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

+ **CRL.M.C. 4102/2011**

% *Judgment delivered on: 9th December, 2011*

SUSHIL KUMAR JAIN & ORS Petitioner
Through : Mr. Sidhartha Luthra, Sr. Adv. with
Mr. Parbhat Kumar, Adv.

versus

CBI & ORS Respondent
Through : Mr. Neeraj Chaudhary, CGSC for
UOI.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

CRL. M.A. 19103/2011 (Exemption)

Allowed subject to all just exceptions.

CRL. M.C. 4102/2011

1 Vide the instant petition, the petitioners have sought the quashing of FIR No. 221/2011/E/0006 dated 17.08.2011, registered under Sections 120-B/420/467/468/471 of Indian Penal Code, 1860 at P.S. CBI/EO-III, New Delhi.

2 Further, the petitioners have sought to direct the respondent No.1 not to investigate the matter as the offences are non-cognizable and are for violation of the provisions of Central Excise Act and Rules.

3 Mr.Sidhartha Luthra, learned Senior Advocate, appearing for the petitioners, submits that Central Excise Department issued circular dated 17.5.2005, whereby, they have powers to searches, seizure , arrest and prosecution. This has been further clarified as follows:-

2.1 Besides the departmental adjudication, prosecution may also be launched under Section 9 of the Central Excise Act, 1944 for the offences under Section 9(1) of the Act. As per provisions of Section 9AA, Prosecution may be launched against any person, Director, Manager, Secretary or other officers of a company/firm and is held guilty of the offences under the Central Excise Act/Rules.

2.4 Prosecution proceedings in a Court of Law are generally initiated after departmental adjudication of offence has been completed. However, prosecution may be launched even where adjudication is not complete.

2.5 Generally, the adjudicating authority should indicate whether a case is fit for prosecution, though is not a necessary pre-condition.

2.6 Confiscation and penalty in departmental adjudication and prosecution in criminal proceedings are dependent of each other and do not amount to double jeopardy.

2.7 Under Executive instructions, the Chief Commissioner of Central Excise or in specified cases, the Inspector General of Central Excise Intelligence, has power to

sanction prosecution.

2.8 Once prosecution is sanctioned, the complaint should be filed in court immediately after sanction of prosecution. If the complaint cannot be titled for some reason, the matter should be reported to the authority who sanctioned the prosecution. ”

4 In support of his arguments, the learned Sr. counsel has relied upon a judgment passed by Hon'ble Supreme Court as reported (1996) 10 SCC 387 titled as Ranadey Micronutrients V. CCE, whereby it has held as under :-

“16 We reject the submission to the contrary made by the learned counsel for the Revenue and in the affidavit made by M.K. Gupta, working as Director in Department of Revenue, Ministry of Finance. One should have though that an Officer of the Ministry of Finance would have greater respect for circulars such as these issued by the Board, which also operates under the aegis of the Ministry of Finance, for it is the Board which is, by statute, entrusted with the task of classifying excisable goods uniformly. The whole objective of such circulars is to adopt a uniform practice and to inform the trade as to how a particular product will be treated for the purposes of Excise Duty. It does not lie in the mouth of the Revenue to repudiate a circular issued by the Board on the basis that it is inconsistent with a statutory provision. Consistency and Discipline are of far greater importance than the winning or losing of court proceedings.

17 The argument that the later circular has only prospective operation and that it cannot apply to these appeals because the Tribunal had already decided

them must also be rejected. It is not open to the Revenue to raise a contention that is contrary to a binding circular issued by the Board. It cannot but urge the point of view made by binding by the later circular.”

5 Learned Sr. counsel has referred to Section 9 of the Central Excise Act, 1994, which reads as under :-

Section 9. Offences and penalties. –

[(1)] Whoever commits any of the following offences, namely: -

(a) contravenes any of the provisions of section 8 or of a rule made under clause (iii) or clause (xxvii) of sub-section (2) of section 37;

(b) evades the payment of any duty payable under this Act;

(bb) removes any excisable goods in contravention of any of the bb)provisions of this Act or any rules made thereunder or in any way concerns himself with such removal;

(bbb) acquires possession of, or in any way concerns himself in transporting, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with any excisable goods which he knows or has reason to believe are liable to confiscation under this Act or any rule made thereunder;

(bbbb) Contravenes any of the provisions of this Act or the rules made thereunder in relation to credit of any duty allowed to be utilised towards payment of excise duty on final products;

6 In support of his arguments, he has relied upon a Judgment

passed by Hon'ble Supreme Court titled ***Om Parkash & Anr. V. Union of India & Anr.*** decided on 30.09.2011 in ***Writ Petition (Criminal) No. 66/2011***, wherein it is held as under :-

“24. As we have indicated in the first paragraph of this judgment, the question which we are required to answer in this batch of matters relating to the Central Excise Act, 1944, is whether all offences under the said Act are non-cognizable and, if so, whether such offences are bailable? In order to answer the said question, it would be necessary to first of all look into the provisions of the said Act on the said question. Sub-section (1) of Section 9A, which has been extracted hereinbefore, states in completely unambiguous terms that notwithstanding anything contained in the Code of Criminal Procedure, offences under Section 9 shall be deemed to be non-cognizable within the meaning of that Code. There is, therefore, no scope to hold otherwise. It is in the said context that we will have to consider the submissions made by Mr. Rohatgi that since all offences under Section 9 are to be deemed to be non-cognizable within the meaning of the Code of Criminal Procedure, such offences must also be held to be bailable. The expression "bailable offence" has been defined in Section 2(a) of the Code and set out hereinabove in paragraph 3 of the judgment, to mean an offence which is either shown to be bailable in the First Schedule to the Code or which is made bailable by any other law for the time being in force. As noticed earlier, the First Schedule to the Code consists of Part 1 and Part 2. While Part 1 deals with offences under the Indian Penal Code, Part 2 deals with

offences under other laws. Accordingly, if the provisions of Part 2 of the First Schedule are to be applied, an offence in order to be cognizable and bailable would have to be an offence which is punishable with imprisonment for less than three years or with fine only, being the third item under the category of offences indicated in the said Part. An offence punishable with imprisonment for three years and upwards, but not more than seven years, has been shown to be cognizable and non-bailable. If, however, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable, then, in such event, even the second item of offences in Part 2 could be attracted for the purpose of granting bail since, as indicated above, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable.

25. *This leads us to the next question as to meaning of the expression "non-cognizable".*

26. *Section 2(i) Cr.P.C. defines a "non-cognizable offence", in respect whereof a police officer has no authority to arrest without warrant. The said definition defines the general rule since even under the Code some offences, though "non-cognizable" have been included in Part I of the First Schedule to the Code as being non-bailable."*

7 I note, it is alleged in the present matter, M/s JMW India Private Ltd., SIDCO Industrial complex, Phase I, Bari Brahmana, Jammu and having their registered office at 309, III Floor, Vikas Deep Building, District Centre, Laxmi Nagar, Delhi was very well aware that their

plant installed at Jammu was viable to run on copper cathodes only. Therefore, they had connived with their other group companies, namely M/s JVIPL and M/s GRPL to illegally receive said copper cathodes, against which M/s JVIPL and M/s GRPL had availed Cenvat credit, from the premises of M/s JVIPL/JMW located at Khasra No.29, Saboil Industrial Area, Delhi to Jammu through the invoices/ bills issued by their trading firms M/s JMW, Delhi or through the non-existent firms M/s Bhartiya Trade Linkers and M/s Ganpati Sales Corporation, both located at Delhi. They had with deliberate fraudulent intentions organized the receipt of copper cathodes, after availing Cenvat credit by M/s GRPL and M/s JVIPL, which had been diverted illegally to their manufacturing unit located at Jammu through the invoices/bills raised by their own trading unit and thus said cathodes were liable to confiscation under rule 15 of the CCR, 2004. Therefore, M/s JMW India Pvt. Ltd. has themselves engaged in acquiring possession of, in transporting, removing depositing, keeping and concealing of those copper cathodes having reason to believe and said goods were liable to confiscation and have rendered themselves liable to a penalty under Rule 26 of the Central Excise Rules 2002.

8 The allegations against all the petitioners are of similar nature and is enumerated in show-cause notice dated 11.11.2010.

9 By the said show-cause notice, the petitioners were to reply the same within 30 days on the receipt of this notice.

It is pertinent to mention some relevant portion of the show

cause notice dated 11.11.2010, which reads as under :-

“23 Therefore, M/s J.V. Industries Pvt. Ltd. Khasra No. 29, Saboli Industrial Area, Shahdara, Delhi are hereby called upon to show cause to the commissioner of Central Excise Commissionerate, Delhi-II, C.R. Building, I.P. Estate, New Delhi, within 30 days of receipt of this notice, as to why –

(i) the extended period of limitation beyond one year for demanding Cenvat credit fraudulently availed/utilized by them as provided unde proviso to subsection (1) of Section 11 A of the Central Excise Act, 1944 should not be invoked in view of the facts narrated in the foregoing paras i.e. suppression of facts with intent to evade payment of duty;

(ii) cenvat Credit, amounting of Rs.11,25,28,227/- (Rupees Elecvn Crore Twenty five lacs Twenty Eight Thousand Two Hundred and Twenty Seven only), which was availed and utilized by them during the years 2006-07 & 2007-08 against the purported purchase and consumption of Copper Cathodes claiming them as inputs, should not be disallowed and recovered from them under Rule 14 of the CENVAT Credit Rules 2004 on invoking the extended period provided in proviso to Section 11A(1) of the Central Excise Act, 1994.”

10 Learned counsel for the petitioner submits that initially he lodged complaint against Central Excise Officials with CBI vide FIR No. RC-DAI-2008-A-0001 dated 01.01.2008 under Sections 120 B Indian Penal Code, 1860 read with Section 07 of Prevention of Corruption Act, 1988 on the allegations that the said officers demanded

bribe from the petitioner No. 1, Mr. Sushil Kumar Jain.

11 Learned Sr. counsel further submits that the present FIR No.221/2011 dated 17.08.2011 has been registered thereafter under Sections 120B/420/468/471 Indian Penal Code, 1860 by CBI EO-III, is nothing but the counter blast of the FIR mentioned above.

12 I note, initially the Department issued two show cause notices and thereafter, FIR was registered.

13 The issue raised by petitioners are that whatever violation under the Act that has to be dealt by the Central Excise Act itself because of the fact that the allegations in the show-cause notices are in verbatim as in the FIR that the fraudulent petitioners have received the Cenvat credit fraudulently.

14 The purpose of the Act is to recover the evaded duty or the Cenvat credit if fraudulently received. However, the fraud committed by the petitioners are covered under the provisions of Indian Penal Code, 1860.

15 In the instant case, the petitioners have received fraudulently the Cenvat credit by forging documents and used as genuine through non-existing companies.

16 I note that the allegations as framed are under the provisions of Indian Penal Code, 1860 and this petition is pre-mature. The case has to be investigated thoroughly. The Investigating Authority after investigation may file the report in favour of petitioners, if it deems so.

17 At this stage, I am not inclined to interfere with. The Criminal

M.C.4102/2011 being devoid of merits.

18 Accordingly, the petition is dismissed.

19 Dasti.

SURESH KAIT, J.

DECEMBER 09, 2011

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