argument that the applicant is not entitled to a pre-arrest bail.

7. In *Union of India v. Padam Narain Aggarwal and Others [2008 KHC 6908 : AIR 2009 SC 254]*, the Honourable Supreme Court has held thus:

“.....It is amply clear that power to arrest a



person by a Custom Officer is statutory in character and cannot be interfered with. Such power of arrest can be exercised only in those cases where the Custom Officer has 'reason to believe' that a person has been guilty of an offence punishable under Sections 132, 133, 135, 135A or 136 of the Act. Thus, the power must be exercised on objective facts of commission of an offence enumerated and the custom officer has reason to believe that a person sought to be arrested has been guilty of commission of such offence. The power to arrest thus is circumscribed by objective considerations and cannot be exercised on whims, caprice or fancy of the officer.”

In the aforesaid decision, the Honourable Supreme Court has sufficiently dealt with the power of the courts to grant anticipatory bail to a person summoned under Section 108 of the Customs Act and held that it was premature in nature, and the applicants who had filed the application for anticipatory



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bail were directed to appear before the Customs Authorities.

8. A Division Bench of this Court in *Kishin S.Loungani v. Union of India and Others [2017(1)KHC 355]* has relied upon the decision of the Honourable Supreme Court in *Padam Narain Aggarwal (supra)* as also the decisions in *Romesh Chandra Mehta vs State Of West Bengal [AIR 1970 SC 940]* and *Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. ((2000) 7 SCC 53 : AIR 2000 SC 2901)*, which were referred to in *Padam Narain Aggarwal (supra)*.

9. The learned Senior Counsel appearing for the applicant has relied upon the decision in *Sushila Aggarwal and Others v. State (NCT of Delhi) and Another [(2020) 5 SCC 1]* to



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argue for the proposition that there is no “inexorable rule” that anticipatory bail cannot be granted unless the applicant is the target of mala fides. There is no invariable or inflexible rule that the applicant had to make out a special case for grant of anticipatory bail and that denial of bail amounts to deprivation of personal liberty, and the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when not imposed by the legislature. The learned counsel also impresses upon this Court the history about the introduction of Section 438 to the Cr.PC to indicate that the purpose was to see that the investigating agencies do not harass or humiliate citizens using their power to arrest.

10. An offence under the Customs Act is undoubtedly an



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economic offence of grave nature and the Hon'ble Supreme Court has held in a number of cases, including in *P. Chidambaram v. Directorate of Enforcement* [2019 KHC 6886 SC (2019) 9 SCC 24], wherein it was held that power under Section 438 Cr.PC being an extraordinary remedy has to be exercised sparingly; more so, in cases of economic offences, and that economic offences stand as a different class as they affect the economic fabric of the society. The Court also relied on the earlier decisions of the Apex Court in *Directorate of Enforcement v. Ashok Kumar Jain* (AIR 1998 SC 631), wherein it was held that in economic offences, the accused is not entitled to anticipatory bail. Similar was the view taken by the Apex Court in *Rohit Tandon v. Directorate of Enforcement* [2017



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KHC 6767 : (2018) 11 SCC 46] , wherein it was held that economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. In **Y.S. Jagan Mohan Reddy v. CBI [2013 KHC 4402 :(2013) 7 SCC 439]**, the Honourable Apex Court held that economic offences constitute a class apart and need to be visited with a different approach in the matter of bail.

11. The applicant has not yet been made an accused. But he apprehends arrest. There are no sufficient material to show that he will be arrested. Merely because he was



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questioned for 60 hours by the Customs Department does not indicate that he is intended to be made an accused.

The fact that the applicant was in constant contact with one of the prime witness, namely Swapna Suresh, and that he had even volunteered to help her by contacting his Chartered Accountant and asking him to assist her in managing her finances indicates that there is a fair possibility that applicant knew about the involvement of Swapna Suresh in the alleged smuggling activity. Whether the applicant was himself actively involved in the commission of the offence is something which is to be investigated and found out. Relying on the decision of the Honourable Supreme Court in *Padam Narain Aggarwal* (*supra*), I find that the power of the Customs Department to



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question the applicant under Section 108 cannot be curtailed by granting anticipatory bail. The relief sought for is undoubtedly premature. Therefore, I am of the opinion that the applicant is not entitled to anticipatory bail. The bail application, is therefore, dismissed.

sd/-

ASHOK MENON

JUDGE

jg

HIGH COURT OF KERALA
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