

HIGH COURT OF CHHATTISGARH, BILASPUR

Miscellaneous Criminal Case No.4980 of 2013

APPLICANT: Sandeep Nair
(In Jail)

Versus

NON-APPLICANTS: 1. Union of India
2. State of Chhattisgarh

{Application under Section 439 of the Code of Criminal Procedure, 1973}

(Reserved for order on 21-11-2013)

Present:

Dr. N.K. Shukla, Senior Advocate with Dr. Saurabh Kumar Pande and Mr. Shailendra Shukla, Advocates for the applicant.

Mr. Maneesh Sharma, Standing Counsel for Central Excise and Customs for Union of India/non-applicant No.1.

Mr. Anil S. Pandey, Govt. Advocate for the State/non-applicant No.2.

Single Bench: Hon'ble Mr. T.P. Sharma, J

ORDER
(22-11-2013)

1. This order shall govern the disposal of I.A.Nos.4 and 5 for conditional bail/ temporary bail and for undertaking for grant of temporary bail, respectively.
2. By this application under Section 439 of the Code of Criminal Procedure, 1973 (for short 'the Code'), the applicant who has been arrested in connection with the offence punishable under Section 89 read with Section 90 of the Finance Act, 1994, has prayed for his release on bail.
3. The applicant has also filed I.A.No.4 for conditional/temporary bail with I.A. No.5 for undertaking for grant of temporary bail.
4. As per the bail application and submission of counsel for the applicant, this is the first bail application filed on behalf of the applicant for grant of regular bail. No other application of this nature is pending before this Court or before the Court below. The application is duly supported by the affidavit of Sujit Surendran Nair, younger brother of the applicant. His bail application has been

dismissed by the Sessions Judge, Durg vide order dated 18-10-2013 passed in
Bail Application No.1410/2013.

5. As per the arrest memo, the applicant has collected service tax amounting to Rs.2.17 crores for the State and has not deposited the same to the State.
6. Initially, bail application was filed by Mr. Kishore Bhaduri, Additional Advocate General/Public Prosecutor in which non-applicant No.2 – State has not been impleaded as party. Competency of Mr. Kishore Bhaduri, Additional Advocate General/Public Prosecutor to represent the applicant was objected by the Standing Counsel for Central Excise and Customs – Mr. Maneesh Sharma, Advocate. During the course of arguments, on 31-10-2013, Mr. Kishore Bhaduri, Additional Advocate General/Public Prosecutor submitted that he is competent to represent the applicant, the offence is not triable by Magistrate, but triable by the Commissioner, Central Excise and the appeal does not lie to the Sessions Court, but to the officers of Central Excise. In the light of aforesaid objection and trial jurisdiction, two questions arose for consideration relating to competency of hearing viz., (1) whether Mr. Kishore Bhaduri, Additional AG/PP is competent to represent the applicant against the State and (2) whether criminal courts are not having jurisdiction to try the offence punishable under Section 89 read with Section 90 of the Finance Act, 1994. Thereafter, Mr. Kishore Bhaduri, Additional AG/PP filed application for withdrawal of power vide I.A.No.1. After obtaining NOC from the associates of Mr. Kishore Bhaduri, Senior Advocate Dr. N.K. Shukla appeared to assist the Court and to represent the applicant. On 11-11-2013, Senior Advocate Dr. N.K. Shukla fairly submitted that the offence involved is triable by criminal courts and not by any statutory authority, offence being cognizable is against the State and the State has entrusted the administration of criminal justice to the Office of the Advocate General, therefore, Mr. Kishore Bhaduri, Additional AG/PP could not represent the accused/applicant against the State.
7. Aforesaid offence has been defined and penalty has been provided under Section 89 of the Finance Act, 1994 which reads thus,

“89. Offences and penalties.—(1) Whoever commits any of the following offences, namely,—

- (a) knowingly evades the payment of service tax under this chapter; or;

- (b) avails and utilizes credit of taxes or duty without actual receipt of taxable service or excisable goods either fully or partially in violation of the rules made under the provisions of this Chapter; or
- (c) maintains false books of account or fails to supply any information which he is required to supply under this Chapter or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or
- (d) collects any amount as service tax but fails to pay the amount so collected to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due,

shall be punishable,—

- (i) in the case of an offence specified in clauses (a), (b) or (c) where the amount exceeds fifty lakh rupees, with imprisonment for a term which may extend to three years:

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 a term of less than six months;

- (ii) in the case of the offence specified in clause (d), where the amount exceeds fifty lakh rupees with imprisonment for a term which may extend to seven years;

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 a term of less than six months;

- (iii) in the case of any other offences, with imprisonment for a term, which may extend to one year.

(2) If any person is convicted of an offence punishable under —

- (a) clause (i) or clause (iii), then, he shall be punished for the second and for every subsequent offence with imprisonment for a term which may extend to three years;
- (b) clause (ii), then, he shall be punished for the second and for every subsequent offence with imprisonment for a term which may extend to seven years.

(3) For the purposes of sub-sections (1) and (2), the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than six months, namely:—

- (i) the fact that the accused has been convicted for the first time for an offence under this Chapter;
- (ii) the fact that in any proceeding under this Act, other than prosecution, the accused has been ordered to pay a penalty or any other action has been taken against him for the same act which constitutes the offence;
- (iii) the fact that the accused was not the principal offender and was acting merely as a secondary party in the commission of offence;
- (iv) the age of the accused.

(4) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Chief Commissioner of Central Excise.”

- 8. As per Section 90 of the Finance Act, 1994, an offence under clause (ii) of sub-section (1) of Section 89 is cognizable. No specific provision for trial of the offence or authority to try the offence has been provided in the Finance Act, 1994.
- 9. As per sub-section (2) of Section 4 and Section 5 of the Code, in absence of any specific provision in the special Act, all offences under any other law or special Act shall be investigated, inquired into and tried in accordance with the provisions of the Code of Criminal Procedure, 1973 and the Code will apply. Sections 4 and 5 of the Code read thus,

“4. Trial of offences under the Indian Penal Code and other laws.—(1) All offences under the Indian Penal Code 1860 (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise, dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

5. Saving.—Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.”

10. Aforesaid question has also been considered by the Constitution Bench of the Supreme Court in the matter of **A.R. Antulay v. Ramdas Srinivas Nayak**¹ and the Supreme Court has held that “in the absence of a specific provision made in the statute indicating that offences will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, inquired into, tried and otherwise dealt with according to the Criminal Procedure Code. In other words, Criminal Procedure Code is the parent statute which provides for investigation, inquiring into and trial of cases by criminal Courts of various designations”.

11. In absence of any specific provision in the Finance Act, 1994, only criminal courts are competent to try the offence punishable under Section 89 of the Finance Act, 1994 in accordance with the parent Act i.e. the Code of Criminal Procedure, 1973 and not by the Commissioner, Central Excise or officers of the Central Excise Department.

12. Administration of criminal justice has been entrusted to the Office of the Advocate General by the State. The State has appointed Mr. Kishore Bhaduri as Additional Advocate General/Public Prosecutor.

13. Upon a survey of precedents practice and scheme of public prosecutions, the High Court of Delhi in the matter of **Lt. Col. K.C. Sud, New Delhi v. S.C. Gudimani, New Delhi**² has held that

“(1) The Public Prosecutor, the Additional Public Prosecutors cannot appear against the State in criminal matters. That is so even where the party has carefully avoided to implead the State as a party in a revision or an appeal, or any other criminal proceedings. This applies to panel lawyers as well,

¹AIR 1984 SC 718

²1981 Cri LJ 1779

because no panel lawyer can appear without being appointed as an Addl. Public Prosecutor.

(2) It is not permissible for the State or the Delhi Administration to allow the Public Prosecutor or the Addl. Public Prosecutor to appear against itself and it must provide so specifically in the terms of their appointment.

(3) The Public Prosecutor cannot appear on behalf of the accused even in cases instituted on a complaint by a private party.”

14. Dr. N.K. Shukla, learned Senior Advocate has also fairly submitted the same i.e. the Additional Public Prosecutor and the Assistant Public Prosecutor are not competent to represent the accused against the State. Mr. Kishore Bhaduri, Additional AG/PP was not competent to represent the applicant against the State.

15. Learned Senior Advocate appearing on behalf of the applicant – Dr. N.K. Shukla has filed I.A.No.4 for grant of conditional bail/temporary bail on the ground that out of Rs.2.17 crores, the applicant has deposited Rs.87,60,475/- and only Rs.1,29,86,207/- is outstanding. The applicant has also pleaded that he will deposit three postdated cheques of Rs.43,28,736/- each and will pay the entire dues within three months.

16. During the course of arguments, another application/undertaking has been filed on behalf of the applicant in which it has been shown that the applicant will deposit three postdated cheques of 6th December, 2013; 6th January, 2014; and 6th February, 2014, and thereby he will pay all dues within three months.

17. Learned Senior Advocate submitted that the applicant has deposited service tax regularly and he also deposit all the dues of service tax, in accordance with law. The applicant is in custody since 15-10-2013, therefore, he is not in a position to deposit service tax which he has recovered. Learned Senior Advocate further submitted that an undertaking has been given that in case of any default, the conditional bail automatically be cancelled and the applicant will abide all the conditions imposed upon him.

18. On the other hand, learned Standing Counsel for Central Excise and Customs Mr. Maneesh Sharma opposed the bail and submitted that the applicant has evaded the liability to pay service tax which he has recovered and about more than Rs.4 crores of service tax is due against the applicant which he is evading. This is not the case in which the applicant will recover his service tax and thereafter, he will deposit, but even as per the statement, the applicant has recovered Rs.2.17 crores as service tax for the State and he is keeping the same with him. The applicant is only a trustee of public money and he is under obligation to discharge the entrustment in accordance with law i.e. to deposit service tax immediately, which he has recovered from the parties. Withholding of service tax amounts to criminal misappropriation of State money.

19. Learned State counsel also opposed the bail.

20. As per the arrest memo, service tax of Rs.2.17 crores was due against the applicant. As per the documents submitted on behalf of the applicant, the applicant has deposited Rs.87,60,475/- and Rs.1,29,86,207/- is still due. Considering period of detention of the applicant, liability of the applicant, amount due against the applicant, grounds taken in the applications for conditional bail and undertaking, and offer of the applicant, it would be appropriate to provide one opportunity to the applicant in the light of his offer/ proposal.

21. Consequently, I.A. No.4 for conditional bail/temporary bail to the applicant is partly allowed under following conditions: -

- If the applicant fulfills the condition/proposal and deposits three post dated cheques for payment of dues on 6-12-2013, 6-1-2014 and 6-2-2014 at the time of furnishing bail bond and furnishes a personal bond of Rs.50,00,000/- (Rupees fifty lakhs only) with two sureties of Rs.25,00,000/- (Rupees twenty five lakhs only) each to the satisfaction of the Chief Judicial Magistrate, Durg, he be released on conditional & temporary bail for a period of three months.
- The applicant shall not leave the territory of the State of Chhattisgarh without permission from the Chief Judicial Magistrate, Durg before payment of aforesaid dues.
- He shall fulfill the conditions mentioned in the undertaking.

- The applicant and the sureties shall affix their photographs along with authenticated copies of documents showing their competency. At the time of furnishing bail bond, the Chief Judicial Magistrate, Durg shall ensure the identity and competency of sureties.
- The applicant shall regularly appear before the court during the course of inquiry or trial. In case of breach of any condition and in case of two continuous defaults in appearance of the applicant before the court, this order shall automatically stand cancelled.

22. I.A.No.5 for undertaking for grant of temporary bail is accepted.

23. Certified copy as per rules.

JUDGE
22-11-2013

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