

## BAIL - BAILABLE OFFENCE UNDER THE CUSTOMS ACT

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*Sheetal Mafatlal, socialite and a Mumbai based business tycoon was arrested by the Mumbai customs upon arrival at Mumbai international airport for allegedly carrying undisclosed jewellery and diamonds worth between Rs 51 lakh to one crore. She was remanded to judicial custody by a local court but subsequently enlarged on bail by the Mumbai High Court on surety of Rs 5 lakhs. She was also directed to mark attendance twice a week along with paying customs duty of Rs 18 lakhs. Actual value of offending goods was ascertained at Rs 58 Lakhs.*

Above news was making headlines in the electronic and print media in the second week of June 2009. Some people were sympathetic to the socialite because they felt that treatment meted by the customs authorities was very harsh and she could have been let off by collecting customs duty and appropriate fine/penalty. On the hand, some people thought that big and powerful people like her should be treated with iron hand to curtail the all pervasive tendency to disrespect the law of land.

**Was the treatment too harsh? May be. Was the arrest legal? Yes. Whether she was entitled for the bail? Yes. Whether any norm was violated on arrest? Yes.**

In terms of Section 135 of the Customs Act, 1962, 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.

In the case of **Avinash Bhosale**, a builder from Pune arrested by the DRI on the alleged smuggling of wrist watches spectacle frames, perfumes and other expensive consumer items worth more than Rupees forty one lakh, 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 filed a Review petition (Criminal) No.130/08, which was dismissed by the Supreme Court on 7 May 2008. Hence, offence falling under Section 135(1)(ii) of the Customs Act is a bailable offence and the issue is *res-judicata* [**236 ELT (2009) A76**]. Sheetal Mafatlal was arrested on the alleged non-disclosure of goods valuing between Rs 51 lakh to one crore and attempted evasion of duty of Rs 18 Lakhs. As it appears that the market value of offending goods was lower than Rs One crore and attempted evasion of duty was lower than Rupees Thirty lakh, the offence was considered as bailable one and she was enlarged on bail. **The real question is if she was accused of a bailable offence, was not she entitled to be enlarged on bail by the custom officer or by the lower court?**

Section 104 of the Customs Act which vest the customs authorities with the power to arrest is as follows:

*Section 104. Power to arrest - (1) If an officer of customs empowered in this behalf by general or special order of the Commissioner of Customs has reason to believe that any person in India or within the Indian customs waters has committed an offence punishable under section 132 or section 133 or section 135 or section 135A or section 136, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.*

*(2) Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a magistrate.*

*(3) Where an officer of customs has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police-station has and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898).*

*(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), an offence under this Act shall not be cognizable.*

Sub-section (1) of Section 104 of the Customs Act empowers the customs officer to arrest a person and sub-section (2) requires arrested person to be produced before the magistrate. Sub-section (3) vest customs officer with the same powers and powers are subject to the same provisions as the officer-in-charge of a police-station has and is subject to under the Code of

Criminal Procedure (“CrPC”). Now, let us analyse relevant provisions of CrPC which are as under:

**Section 56. Person arrested to be taken before Magistrate or officer in charge of police station-** *A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.*

**Section 57. Person arrested not to be detained more than twenty-four hours-** *No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court.*

**Section 436. In what cases bail to be taken-** *(1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at, any, time, while-in, the custody of such officer or at any stage of the proceeding before such court to give bail, such person shall be released on bail:*

**Provided** *that such officer or court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:*

**Provided further** *that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 or section 446A.*

*(2) Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the court or is brought in custody and any such refusal shall be without prejudice to the powers of the court to call upon any person bound by such bond to pay the penalty thereof under section 446.*

Section 436 of the CrPC provides for enlargement of arrested person accused of a bailable offence. In the case of **Aslam Babalal Desai vs State Of Maharashtra [1992]**, the Apex Court held that bail is the rule in the case of bailable offences. Recently, necessity of bail in a civilized society was examined in detail by the Apex court. In the case of **Vaman Narain Ghiya vs State of Rajasthan [2008]**, the Hon’ble Supreme Court observed that:

*"Bail" remains an undefined term in the Cr. P.C. Nowhere else the term has been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints since the U.N. Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression 'bail' denotes a security for appearance of a prisoner for his release. ....*

*Bail may thus be regarded as a mechanism whereby the State devolves upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. **A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police.** It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on one hand, the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence, viz., the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have (A. K. Gopalan v. State of Madras AIR 1950 SC 1000).*

*The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. **An accused is not detained in custody with the object of punishing him on the assumption of his guilt.***

*Chapter XXXIII consists of Sections 436 to 450. Sections 436 and 437 provide for the granting of bail to accused persons before trial and conviction. For the purposes of bail, offences are classified into two categories, that is, (i) bailable, (ii) non-bailable. Section 436 provides for granting bail in bailable cases and Section 437 in non-bailable cases. A person accused of a bailable offence is entitled to be released on bail pending his trial. In case of such offences, a police officer has no discretion to refuse bail if the accused is prepared to furnish surety. The Magistrate gets jurisdiction to grant bail during the course of investigation when the accused is produced before him. In bailable offence there is no question of discretion for granting bail. The only choice for the Court is as between taking a simple recognizance of the principal offender or demanding security with surety. **Persons contemplated by this Section cannot be taken in custody unless***

***they are unable or unwilling to offer bail or to execute personal bonds. The Court has no discretion, when granting bail under this section, even to impose any condition except the demanding of security with sureties.***

[Emphasis supplied]

It is often argued that investigation requires time to collect evidence and therefore investigating authorities are required to take arrested person accused of bailable offence on judicial remand. In the case of **Pravinkumar Chandrakant Vyas vs State Of Gujarat [2001]**, the Hon'ble Gujarat High Court quashed a circular issued by the Commissioner of Police, Rajkot directing his subordinate to obtain remand from the Magistrate for investigation even in the cases of bailable offence. The Hon'ble Court observed that:

*“As has been noted by us above, even in bailable offence, requirement of the investigating agency for bringing to book the alleged offender and others connected with it, cannot be disregarded. Effective investigation is necessary in general interest of society. In our view, therefore, it is open to the investigating agency to utilise minimum possible time to interrogate the accused and to take his identification marks, finger prints, photographs, etc., which would help the police not only to bring the arrested person to book, but also furnish clue or linkage of the offence with other offenders and offences. If such a need is found necessary by the investigating officer even in bailable offence, the officer can resort to the provisions contained in Sections 4 and 5 of the Identification of Prisoners' Act, 1920 and for the limited purpose mentioned therein, he has to approach the Magistrate. In all other cases, it is the bounden duty of the officer arresting a citizen for bailable offence to admit him to bail as and when he is prepared to offer bail to the police officer or in event of his production before the Magistrate, to the Magistrate. Any other interpretation of the provisions of the Code would violate the aforesaid discussed provisions of the Code and the fundamental right of the citizen under Article 22 of the Constitution.”*

It is also often argued that at the time of arrest, it is not known whether offence is in the nature of a bailable offence or non-bailable offence and only after the investigation, charges can be determined. In the case of **Trinayan Saikia vs State Of Haryana [2009]**, the Hon'ble Punjab & Haryana High Court has held that:

*“.....As per the prosecution case, the offences which are at present attributed to the petitioner are bailable offences. According to the prosecution it is yet to be ascertained as to whether the offence under Section 304 IPC is made out. .... it is to be considered by the Court concerned at the time of consideration of framing of charge. At this stage, it would be too pre-mature to hold that the offence under Section 304 IPC is made out. .... In case the prosecution at some later stage does add the offence under Section 304 IPC holding that the same to be made out, the necessary consequences that entail would follow.*

In view of the above judgments, following picture emerges in the case of arrest of a person for the bailable offence:

- Bail is the rule. Bail has to be unconditional except for execution of personal bond and demanding of security with sureties.
- Accused Persons cannot be taken into custody, if he executes bond/surety
- Bail cannot be denied on the plea of further investigation
- Bail cannot be denied on the plea that nature of offence i.e. bailable or non-bailable is yet to be ascertained

Above rules for bailable offences are also applicable under the Customs Act. Section 57 of the CrPC stipulates that an arrested person is required to be produced before the magistrate which is similar to section 104(2) of the Customs Act. It may be noted that power to arrest under section 56 of the CrPC is subject to the provisions as to bail, whereas power to arrest under section 104(1) of the Customs Act is without any provision for bail. Section 104(3) of the Customs Act empowers the customs officers with the power of the officer-in-charge of a police-station which includes powers to release the arrested person on bail. The sub-section (3) also makes such powers subject to the provisions under the CrPC. It is amply clear that powers of arrest under the Customs Act are subject to provisions of CrPC. Hence, if a custom officer is powered to arrest a person, he is also required to enlarge the arrested person on bail if the person is accused of a bailable offence.

In the case of **D.K. Basu vs State of West Bengal [1996]**, in order to guard the fundamental right of a citizen against illegal and unlawful, the Hon'ble Supreme Court has issued mandatory directions to all police in the whole of India which are also applicable to the custom authorities. Supreme Court observed thus:-

*"However, it is true that in case of too much of emphasis on protection of fundamental rights and human rights of hardened criminals, such criminals may go scotfree without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis, the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in the efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worse than the disease itself."*

It appears that the customs authorities have never used powers to release an arrested person on bail as provided under section 104(3) of the Customs Act and this piece of legislation has become a mere decorative legislation. Customs consider remand of a person accused of smuggling as an effective preventive tool. However, non-exercise of the power or refusal to release arrested person accused for a bailable offence by the custom officers on bail is violation of the fundamental rights and human rights of the arrested person. The Hon'ble Supreme Court has aptly observed in D.K. Basu case (supra) that cure can not be worse than the disease itself.

Section 155 of the Customs Act provides for the protection to the custom officers from suit, prosecution or other legal proceeding for anything which is done in good faith. Denial of bail by the custom officer to the arrested person accused of bailable offence cannot be said to be an act done in good faith, and therefore not entitled for the protection. Officers denying the bail to eligible persons may be prosecuted in a court of law. There is an increased level of awareness in the general public due to the advent of new communication technology like television and internet. It is the time for the customs to learn that power comes with responsibility and failure to discharge responsibility may lead to prosecution by the public. Dice may also be cast against the department.

P.S. I am still not able to understand how a magistrate can refuse bail to a person accused of a bailable offence under the Customs Act. Persons accused of bailable offence cannot be taken in custody unless they are unable or unwilling to offer bail or to execute personal bonds. The Court has no discretion, when granting bail under this section, even to impose any condition except the demanding of security with sureties. This rule laid down by the parliament of India has been flouted by the lower courts numerous times. Public can prosecute customs officers for refusal to enlarge on bail but no such remedy is available against the lower courts transgressing the law.

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