

**ARREST UNDER THE CUSTOMS ACT – BAILABLE OR NON-BAILABLE
OFFENCE**

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Section 104 of the Customs Act, 1962 (the “**Customs Act**”) empowers the Commissioner of Customs to order arrest of a person for an offence punishable under Section 132, 133, 135, 135A and 136 of the Customs Act. In terms of sub-section (2) thereof, every person arrested under sub-section (1) is required to be taken to a magistrate without any delay. Sub-section (3) thereof confers same powers to customs officer for the purpose of releasing arrested person on bail as enjoyed by the police under the Code of Criminal Procedure, 1898 (“**Code**”). In terms of sub-section (4) of the Section 104, offences under the Customs Act are non-cognizable. However, it has not been declared in the Customs Act as to whether said offences are bailable or non-bailable.

Punishable offences and quantum of punishment

Different kinds of offences under the Customs Act are punishable with varying amount of imprisonment or with fine or both. A summary of punishable offences and consequent punishments are given below:

Section	Nature of offence	Punishment
132	Making false declaration, false documents, false statement etc.	Imprisonment for a term which may extend to two years or with fine, or with both
133	Obstructing the customs officer	Imprisonment for a term which may extend to two years or with fine, or with both
134	Refusal for screening of X-ray or medical procedure for detection and bringing out goods secreted inside body	Imprisonment for a term which may extend to six months, or with fine, or with both
135(1)	(a) Misdeclaration of value or fraudulent evasion or attempt at evasion of any duty or of any prohibition on import or export of goods; or (b) Possession, carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or dealing with prohibited goods ¹	See below

Section	Nature of offence	Punishment
	(c) Attempts to export prohibited goods; or (d) Fraudulent availment or attempts to avail drawback or any exemption from duty on export:	
	(i) If the offence relates to,— (A) any goods the market price of which exceeds Rupees One crore; or (B) the evasion or attempted evasion of duty exceeding Rupees Thirty lakh; or (C) notified prohibited goods ⁱⁱ ; or (D) amount of drawback or exemption from duty exceeds Rupees Thirty lakh	Imprisonment for a term which may extend to seven years and with fine
	(ii) If the offence relates to any other case	Imprisonment for a term which may extend to three years, or with fine, or with both
135(2)	Second conviction under Section 135 or 136 of the Customs Act	Imprisonment for a term which may extend to seven years and with fine
135A	Preparation to export any goods in contravention of the provisions of the Customs Act	Imprisonment for a term which may extend to three years, or with fine, or with both
136	Offence committed by customs officers	Imprisonment for a term which may extend to three years, or with fine, or with both

Provisions of Section 135 of the Customs Act have been amended by the Finance Act, 2003 (w.e.f. 14 May 2003) and recently by the Finance Act, 2007 (w.e.f. 11 May 2007). Prior to the amendment by the Finance Act, 2003, offences viz. fraudulent evasion or attempt at evasion of any duty or of any prohibition on goods or dealing with imported goods which were prohibited, and notified under Section 123 of the Customs Actⁱⁱⁱ and the market price of which exceeded Rupees One lakh were punishable with imprisonment for a term which may extend to seven years and with fine. Other offences were punishable with imprisonment for a term which may extend to three years, or with fine, or with both. There was a view that provisions of Section 135 were not applicable to cases involving duty free export goods or fraudulent availment of duty drawback or other

export incentives. Therefore, provisions of Section 135 were amended to include offences pertaining to the export goods.

The Finance Act, 2007 substituted old provisions of Section 135(1) to make punishment more stringent in some case whereas in some other case quantum of punishment was reduced. Earlier, a maximum imprisonment of seven years was prescribed only for the following offences:

- (A) Offending goods were notified goods under Section 123; **and**
- (B) Market value of the offending goods exceeded Rupees One lakh.

In all other cases, maximum imprisonment prescribed was three years only. Since the majority of offences pertained to non-notified goods and therefore maximum prescribed imprisonment was three years only.

Now, pursuant to amendment by the Finance Act, 2007 offences for evasion of customs duty or circumventing the prohibitions on import or export pertaining to the following goods are punishable with maximum imprisonment of seven years:

- (A) Market value of offending goods exceeds Rupees One crore; **or**
- (B) Evasion or attempted evasion of duty exceeds Rupees Thirty lakh; **or**
- (C) Offending goods are prohibited goods as notified by the Central Government; **or**
- (D) Cases of fraudulent drawback or other export incentives exceeding Rupees Thirty lakh.

In other words, offences for evasion of customs duty or circumventing the prohibitions on import or export pertaining to following goods are punishable with maximum imprisonment of three years:

- (A) Market value of goods is lower than Rupees One crore; **and**
- (B) Evasion or attempted evasion of duty is lower than Rupees Thirty lakh; **and**
- (C) Goods are not notified by the Central Government; **and**
- (D) Fraudulent claim of drawback or other export incentives is lower than Rupees Thirty lakh.

A comparison between the old and new provisions reveals that on one hand market value of the offending goods has been raised from Rupees One lakh to Rupees One Crore, whereas on the other hand goods other than goods notified under Section 123 have also been brought within the ambit of maximum imprisonment of seven years i.e. now, for a maximum imprisonment of seven years, it is not necessary that offending goods should be goods notified under Section 123 of the Customs Act. The new provisions are well in tune with the present economic scenario and to curb white collar crimes detected in recent years where there has been manifold raise in the cases of fraudulent claim of export incentives. However, it is surprising and intriguing to note that there was no

mention either in the explanatory notes or memorandum to the budget'2007 about these significant changes.

Bailable and Non-bailable offence

In terms of Section 2(a) of the Code, “bailable offence” means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and “non-bailable offence” means any other offence.

Although the Customs Act declares that offences under the Customs Act are non-cognizable, there is no declaration as to whether such offences are bailable or non-bailable. Offences against other laws are classified under Part II of the First Schedule to the Code. Relevant entries under Part II of the First Schedule to the Code are reproduced below:

Classification of offences against other laws:

Offence	Bailable or Non-bailable	By what court triable
If punishment with death, imprisonment for life, or imprisonment for more than seven years	Non-bailable	Court of Session
If punishable with imprisonment for three years and upwards but not more than seven years	Ditto	First class Magistrate
If punishable with imprisonment for less than three years or with fine only	Bailable	Any Magistrate

Punishments with imprisonment for three years and upwards are classified as non-bailable offence and can be tried at the Magistrate of the first class. On the other hand, punishments with imprisonment for less than three years are classified as bailable offence and can be tried at any Magistrate.

Also, Section 138 of the Customs Act provides for summary trial by a Magistrate of the offences other than punishable under Section 135(1)(i) or 135(2) of the Customs Act.

Nature of offence under Section 135(1)(ii) of the Customs Act – A Dichotomy

The maximum imprisonment prescribed for offences under Section 132, 133, and 134 is for two years, therefore there is no qualm that these offences are bailable offences. In the case of offences under Section 135(1)(i) of the Customs Act, maximum punishment is seven years, therefore there is no qualm that these offences are non-bailable offences. In the past, there had been cases involving smuggling of gold or other notified goods where the prescribed maximum imprisonment was seven years and most of the courts have held that such offences were non-bailable.

The maximum imprisonment prescribed for offences under Section 135(1)(ii), 135A and 136 is for three years. The question whether offences under these sections are bailable or non-bailable is a contentious issue. The expression used ‘**which may extend to three years**’ in Section 135(1)(ii) of the Customs Act vis-à-vis relevant entries under Part II of the First Schedule to the Code has always been a bone of contention before various judicial forums. Each of them has interpreted this expression vividly at different occasions considering the law, facts and circumstances. Although there are plethora of judgments which discuss the nature of offence committed under Section 135(1)(ii), but every time the approach taken by judiciary is so diverged that it was almost impossible to ascertain the settled position under the law.

In the case of **Mohan Lal Thapar v. Y.P.Dabara [2002 (143) ELT 44 (Del.)]** the offence under Section 135(1)(ii) of the Customs Act was held as non-bailable offence. The Delhi High Court held that “*Controversy at hand mainly revolves around the interpretation and construction of the word ‘for’ as used in the entries against the column of ‘offence’ in the Table. Word ‘for’ used before the term of sentence of imprisonment in Table I if read with corresponding sections providing punishment, would clearly indicate that it refers to the term of sentence of imprisonment which may extend up to the period of punishment provided for the offence(s). Thus, the word ‘for’ occurring before the words ‘three years and upwards but not less than seven years’ in said second entry in Table II would include the offences under other laws wherein punishment may extend up to three years. The offences for which punishment provided may not go up to three years, only will be governed by third entry in Table II.*”

In the case of **Subhash Chaudhary Vs Deepak Jyala and Ors. [2005 (179) ELT 0532 (Bombay)]**, offence under Section 135(1)(ii) of the Customs Act was held as bailable. The Bombay High Court held that “.... *firstly, the said offence has been made a non-cognizable offence by virtue of the non obstante clause in Section 104(4) of the Customs Act. Secondly, it is triable “summarily” by a Magistrate by virtue of Section 138 of the Act. Moreover, Section 135(1)(ii) provides for punishment as imprisonment for a term which may extend to three years, or with fine, or with both. Indeed, it is provided that imprisonment may extend to three years; but the same provision also provides for alternative punishment of fine (only) or imprisonment and fine both. The question is, merely because the punishment of imprisonment provided for is for a term which may extend to three years i.e. three years, does it mean that it will fall in Entry 2 of Part II of First Schedule of the Code and not in Entry 3 thereof.*” On examination of the Code, the court found non-cognizable offences punishable with imprisonment which may extend to three years, have been treated on par with offences where imprisonment is for “less than three years”, so as to make them bailable. Subsequently, same position was reiterated by the Bombay High Court in the case of **Sangit Krishna Kumar Agrawal Vs UOI [2007 (219) ELT 0143 (Bom.)]**, and **Kuresh Taherbhai Rajkotwala Vs UOI [2007 (209) ELT 0347 (Bom.)]**.

Even the Punjab and Haryana High Court in the case of **Kulbhushan Goyal Vs Joint Commissioner of Customs [Crl. Misc. No. 71789-M/05]** held that offence under Section 135(1) (ii) is a bailable offence.

On the other hand, Kerala High Court in the case of **C.K. Boban Vs UOI [2005 CriLJ 2801]**, while interpreting the Section 135(1)(ii) held that *“the position would be clear from the second item in Part II of First Schedule to the Code which provides that if the offence is punishable with imprisonment for three years and upwards, the offence is non-bailable. The expression used is “three years and upwards” which would definitely include an offence punishable for a term upto three years. Part II of First Schedule is clear that if the offence is punishable for a term of three years and upwards, that offence is non-bailable. What is bailable is an offence punishable with imprisonment for a term of less than three years. The question can be answered in another way as well. Can you punish an accused with imprisonment for a term of three years under Section 135(1)(ii) of the Customs Act? If the answer is ‘yes’, then the second item in Part II of the First Schedule to the Code would apply. Obviously, the offence would be non-bailable in such a case. Therefore, the contention that the offence under Section 135(1)(ii) of the Customs Act is bailable does not deserve acceptance. That was the law as existed before the amendment carried out by the Finance Act, 2007.”*

Again, the Delhi High Court in the case of **Inderjeet Nagpal Vs DRI [2006 (193) ELT 0408 (Del.)]** and **Lalit Goel Vs CCE [2008 (224) E.L.T. 216 (Del.)]** has differed with views expressed by the Bombay High Court in **Subhash Chaudhary (supra)** and followed its earlier decision in **Mohan Lal Thapar (supra)**.

It can be seen from the above discussion that apparently, there was no unanimity of views between various High Courts on the issue. However, there are some other enactments wherein identical provision for imprisonment for a term which may extend to three years or with fine or with both has been provided and discussed.

Comparison with other existing laws

- **Electricity Act, 2003 (the “Electricity Act”)**

In the case of **Ranjit Kumar Bag Vs State of West Bengal, [2006 (1) CHN 445]** the Calcutta High Court without examining the issue in detail accepted the finding of the lower court that punishment term which may extend to three years is a non-bailable offence and the term ‘extending upto three years’ should fall in Part II to the Code.

- **Cinematograph Act, 1952 (the “Cinematograph Act”)**

In the case of **Tapan Biswas Vs State of Assam [2001 (3) GLT 13]**, the Court held that in respect of offence under Section 7(1)(a) of the Cinematograph Act, which is punishable with imprisonment for a term which may extend to three years or with fine, is a bailable offence. For the purpose of interpreting this clause the Court had relied on the Supreme Court decision in **Rajeev Chaudhary case (infra)**.

- **Copyright Act, 1957 (the “Copyright Act”)**

In the case of **Hridyananda Sharma Vs State of Assam [2003 (27) PTC 219 (Gau)]**, the question came up before the Gauhati High Court was whether the offence punishable under Section 68A of the Copyright Act, provides for imprisonment which may extend to three years with fine is a bailable offence? The High Court dissented from the **Tapan Biswas** case (*supra*) and **Rajeev Chaudhary** case (*supra*) and stated that reliance on them was erroneous. The High Court stated that for an offence under Section 68A the punishment may be three years. Since the punishment can be for three years, it has to be held as non-bailable in the light of the contents of Part II of the First Schedule of the Code.

In the case of **Amarnath Vyas Vs State of Andhra Pradesh [2007 CriLJ 2025]**, the question came up for consideration before the Andhra Pradesh High Court was whether the offence punishable under Section 63 of the Copyright Act providing for imprisonment for a term which shall not be less six months but which may extend to three years with prescribed fine is bailable offence? The Court analyzed the contentious provision of the Copyright Act with that of the Code in juxtaposition. The Court found that the expression “punishment for a term which may extend to three years” under Copyright Act is certainly not similar to the expression “punishment for three years and upwards” of the Code and relied on the findings of **Rajeev Chaudhury** case (*infra*) and held that *“...there may be certain other class of offences which may fall in between classification II and classification III of Part-II of First Schedule. Merely because they are not coming squarely within the domain of classification-III, they cannot automatically be treated as included in the classification-II. By default, they cannot be considered as coming within the purview of the classification-II.”*

Differing from the above position, the Kerala High Court in **Sureshkumar Vs The Sub Inspector of Police [2007 (3) KLT 363]**, held that offence under Section 63 of the Copyright Act undoubtedly falls under Part II of the First Schedule making them non-bailable offence.

In view of the above, it is clear that even in other enactments also, there was a raging controversy.

Supreme Court of India

Supreme Court of India also in some occasions dealt with similar issues. In **Rajeev Chaudhury Vs State (NCT), Delhi, [2001 (5) SCC 34]** the moot question came up before the Supreme Court was regarding the interpretation and construction of the expression offence punishable with imprisonment ‘**for a term not less than ten years**’ occurring in the proviso (a) to Section 167(2) of the Code in the context of the expression imprisonment ‘**which may extend to ten years**’ occurring in Section 386 of Indian Penal Code, 1860 (“**IPC**”), for an extortion case. The Court while interpreting both the clauses on terms of the punishment held that:

‘Hence in cases where offence is punishable with imprisonment for ten years or more, the accused could be detained up to a period of 90 days. In

this context, the expression "not less than" would mean imprisonment should be ten years or more and would cover only those offences for which punishment could be imprisonment for a clear period of ten years or more. Under Section 386 punishment provided is imprisonment of either description for a term which may extend to ten years and also fine. That means, imprisonment can be for a clear period of ten years or less. Hence, it could not be said that minimum sentence would be ten years or more. Further, in context also if we consider Clause (i) of proviso (a) to Section 167(2), it would be applicable in case where investigation relates to an offence punishable (1) with death; (2) imprisonment for life; and (3) imprisonment for a term of not less than ten years. It would not cover the offence for which punishment could be imprisonment for less than ten years. Under Section 386 IPC, imprisonment can vary from minimum to maximum of ten years and it cannot be said that imprisonment prescribed is not less than ten years'.

The decision of Supreme Court clearly states that the expression "imprisonment for a term not less than ten years" could not be equated with "imprisonment for ten years or less" and that the expression would cover only those offences which are punishable with imprisonment for a clear period of ten years or more. It is worthwhile to mention here that applicability of the instant case as precedent has been questioned in various cases as mentioned above, whereas, on the other hand other courts have taken it as the "**stepping stone**" for delivering judgment on the nature of offence under Section 135(1)(ii) of the Customs Act. The finding of instant case can be interpreted simply by saying that *the duration in the form of upper and lower limit should be taken into consideration at the time of determining the nature of offence*. For instance, if the statute provides for period of punishment "which may extend to three years", then the same will not fall into the category of punishment which includes a term of "three years or more". The reason being that the former category has the maximum term prescribed as three years and the latter begins with it.

In the case of **Alpesh Arvind Lal Gandhi Vs UOI [2006 (075) RLT 5 (SC)]** a matter pertaining to anticipatory bail under the Customs Act, the Supreme Court had got the opportunity to examine the issue in details but without doing so the apex court granted temporary relief to the applicant. Further, the orders of Bombay High court in **Subhash Chaudhary** case and **Sangit Krishna Kumar Agrawal** case have been appealed by the Union of India vide appeal SR 5369-5370/2004 and SR 7194/2007 which has been duly admitted by the Apex Court, therefore the issue was kept in limbo.

Avinash Bhosale, a builder from Pune was arrested by the Directorate of Revenue Intelligence ("**DRI**") at Mumbai Sahar Airport on 27 May 2007 for alleged smuggling of four diamond studded wrist watches worth more than Rupees Thirty lakh and branded spectacle frames, perfumes and other expensive consumer items worth more than Rupees Eleven lakh. The alleged duty evasion worked out to Rupees Seventeen lakh. Based on the facts available on arrest memo, it appears that the case falls under Section 135(1)(ii) of the Customs Act as firstly the cumulative value of offending goods were lower than

Rupees One crore and secondly the duty allegedly evaded was lower than Rupees Thirty lakh. It is also pertinent to mention that Government of India is yet to issue a notification for goods falling under Section 135(1)(i)(C) as notification issued under Section 123 is not applicable for Section 135(1)(i)(C). However, prior to 11 May 2007, same offence would have fallen under Section 135(1)(i) for the simple reason that firstly watches are notified goods under Section 123 and secondly the value of offending watches were more than Rupees Two lakh.

Subsequently, Avinash Bhosale was released on bail by the Magistrate on the basis that offence was bailable in nature. On appeal, the Bombay High Court set aside the Magistrate order for the reason that arrest memo did not contained the relevant provision i.e. Section 135(1)(i) or 135(1)(ii) of the Customs Act. DRI contested the bail on the ground that his offence falls under Section 135(1)(i) and not under Section 135(1)(ii) of the Customs Act. There was no plea by the customs that offences under Section 135(1)(ii) are not bailable. The Apex Court in **Criminal Appeal No.1138/07** held that **“On the basis of material placed on record, and the amended Section 135(1)(ii) of the Customs Act, it appears to us that apparently the offence which is alleged to have been committed is a bailable offence and thus the Magistrate has rightly granted bail to the appellant”**. Against this order, the Government has filed **Review petition (Criminal) No.130/08**, which has also been dismissed by the Supreme Court on 7 May 2008.

The Delhi High Court even in the case of **Lalit Goel** decided on 2 November 2007 and **Arun Kumar Gupta Vs DRI** decided on 18 February 2008, held that the order of Supreme Court in **Avinash Bhosale’s** case was *per incuriam* as the same was stayed by the Supreme Court and therefore is not a binding judgment. The Delhi Court following the precedents held that the offence under Section 135(1)(ii) is non bailable.

Since, the review petition against the apex court order in the case of **Avinash Bhosale** has been dismissed by the Supreme Court, the issue is *res-judicata* and the contrary views of Delhi High Court are no longer valid.

In view of the above, it can be concluded that the offence falling under Section 135(1)(ii) of the Customs Act is a bailable offence. With the dismissal of review petition, the Supreme Court has finally closed the door of interpretations on the issue and accordingly offences punishable with imprisonment **which may extend to three years** are bailable offence not only under the Customs Act but also various other enactments.

ⁱ Prohibited goods means goods liable to confiscation under section 111 or 113 of the Customs Act. Under section 111(d) and 113(d) of the Customs Act, prohibitions includes goods prohibited under other laws like Foreign Trade (Development & Regulation) Act, Prevention of Food Adulteration Act, Drugs & Cosmetics Act, Environment Act, Arms Act, Livestock Importation Act, Coffee Act, Tea Act etc. wherever there is restriction on import or export of such goods.

ⁱⁱ The Central Government has not issued any notification under section 135(1)(i)(C) of the Customs Act.

ⁱⁱⁱ In the case of goods notified under Section 123 of the Customs Act, burden of proving that goods are not smuggled is on the accused whereas in other case, burden is on the Department. Gold and watches are specifically covered under Section 123 of the Customs Act. Presently, some other goods notified under Section 123 are Synthetic yarn, Metallised yarn, Synthetic fabrics, Electronic Calculator, Watches and parts thereof, Zips and Silver bullion.