

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Crl. Rev. P. No. 160 of 2007

% Date of Decision : 05.02.2008

ANIL MAHAJAN & ANR. PETITIONERS
Through: Mr. Sandeep Sethi,
Senior Advocate with
Mr. Prem Ranjan Kumar,
Advocate.

- V E R S U S -

UNION OF INDIA & ANR. RESPONDENTS
Through: Mr. Vineet Malhotra,
Advocate for R – 1 / UOI.
Mr. Sunil Sharma,
Advocate for R – 2 / Customs.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

SANJAY KISHAN KAUL, J. (ORAL)

1. A search was carried out by the customs authorities on 30.07.1999 in the premises of New India Agencies, which is stated to be a proprietorship concern of petitioner No. 1 and petitioner No. 2 was stated to be the Executive–Cum–Caretaker of the said concern. The said concern was engaged in the

business of import in trading of textiles and some other consumable goods. The statements of both the petitioners were recorded and the petitioners were arrested for the offences under Section 132 and 135 of the Customs Act, 1962 (hereinafter to be referred to as, 'the said Act') on account of alleged false declaration, false documents and evasion of customs duty. Simultaneously adjudication proceedings were also initiated under the said Act.

2. In the course of adjudication proceedings, on the written request made by the petitioners, the Commissioner of Customs appointed three Officers to examine the goods afresh in order to find out whether the goods were co-related with the documents produced. This was in pursuance to an order dated 12.06.2001 and the Officers were directed to record detailed findings giving the nature and description of the goods and as to whether the particulars tallied with the bills of entry and the reasons to be recorded for any goods not tallying with the bills of entry produced. The said Committee submitted a report on 28.09.2001.

3. The Commissioner, however, in terms of the order dated 27.11.2001 found against the petitioners and directed confiscation of goods and imposition of penalty. The petitioners aggrieved by the said order filed a statutory appeal before the CESTAT, which found in favour of the petitioners in terms of the order dated 03.02.2003. A conclusion was reached that the

documents did tally with the particulars of the case and there was no justification for confiscation of the goods and imposition of penalty. The goods were not released and, thus, the petitioners filed a writ petition being CWP No. 7021/2003 wherein a direction was issued on 18.12.2003 for release of the goods.

4. The customs authorities then filed an appeal before the Court against the order of the CESTAT, but in terms of the Order of this Court dated 06.01.2004 sought leave to withdraw the said appeal to enable the customs authorities to move the Tribunal under Section 129(B)(ii) of the said Act for rectification of mistake. The application was so filed, but was rejected vide order dated 18.01.2005. There was no further challenge and, thus, the adjudicatory proceedings rested at that.
5. The criminal proceedings carried on simultaneously and the complaint was filed alleging that the accused persons had illegally imported into India goods, which were covered under Section 123 of the said Act and had acquired possession and were concerned in carrying, removing, storing, deposition, harbouring, transporting, keeping, selling, purchasing or dealing with the seized goods which they knew or had reasons to believe were liable to confiscation under Section 111 of the said Act and had, thus, committed offences punishable under Sections 132 and 135(1)(b) of the said Act. It is not disputed that it is these very goods which form the subject matter of

adjudication proceedings as is apparent from the show-cause notice dated 27.01.2000. In the adjudication proceedings, it was alleged that 4447 rolls measuring 1,28,745.80 metres of synthetic fabric of foreign origin of assorted colours valued at Rs.1,28,745.80 have been seized from the premises which had been smuggled into India in contravention of various prohibitions which restrictions were imposed on import thereof under Section 111 of the said Act.

6. The Court of learned ACMM framed charges in C.C. No. 1/2/1999 in terms of the impugned order dated 24.11.2006. In the said order, while there is a reference to the aspect of the Commissioner awarding penalty and setting aside of the same by the CESTAT, the grievance is that there is no further discussion on that behalf, although it is a detailed order.

7. The sum and substance of the plea advanced by learned senior counsel for the petitioners is that once the adjudicatory process in relation to the same subject matter has come to the conclusion that there was no illegality committed by the petitioners under the said Act, the prosecution against the petitioners would not survive. In this regard, learned senior counsel referred to the judgment of learned Single Judge of this Court in Sunil Gulati v. R.K. Vohra and other connected cases, 2007 (1) JCC 220. The legal position was succinctly set out by A.K. Sikri, J. on conspectus of various judgments of the Supreme Court dealing with different situations in such matters. There

were four eventualities discussed and the principles culled out from the various judgments were set out as under :-

“1. On the same violation alleged against a person, if adjudication proceedings as well as criminal proceedings are permissible, both can be initiated simultaneously. For initiating criminal proceedings, one does not have to wait for the outcome of the proceedings are independent in nature.

2. The findings in the departmental proceedings would not amount to *res judicata* and initiation of criminal proceedings in these circumstances can be treated as double jeopardy as they are not in the nature of “*prosecution*”.

3. In case adjudication proceedings are decided against a person who is facing prosecution as well and the Tribunal has also upheld the findings of the adjudicators / assessing authority, that would have no bearing on the criminal proceedings and the criminal proceedings are to be determined on its own merits in accordance with law, uninhibited by the findings of the Tribunal. It is because of the reason that in so far as criminal action is concerned, it has to be proved as per the strict standards fixed for criminal cases before the criminal court by producing necessary evidence.

4. In case of converse situation namely where the accused persons are exonerated by the competent authorities / Tribunal in adjudication proceedings, one will have to see the reasons for such exoneration to determine whether these criminal proceedings could still continue. If the exoneration in departmental adjudication is on technical ground or by giving benefit of doubt and not on merits or the adjudication proceedings were on different facts, it would have no bearing on criminal proceedings. If, on the other hand, the exoneration in the adjudication proceedings is on merits and it is found that allegations are not substantiated at all and the concerned person(s) is/are innocent, and the criminal prosecution is also on the same set of facts and circumstances, the criminal prosecution is also on the same set of facts and circumstances, the criminal prosecution

cannot be allowed to continue.

The reason is obvious criminal complaint is filed by the departmental authorities alleging violation / contravention of the provisions of the Act on the part of the accused persons. However, if the departmental authorities themselves, in adjudication proceedings, record a categorical and unambiguous finding that there is no such contravention of the provisions of the Act, it would be unjust for such departmental authorities to continue with the criminal complaint and say that there is sufficient evidence to foist the accused persons with criminal liability when it is stated in the departmental proceedings that *ex facie* there is no such violation. The yardstick would, therefore, be to see as to whether charges in the departmental proceedings as well as criminal complaint are identical and the exoneration of the concerned persons in the departmental proceedings is on merits holding that there is no contravention of the provisions of any Act."

(emphasis supplied)

8. The aforesaid judgment has been followed by another learned Single Judge of this Court *inter alia* in Crl. Misc. (Case) No. 938/2005 titled M/s. Bihariji Mfg. Co. (P) Ltd. & Ors. v. Commissioner of Central Excise, Anti Evasion, Delhi decided on 14.02.2007 where adjudicatory proceedings culminated in orders favouring the accused / assessee and where in exercise of independent powers of prosecution, complaints were lodged. It was pointed out that there was a distinction between saying that two proceedings can be maintained as a matter of law and to say that after suffering an adjudication order on the same facts, the Department or prosecuting agencies ought not to be allowed to proceed and prosecute the assessee having failed to establish the basic facts.

9. It is, thus, the submission of learned senior counsel for the petitioners that the facts of the present case also are identical to these two cases where though the adjudicating process went in favour of the Department initially, the accused had subsequently succeeded.

10. Learned counsel for the Department, however, strenuously opposed the petition by relying on the same set of judgments to contend that there was no ground for quashing the order of framing charges.

11. In order to appreciate the controversy, the ratio of the aforesaid judgments has to be examined. The present case would fall in the 4th category of Sunil Gulati's case (supra) inasmuch as the accused persons were exonerated by the competent authority / Tribunal in the adjudication proceedings. If such exoneration in the departmental adjudication is on a technical ground or by giving benefit of doubt and not on merits or the adjudication proceedings were on different facts, it would have no bearing on the criminal proceedings. However, on the other hand, if the exoneration in the adjudication proceedings were on merits and the allegations were found not to be substantiated with the concerned persons being found innocent of the same, then criminal prosecution cannot be permitted to continue. The obvious reason for the same is that the criminal complaint is filed by the departmental authorities alleging violation or contravention of the provisions of the said Act while

simultaneously in the adjudication proceedings, there is a categorical and unambiguous finding that there is no such contravention of the provisions of the said Act. Thus, it was held that it would be unjust for such departmental authorities to continue with the criminal complaint and say that there is sufficient evidence to foist the accused persons with criminal liability when in the departmental proceedings, it has been found that *ex facie* there was no such violation. The yardstick fixed was that the charges in the departmental proceedings as well as the criminal complaint must be of identical nature and the exoneration of the concerned person in the departmental proceedings is on merits holding that there is no contravention of the provisions of the said Act.

12. It is the latter aspect, which is sought to be emphasized by learned counsel for the respondents by seeking to contend that the only reason for the adjudication process going against the Department was the inability to produce relevant evidence and, thus, it is a technical nature of decision.

13. I am afraid, the said plea is only to be stated to be rejected.

14. If on the basis of the evidence and material produced a finding is reached by the adjudicatory authority on merits, it cannot be said to be a technical finding. To accept the plea of learned counsel for the respondents would imply that the Department would have the right not to produce material before the adjudicating authority, invite an unfavourable

decision and yet prosecute the complaint on the basis that it would produce further evidence in support of its case.

15. The matter, in fact, is also not so simple as is made out by learned counsel for the respondents. The Commissioner of Customs brought all the evidence produced before himself and even inspection of goods was carried out by the Committee of Officers appointed at the request of the petitioners. On the conspectus of all the aforesaid material, a finding was reached against the petitioners by the customs authorities. It was held that the report of the Committee lent no support to the contention of the petitioners that the goods seized are covered under the documents produced by them. Thus, the substratum of the finding was that the goods were not found to be the same, which could be relatable to the documents. The CESTAT, however, found to the contrary. A categorical finding was reached that to the extent the particulars existed and could be co-related, the Committee had found the goods to be covered by the documents. It had found the physical appearance, the nature and description of the fabrics to be the same as in the bills of entry and had found the width to tally wherever the width was given in the documents. The finding of the Commissioner was found to be incorrect that the Committee could not co-relate the goods in regard to the width for the reason that this parameter was in itself quite vague and no definite opinion as to conformity followed. It concluded in

favour of the petitioners that the goods were covered by the bills of entry and they confirmed the claim of the petitioners. The adverse finding reached on account of the transport company not responding to the summons was also not upheld by reason of the fact that the same did not imply that the documents did not exist since copies of documents had been produced. The petitioners were held to have produced evidence relating to carriage of goods and it was up to the Department to rebut that evidence by appropriate measures, which it failed to do. It was, thus, held that there was no justification for confiscation of the goods or imposition of penalty.

16. The present case is, thus, not one where it could be said that the adjudication proceedings are based on technical ground or by giving benefit of doubt or that the merits have not been examined. I am unable to accept the plea of learned counsel for the respondents that the observation to the effect that the Department did not produce any evidence in rebuttal and the evidence produced by the petitioners in this behalf would imply that the findings arrived at is of technical nature.

17. I am, thus, of the considered view that the charges cannot be framed and the criminal prosecution cannot be permitted to continue against the petitioners once the adjudication proceedings on merits have been found in favour of the petitioners.

18. In the end, it must be observed that in view of the findings of the adjudicatory process, it was a fit case where the Department ought to have conceded the matter on the basis of the settled legal position. The Department had failed in the adjudicatory process against the petitioners and yet continued to contend that the criminal proceedings must go on. The legal system by which we are governed is adversarial in nature, but there is a special responsibility on the Government and public authorities to act reasonably and in a fair manner. The over-burdened legal system cannot be further burdened by unnecessary cases or contest in the form of luxury litigation on the part of the Government authorities. Learned counsel for the respondents, in fact, pleaded that no one had even come to instruct him after the brief had been handed over to him, which itself shows the lack of seriousness on the part of the Department in defending the present case. It appears that only the formality of a seal of approval from the Court is sought to be obtained without the Department acting in a just and fair manner resulting in unnecessary wastage of time of the Court. I, thus, deem it appropriate to burden the respondents with costs of the present petition and it is open to the Department to recover the same from any Officer, who may be negligent in the performance of his duties.

19. The petition is accordingly allowed, the impugned order of framing charges is quashed and the petitioners are discharged.

The petitioners shall be entitled to costs from the respondents
quantified at Rs.20,000/-.

Crl. M. A. No. 3150/2007 IN CRL. REV. P. No. 160/2007

The application does not survive for consideration in view of
disposal of the main petition.

Application stands disposed of.

February 05, 2008
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SANJAY KISHAN KAUL, J.