

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C. 239/2004**

Date of Reserve: 22.12.2009

Date of Decision: 22.01.2010.

SUDARSHAN LOHIA

..... Petitioner

Through: Mr. Mohit Kumar, advocate

versus

UOI through Chief Commissioner of Customs, ND

..... Respondent

Through: Mr. Satish Aggarwala, advocate

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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

MOOL CHAND GARG,J

1. The petitioner who has been arrayed as accused No. 2 in complaint case No. VIII-(Law)/Cus/174/98 pending before the ACMM Patiala House, New Delhi filed under Section 132/135(1)(a) of the Customs Act seeks quashing of the order dated 02.09.1998, taking cognizance on the aforesaid complaint against him on the ground, that the said complaint is not only barred by time but is also not maintainable qua him as there is no evidence admissible in law which may result in his conviction. It is, thus, prayed that proceedings in that case against the petitioner be quashed by exercising powers of this Court under Section 482 of the Cr.P.C. as the trial of the petitioner in that case without there being any evidence against him would tantamount to abuse of the process of the Court

2. Briefly stating, the facts giving rise to the filing of this petition are:

- i. Accused no.1 Shri Adarsh Bhushan Mitra who is the owner and proprietor of M/S Magadh Enterprises and who is in export business procured an export order to supply public address system and jackets to one M/S Rafisons Pvt. Ltd. Dubai P.O. Box No. 61236
 - ii. The petitioner at the request of accused no. 1 suggested name of a Custom House Clearing Agent (CHA) namely M/S Bhatia Shipping and Agencies Pvt. Ltd. to the said accused as he was knowing the ex-manager Shri Ved Bhatia of M/S Bhatia Shipping Agency.
 - iii. The petitioner also visited Customs office in Patpargang for the purpose of processing documents which had to be filed by accused no. 1 before the Customs authorities. Similarly, the petitioner also suggested the source of purchasing jackets to the first accused in Kolkata from whom the first accused engaged the purchase of jackets with one Pavan Goenka. However, it has been submitted that the petitioner is in no way connected with the export of any of the goods which the first accused was to undertake & did not get any financial advantage nor had any intention to do so.
3. The petitioner submits that the aforesaid complaint and the order of cognizance needs to be quashed, inter alia, on the following grounds:
- i. Because, the petitioner is not associated in any capacity with the proprietorship concern of the accused no. 1. The petitioner is neither a partner nor an employee, nor instrumental in taking decision of M/S Magadh Enterprises. It is pertinent to mention here that the present petitioner is NEITHER THE EXPORTER NOR THE IMPORTER and as such the complaint filed against the petitioner is an abuse of process of law and the same is liable to be quashed.
 - ii. Because, the petitioner has not assisted and/or contributed financially for the procurement of public address system or the jackets so as to create any interest for himself in the export deal of the accused no.1.
 - iii. Because, the allegations made against the petitioner not sustainable in the eyes of law as the petitioner had simply suggested the name of

CHA agent, source of procurement of jackets and delivery of some documents to the CHA and therefore no guilt/offence can be attributed to the petitioner. As such the process issued against the petitioner is a result of non-application of mind and a mechanical approach which deserves to be quashed at this stage alone by this Hon'ble court to prevent manifest injustice.

- iv. Because, the petitioner admittedly had not signed any documents relating to the offences alleged and even as per the case of the prosecution itself it was only accused no. 1 who signed all such documents and further the petitioner did not help the accused no. 1 or any one else in the preparation of the same, and he never ascertained any valuation as he was/is not concerned with any monetary outcome of any transaction conducted by the accused no. 1 and further the petitioner did not finalize the final prices of the items/ goods which were to be exported and the petitioner had no role to play either in the export business or otherwise.
- v. Because, the ingredients of Sections 132 and 135(1)(a) are not made out and the same cannot be made out under the facts and circumstances as the prosecution and the Ld. Magistrate failed to consider that the Section 132 is not applicable in the present case and also Section 135 of the Customs Act can't be attracted qua the petitioner as he is not the exporter as envisaged in the Section 19 of FERA under which the prohibition has been alleged to have been violated.
- vi. Because, no case under Section 132 of the Customs Act is made out as admittedly the petitioner never made, signed, used any document, declaration or statement in the course of the export business of accused no. 1 knowingly or under a belief that such declaration, document or statement is false in any material particular. It is the case of the prosecution agency that the petitioner never signed any documents pertaining to the export business and even the statement of Accused No. 1, recorded by the customs official under Section 108 of the Customs Act reveals that it was only accused no. 1 who made, prepared and signed and further gave instruction relating to the said

documents to various persons meant for his export business. Thus looking from any angle there is no material against the petitioner, the criminal proceedings initiated against him are liable to be quashed.

- vii. Because, the violation as contemplated under Section 18 (1)(a) of the FERA is only applicable to the exporter and goods relating to the exporter and the declaration to be filed by the exporter and the violation of the said Section of FERA cannot be attributed to the petitioner who is neither an exporter of goods nor associated in any capacity with the exporter M/S Magadh Enterprises. Hence the provisions of Section 135(1)(a) of the Customs Act for violation of the prohibition under FERA cannot apply to the petitioner as admittedly, even as per the admission by the prosecution agency in para no. 2 of the complaint the accused no. 1 is the exporter and owner of the goods in question.
- viii. Because, even otherwise, the prosecution agency has tried to rope in the petitioner for attempt to claim higher credit entitlement under DEPB Scheme (Duty Entitlement Passbook Scheme) which is not applicable in present case and in any event to the present petitioner.
- ix. Because, the DEPB Scheme allows drawback of import charges on inputs used in the export products. The objective of DEPB Scheme is to neutralize the incidence of customs duty on the import content of the export product. The neutralization under the Scheme is provided by way of grant of duty credit against the export product. The said DEPB Scheme comes within the ambit of DUTY EXEMPTION SCHEME which enables DUTY FREE IMPORT OF INPUTS required for EXPORT PRODUCTIONS.

Admittedly, no import of any inputs or raw materials or any ancillary items required for the production of the items meant for export was ever carried out even by the accused no. 1. It is the case of the prosecution by their own admission that the products were indigenous and the same were procured from Bhagirath Palace, Delhi, Roorkee (Uttaranchal) and Kolkata. Thus, there was/is no scope to violate or misuse the DEPB Scheme and any wrong belief of the accused no. 1

regarding the same can never be the basis of any crime and/or conviction as the same could not have been availed of by the accused no. 1 and in no case by the accused no.2.

Therefore, the entire case of prosecution against accused no.2 is not made out and the said proceedings are liable to be quashed at once.

- x. Because, the sanction by the Commissioner of Customs for prosecution is invalid and void ab-initio as it is a result of non-application of mind and suffers from grave lacuna of being mechanical in nature without going into to the correct facts and without testing the applicability of the provisions of the Customs Act and FERA and the DEPB Scheme.
- xi. Even the statement of accused no. 1 recorded under Section 108 of the Customs Act and that of the complainant does not implicate the petitioner in the aforesaid case. Besides that, there is no other evidence available with the respondent against the petitioner.

4. I have heard the submissions of both the sides. None of the parties have filed written submissions despite opportunity granted.

5. Section 135 of the Customs Act reads as under:

Section 135 - Evasion of duty or prohibitions

[(1) Without prejudice to any action that may be taken under this Act, if any person--

- (a) is in relation to any goods in any way knowingly concerned in misdeclaration of value or in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods; or
- (b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111 or section 113, as the case may be; or
- (c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under section 113; or
- (d) fraudulently avails of or attempts to avail of drawback or any exemption from duty provided under this Act in connection with export of goods,

he shall be punishable,--.....”

6. In view of the aforesaid provision, the petitioner not being an exporter and there being nothing on record to suggest that he was involved in the export concerned; no case is made out against him under Section 135 of the Customs Act.

7. Section 132 of the Customs Act reads as under:

Section 132 - False declaration, false documents, etc

Whoever makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document in the transaction of any business relating to the customs, knowing or having reason to believe that such declaration, statement or document is false in any material particular, shall be punishable with imprisonment for a term which may extend to [two years], or with fine, or with both.

8. At the outset, it may be observed that in the present case there is nothing to show that the petitioner made any false declaration or prepared false documents and, therefore, he is not liable to be prosecuted under Section 132 of the Customs Act. In this case, moreover the complaint is barred by limitation inasmuch as as per the provision of Section 132 which existed at the relevant time the punishment which could have been imposed for violating Section 132 could have extended for a period of six months or with fine or with both and limitation in such a case as provided under Section 468 of the Cr.P.C. was only 1 year. In the present case, the complaint was filed by the respondent on 31.08.1998 whereas the incident in this case pertains to the year 1997 and, therefore, the complaint was admittedly barred by limitation. This has also been accepted by the learned counsel for the respondent during the course of arguments.

9. Consequently, the order taking cognizance against the petitioner and the proceedings initiated against the petitioner are hereby quashed. The petition is allowed. The bail bond, if any, of the petitioner stands discharged.

10. Copy of the order be sent to the Trial Court.

MOOL CHAND GARG, J.

JANUARY 22, 2010
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