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

+ CRL.M.C. 520/2011

% Judgment delivered on:22nd July, 2011

CHINTA DEVI Petitioner
Through:Ms.Sangita Bhayana, Adv.

Versus

RAJESH ARORA AIR CUSTOM OFFICER Respondent
Through:Mr.G.S. Kanojia, Adv.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

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

SURESH KAIT, J.(Oral)

1. The petitioner was allegedly intercepted on 26.09.2001, at the IGI Airport, New Delhi, when she was coming from Hongkong and as a result of the search of her baggage, 5.808KG of white medicinal powder, which on chemical analysis was found to be Desxamethasone, was allegedly recovered from the shampoo and talcum powder bottles. It is further alleged that CIF value of that white powder was ₹ 4,96,54/- and the market value was ₹8,71,200/-.

2. Ms. Sangeeta Bhayana, Id. counsel for the petitioner submits that the petitioner has been falsely implicated in the above mentioned case, as even in her statement recorded under Section 108 of the Customs Act, 1962 (hereinafter referred to as "the said Act"), she has clearly stated that she had no knowledge regarding the concealment of the white powder in the shampoo and talcum powder bottles.

3. The petitioner has further stated that she did not know Mohan Chopra, Masterji and Peter who had allegedly given the plastic bottles in question to her son Karamvir in Hongkong for delivery to his man outside the Airport. She has also stated in her statement that she was not aware of the Airlines procedure and her son had taken her passport and ticket and checked the baggage together with his own ticket.

4. The Id. counsel for the petitioner states that the medicinal powder in question was confiscated under Section 111(b) and (m) of the said Act and penalty was also imposed on the petitioner and her son by the Additional Commissioner of Customs.

5. Being aggrieved by the aforesaid order the petitioner filed the appeal before the Commissioner of Customs(Appeals) who

has maintained the confiscation of goods and reduced the penalty amount imposed on the petitioner to ₹35,000/-, vide its order dated 05.05.2005.

6. Again the petitioner assailed this order by filing the Revision Petition under Section 129-DD before the Joint Secretary, to the Government of India, who exonerated her on the ground that she had no knowledge regarding the concealment of medicinal powder in the shampoo and talcum powder bottles.

7. Vide order dated 11.08.2005, the confiscation of goods was maintained by the Joint Secretary and it was held that it would be difficult to fully establish *mens rea* in case of the petitioner and the Government is of the opinion that the petitioner cannot be visited with penalty.

8. The Joint Secretary, Government of India, came to this conclusion on the basis that both the applicants did not at any stage seem to have any knowledge of the contents, namely, Dexcamethasone powder in the talcum powder boxes. Lack and absence of having knowledge, has been clearly in the statements of both the applicants at the initial stages of seizure under Section 108 of the said Act. Later the statement of prime

accused Shri Kuldip Chopra was recorded under Section 108 of the said Act which further corroborates this version of the applicants which stated that both of them had no knowledge regarding the contents of the talcum powder boxes.

9. The Joint Secretary, concluded that in the absence of any such knowledge and judicial pronouncements and the abandonment of goods, it will be difficult to fully establish *mens rea* in case of both the applicants and the learned Joint Secretary was of the opinion that both the applicants cannot be visited with penalty. Therefore, while confiscation of goods cannot be assailed and penalty on both the applicants, therefore, was set aside the order dated 05.05.2005 passed by the Commissioner of Customs (Appeals).

10. The aforesaid order passed by learned Joint Secretary, has not been challenged by the Customs, therefore, had attained finality.

11. The custom department had filed the complaint against the petitioner for the offences punishable under Section 132 and 135 (1) (a) of the said Act, in the Court of learned Additional Chief Metropolitan Magistrate, New Delhi. Vide order dated 18.03.2010, learned ACMM; New Delhi discharge the

petitioners on the basis that there would not be any possibility of conviction of the accused, even the prosecution case brought on record, till date, remains unrebutted. Accordingly, the petitioner was discharged.

12. The custom department, being aggrieved by the aforesaid order dated 18.03.2010 filed a revision before the Sessions Court, whereby, the learned Additional Sessions Judge vide order dated 25.11.2010 set aside the order of learned ACMM; New Delhi and the parties were directed to appear before learned ACMM; New Delhi on 06.12.2010. Since then, the matter is pending for adjudication before learned ACMM; New Delhi.

13. By way of this petition, the petitioner has challenged the order dated 25.11.2010 and the proceedings pending before the learned ACMM; New Delhi.

14. Learned counsel for petitioner submits that the petitioner was exonerated by the learned Joint Secretary to the Government of India, vide its order dated 11.08.2005, the said order has attained finality, since the aforesaid order has not been challenged by the customs.

15. Further, learned counsel for petitioner submits that since the petitioner has been exonerated in the adjudication proceedings, therefore, he can not be prosecuted in the complaint filed by the department, under Section 132 and 135 (1) (a) of the said Act.

16. Thus, by way of this petition, she has prayed to quash the prosecution proceedings pending before the learned ACMM; New Delhi.

17. The Id. counsel for the petitioner has referred to the judgment of the Supreme Court in the case of **Radheyshyam Kejriwal vs. State of West Bengal & Anr.**, JT 2011(2) SC 443 wherein the Supreme Court has upheld the two judgments of this Court in para 22.1 and 22.2 as under:-

“22.1 The Delhi High Court also considered this question arising out of a case under Foreign Exchange Regulation Act, in detail in the case of **Sunil Gulati & Anr. V. R.K. Vohra** [145 (2007) DLT 612], and held as follows :-

“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 should 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 the concerned person(s) is/are innocent, and 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 person in the departmental proceedings is on merits holding that there is no contravention of the provisions of any Act.

22.2 We respectfully endorse the view taken by the Bombay High Court in the case of Hemendra M. Kothari (supra) and Delhi High Court in Sunil Gulati (supra). “

18. Mr. G.S. Kanojia, Id. counsel for the Department submits that the learned Joint Secretary has maintained the confiscation of the goods and only set aside the penalty imposed on the petitioner. He relies on Section 138-A of the said Act which reads as under:-

“Section 138-A Presumption of culpable mental state. (1) In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation. - In this section, “culpable mental state” includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.”

19. A perusal of the aforesaid Section shows that it requires a culpable mental state of the accused. The Court shall presume the existence of such mental state but it shall be a defence for

the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

20. Learned counsel for petitioner submits that the Joint Secretary to the Government of India has accepted the contention of the petitioner that she had no knowledge about the substances in the aforesaid shampoo and talcum powder bottles, therefore, in this case there cannot be any *mens rea* since the petitioner had no knowledge about the substance found in the aforesaid bottles. The Joint Secretary has maintained the order of confiscation and the same has not been challenged by the petitioner since the said two bottles were of the substances which are not permissible to be given to the petitioner. Under the Customs Act, 1962 there is complete restriction on the aforesaid substance, which the petitioner has brought from Hong-kong, without her knowledge, therefore, her state of mind cannot be said to be having an intention to import or smuggle the aforesaid substance.

21. While relying on the aforesaid two judgments of this Court, which are affirmed by the Supreme Court, the Id. counsel for the petitioner has prayed that since there is no adjudication

pending against the petitioner and the petitioner has been exonerated, in the adjudication proceedings, therefore, the criminal proceedings pending before the trial court cannot go on.

22. While allowing the case of **Sunil Gulati & Anr. V. R.K. Vohra**, [145 (2007) DLT 612] this Court held that 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 should still continue. If the exoneration in departmental adjudication is on technical ground or by giving benefit of doubt and not on merits of the adjudication proceedings were on different facts, it would have no bearing on criminal proceedings.

23. In the instant case also the Joint Secretary to the Government of India, Department of Revenue has exonerated the petitioner fully on the basis that the petitioner had no intention of smuggling or knowledge of the substances in the aforesaid two bottles.

24. Keeping in view, the view taken in **Sunil Gulati & Anr.(supra)**, I am of the opinion, that the criminal proceedings

pending before the trial court cannot go on, against the petitioner, since the petitioner has been fully exonerated by the Joint Secretary to the Government of India, and same has attained the finality.

25. In view of the above submissions and discussions, I quash the proceedings in the criminal complaint dated 08.08.2002, under Sections 132 & 135 (1)(a) of the said Act, pending against the petitioner in the Court of Ld. ACMM, New Delhi.

26. Accordingly, CRL.M.C. No.520/2011 is allowed.

27. No orders as to costs.

28. Dasti.

SURESH KAIT, J

JULY 22, 2011
RS/Mk