IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.03.2015

CORAM:

THE HONOURABLE MS. JUSTICE R. MALA

Criminal Revision Nos.44 & 45 of 2015
and
M.P.Nos.1 & 1 of 2015

Date of Reserving the Judgment	Date of Pronouncing the Judgment
13.03.2015	17.03.2015

Crl.R.C.No.44 of 2015

1.Blue Ocean Logistics Limited
Rep by Sarvesh Pratap Singh

2.Sarvesh Pratap Singh ...Petitioners/Accused Nos.1 & 2

v.

State represented by
Inspector of Police
CBI/SCB/Chennai ...Respondent/Complainant

Prayer:
Criminal revision filed under Section 397 read with 401 of Cr.P.C., against the order dated 28.11.2014 made in Crl.M.P.No.1551/2013 in C.C.No.5261/2013 on the file of the learned Additional Chief Metropolitan Magistrate, Egmore, Chennai.

Crl.R.C.No.45 of 2015

G.Gopalakrishnan ...Petitioner/Accused No.3

v.

State represented by
Inspector of Police
CBI/SCB/Chennai ...
Respondent/Complainant

Prayer:
Criminal revision filed under Section 397 read with 401 of Cr.P.C., against the order dated 28.11.2014 made in Crl.M.P.No.408/2014 in C.C.No.5261/2013 on the file of the learned Additional Chief Metropolitan Magistrate, Egmore, Chennai.

For Petitioners : Mr.B.Dhanasekaran
in both the Revisions

For Respondents : Mr.K.Srinivasan
Special Public Prosecutor
in both the Revisions

COMMON ORDER

The present Criminal Revisions have been preferred for setting aside the impugned order dated 28.11.2014 made in Crl.M.P.Nos.1551 of 2013 and 408 of 2014 in C.C.No.5261 of 2013, wherein the discharge applications filed by A1, A2 and A3 under Section 239 Cr.P.C came to be dismissed.

2. The case of the petitioners is as follows:

(a) Acting on the intelligence that one M/s.Sharmi Exim Co., Chennai are attempting to export fertilizer grade potassium chloride (Muriate of Potash) by misdeclaring it as 'Industrial Salt Chemical Grade (Sodium Chloride)', a consignment of export goods covered under Shipping Bill No.3440204 dated 23.07.2009 kept in export godown of CFS - D.R.Logistics P Ltd., Minjur, Chennai was detained by the officers of the Docks Intelligence Unit (DIU), Customs House, Chennai on 27.07.2009 on a reasonable belief that the exported has misdeclared the description of the goods in the consignment in order to smuggle it out of the country. So, the samples of the goods were taken and sent for analysis. On analysis, the samples were found to be 'Agricultural Grade - MOP (Muriate of Potash)'. Further, the FOB value was declared as Rs.8,27,421/- whereas the Market value is Rs.39,42,400/-. The Muriate of Potash (MOP) is a restricted item for export as per para 207 of the Foreign Trade policy 2009 - 2014 read with notification No.30 (RE-2003) / 2002-2007 dated 28.01.2004 issued by the Director General of Foreign Trade and is permitted for export only under license. Sharmi Exim Co., neither has a license for exporting Potassium Chloride (Muriate of Potash) - fertilizer grade, nor have they ever imported fertilizer grade Potassium Chloride. Further, they have not produced any certificate from the statutory auditors to the Department of Fertilizers that the quantity intended to be exported has been imported in the last six months and no concession/subsidy has been claimed. Thus, it appeared that Sharmi Exim Co., have attempted smuggling of fertilizer grade Potassium Chloride (Muriate of Potash), a restricted item for export, by way of false declaration. Hence, the Deputy Commissioner of Customs (Prosecution Unit) has filed a complaint. The said complaint was taken on file in C.C.No.72 of 2013 and C.C.No.961 of 2013 and the same are pending.

(b) On the other hand, based on source information, the CBI has registered a case in RC. 2/S/2013/CBI/SCB/Chennai on 30.01.2013 and after investigation has filed chargesheet against the petitioners herein as well as the other accused under Sections 120-B r/w 420 and 420 r/w 511 IPC in C.C.No.5261 of 2013 on the file of the learned Additional Chief Metropolitan Magistrate, Egmore, Chennai. While so, the petitioners herein viz., the accused nos.1, 2 and 3 had filed discharge applications under Section 239 Cr.P.C. The Trial court after considering the submissions made by either sides, dismissed the said applications made in Crl.M.P.Nos.1551 of 2013 and 408 of 2014 in C.C.No.5261 of 2013 vide impugned order dated 28.11.2014.

3. Challenging the impugned order, the learned counsel appearing for the revision petitioners would submit that on the basis of the source information, a case has been registered by the respondent/CBI against the petitioners herein as well as the accused A4 to A6 for an offence under Section 120-B r/w 420 and 420 r/w 511 IPC. The learned counsel for the petitioner would submit that the Deputy Commissioner of Customs (Prosecution unit) has also preferred a complaint against these petitioners and the other accused stating that the first petitioner had attempted to export Potassium Chloride (MOP) by mis-declaring the same as 'Industrial Salt' Chemical Grade (Sodium Chloride) and thereby the petitioners had committed offences under Section 132 and 135 of the Customs Act, 1962 r/w the Fertilizer (Control) Order, 1985 and The Essential Commodities Act, 1955. Further more, for the very same consignment, the respondent herein had also filed the chargesheet. So, the learned counsel for the petitioner would contend that no person can be prosecuted twice for the very same offence, as laid down under Article 20 of the Constitution of India, Section 26 of the General Clauses Act and Section 300 of Criminal Procedure Code. The learned counsel would further submit that before filing of the chargesheet, no sanction has been obtained as mandated under Section 137 of the Customs Act. Furthermore, the ingredients of Section 420 IPC has not been made out. The above factums were not considered by the Trial Court while passing the impugned order and hence, the learned counsel for the petitioner prayed for setting aside the impugned order. To substantiate his argument, the learned counsel for the petitioners relied upon the decisions reported in

1. (2001) 6 Supreme Court Cases 181, T.T.Antony v. State of Kerala and Others.
2. AIR 1983 Supreme Court 974, Assistant Collector of Customs (Prevention) bombay v. Babu Miya Sheikh Imam and Others.

and prayed for setting aside the impugned order.

4. Resisting the same, the learned Special Public Prosecutor appearing for the respondent/CBI would submit that the respondent herein on source information had registered a case and after investigating the matter had filed a chargesheet. So, the registration of the case for the offence under Section 132 and 135 of the Customs Act is entirely different and the same does not amount to double jeopardy. He would further submit that the Trial Court has

clearly held that the ingredients of Section 420 IPC has been made out. The learned Special Public Prosecutor had also taken me through the paragraphs 4 to 6 of the counter affidavit and submitted that the order of the Trial Court does not suffer any illegality and prayed for dismissal of the revision petitions.

5. Considered the rival submissions made by both sides and perused the typed set of papers.

6. The case of the prosecution is that the first accused Shri.L.Subash, Proprietor, M/s.Sharmi Exim Company attempted to export fertilizer grade Potassium Chloride (MOP) by misdeclaring it as 'Industrial Salt Chemical Grade (Sodium Chloride)', a consignment of export goods covered under Shipping Bill No.3440204, dated 23.07.2009 filed by Sharmi Exim Co., kept in the godown of CFS - D.R.Logistics P Ltd., Minjur, Chennai was detained by the officers of Docks Intelligence Unit (DIU), Customs House, Chennai on 27.07.2009 on a reasonable belief that the exported has misdeclared the description of the goods in the consignment in order to smuggle it out of the country. So, the samples of the goods were taken and sent for analysis.

7. The State Agricultural Department has sent a letter dated 18.01.2010 stating that the samples were found to be 'Agricultural Grade - MOP (Muriate of Potash)'. Further, it was stated that the FOB value was declared as Rs.8,27,421/- whereas the Market value is Rs.39,42,400/-. The Muriate of Potash (MOP) is a restricted item for export as per para 207 of the Foreign Trade policy 2009 - 2014 read with notification No.30 (RE-2003) / 2002-2007 dated 28.01.2004 issued by the Director General of Foreign Trade and is permitted for export only under license. Sharmi Exim Co., neither has a license for exporting Potassium Chloride (Muriate of Potash) - fertilizer grade, nor have they ever imported fertilizer grade Potassium Chloride. Further, they have not produced any certificate from the statutory auditors to the Department of Fertilizers that the quantity intended to be exported has been imported in the last six months and no concession/subsidy has been claimed. Thus, it appeared that Sharmi Exim Co., have attempted smuggling of fertilizer grade Potassium Chloride (Muriate of Potash), a restricted item for export, by way of false declaration, thereby liable for confiscation under Section 113 (d), (h) and (i) of the Customs Act, 1962 and the proprietor of Sharmi Exim Co., Shri.L.Subash is liable for penal action under Section 114(i) and 114AA of the Customs Act, 1962. Hence, the Deputy Commissioner of Customs (Prosecution Unit) has filed a complaint. The said complaint was taken on file in C.C.No.72 of 2013 and C.C.No.961 of 2013 and the same are pending.

8. Now on the basis of the source information, the respondent/CBI had made investigation and filed chargesheet against the petitioners herein along with the other accused. So, the

petitioners herein who are arrayed as A1 to A3 would submit that once the Customs Department has prosecuted them under Section 132 and 135 of the Customs Act, they cannot be prosecuted for the offences under Sections 120-B r/w 420 and 420 r/w 511 IPC.

9. At this juncture, it would be appropriate to incorporate Article 20 of the Constitution of India.

> 20. Protection in respect of conviction of offences.-
> (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, not be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
> (2) No person shall be prosecuted and punished for the same offence more than once.
> (3) No person accused of any offence shall be compelled to be a witness against himself.

10. It would also be appropriate to incorporate Section 26 of the General Clauses Act, 1897.

> 26. Provision as to offences punishable under two or more enactments.- Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

11. It would also be appropriate to incorporate Section 300 of Criminal Procedure Code, 1973.

> 300. Person once convicted or acquitted not to be tried for same offence.- (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub- section (1) of section 221, or for which he might have been convicted under sub- section (2) thereof.
> (2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government, for any distinct offence for which a separate charge might have been made against him at the former trial under sub- section (1) of section 220.
> (3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last- mentioned offence, if the consequences had not happened, or were not

known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged under section 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first- mentioned Court is subordinate.

(6) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897 , (10 of 1897) or of section 188 of this Code.

12. Thus, considering the facts of the present case in the light of the above provisions, it appears that the Trial Court has considered the matter in proper perspective and came to the correct conclusion that filing of the complaint by the Deputy Commissioner of Customs, which was taken on file in C.C.Nos.72 and 961 of 2013 is not a bar for filing the chargesheet by the respondent herein. It is also pertinent to note that the offence mentioned under the customs case is entirely different from the offence mentioned by the CBI in its chargesheet. So, it is appropriate to incorporate Sections 132 and 135 of the Customs Act.

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 extent to [two years], or with fine, or with both.

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,—

(i) in the case of an offence relating to,—

(A) any goods the market price of which exceeds one crore of rupees; or

(B) the evasion or attempted evasion of duty exceeding thirty lakh of rupees; or

(C) such categories of prohibited goods as the Central Government may, by notification in the Official Gazette, specify; or

(D) fraudulently availing of or attempting to avail of drawback or any exemption from duty referred to in clause (d), if the amount of drawback or exemption from duty exceeds thirty lakh of rupees, with imprisonment for a term which may extend to seven years and with fine:
Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than one year;

(ii) in any other case, with imprisonment for a term which may extend to three years, or with fine, or with both.]

[(2) If any person convicted of an offence under this section or under sub-section (1) of section 136 is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court such imprisonment shall not be for less than 3 [one year].

(3) For the purposes of sub-section (1) and (2), the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than 3[one year], namely:

(i) the fact that the accused has been convicted for the first time for a reference under this Act;

(ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods which are the subject matter of such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party to the commission of the offence;

(iv) the age of the accused.]

13. On a bare perusal of the above provisions, it is amply clear that once a product is to be exported, it is mandatory to obtain license by giving correct declaration of the product to be exported. However, in the instant case, the accused had attempted to export fertilizer grade Potassium Chloride (MOP) by mis-declaring it as 'Industrial Salt Chemical Grade (Sodium Chloride)'. In such circumstances, the Customs Department has filed a complaint and the same was taken on file of the learned Additional Metropolitan Magistrate Court in C.C.Nos.72 and 961 of 2013, which are pending.

14. However, the final report has been filed by the respondent/CBI only for the offences under IPC. In the said report, it was specifically mentioned that A1 to A6 entered into a criminal conspiracy during the year 2009 at Chennai and other places, and in pursuance of the above criminal conspiracy, procured subsidized Muriate of Potash meant for agricultural purposes, which is a restricted item for export without valid license, and attempted to export 100 metric tonnes of MoP to Malaysia in the name of M/s.Blue Ocean Logistics Ltd and 110 metric tonnes of MoP to USA in the name of M/s.Sharmi Exim Co Ltd., by mis-declaring the consignments as Industrial Salt and also attempted to cheat the Government of India and to cause a wrongful loss to the Government of India by invoicing the consignment of 100 MT of MoP at Rs.8,98,535/-, whereas the market value of the consignment was Rs.39,42,400/- and thereby attempted to obtain corresponding unlawful gain to themselves. The above acts of the accused persons constitute offence punishable u/s 120-B r/w 420 IPC and 420 r/w 511 IPC and substantive offences thereof.

15. In such circumstances, the chargesheet filed by the respondent/CBI is entirely different. Furthermore, as already stated the cases in C.C.Nos.72 and 961 of 2013 are pending for trial and the accused were neither convicted nor acquitted. When that being so, as per Section 26 of the General Clauses Act which reads that where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence. Admittedly, the case in C.C.Nos.72 and 961 of 2013 had not ended either in conviction or in acquittal.

16. Likewise, as per Article 20 of the Constitution of India, no person shall be prosecuted and punished for the same offence more than once. However, in the instant case, the offences under Sections 132 and 135 of the Customs Act is entirely different from the offences under Sections 120-B r/w 420 IPC and 420 r/w 511 IPC.

Further, as already stated, the petitioners herein were neither convicted nor acquitted in the case in C.C.Nos.72 and 961 of 2013. In such circumstances, the argument advanced by the learned counsel for the revision petitioners that the petitioners shall not be prosecuted again for the very same offence does not merit acceptance. The Trial Court in paragraph 25 of its judgment had considered the said aspect in proper perspective and came to a correct conclusion that the offences in both the cases are distinct and separate.

17. At this juncture, it would be appropriate to consider the decisions relied on by the learned counsel for the revision petitioners.

17.1. The learned counsel relied upon the decision reported in (2001) 6 Supreme Court Cases 181, T.T.Antony v. State of Kerala and Others, wherein based on the report of the Commissioner, a case has been registered and investigated. In that, it was held that the report of the Commissioner is not binding upon the Government or Courts, but it is helpful to the investigating agency in making investigation. Hence, the said decision is not applicable to the facts of the present case.

17.2. The next decision relied on by the learned counsel for the petitioner is reported in AIR 1983 Supreme Court 974, Assistant Collector of Customs (Prevention) bombay v. Babu Miya Sheikh Imam and Others, wherein it was dealt with the true interpretation of Section 135(1)(a)(ii) of the Customs Act, 1962. However, the instant case deals with the the question whether a person shall be punished for the very same offence twice or not. So, the above citation is not applicable to the facts of the present case.

18. The next issue raised by the learned counsel for the petitioner is that no sanction has been obtained under Section 137 of the Customs Act, 1962 before filing the final report. At this juncture, it would be appropriate to incorporate the said provision.

137. Cognizance of offences. —

(1) No court shall take cognizance of any offence under section 132, section 133, section 134 or [368] [section 135 or section 135A], except with the previous sanction of the [369] [Commissioner of Customs].

(2) No court shall take cognizance of any offence under section 136,—

(a) where the offence is alleged to have been committed by an officer of customs not lower in rank than [370] [Assistant Commissioner of Customs or Deputy Commissioner of Customs], except with the previous sanction of the Central Government;

(b) where the offence is alleged to have been committed by an officer of customs lower in rank than [370] [Assistant Commissioner of Customs or Deputy Commissioner of Customs], except with the previous sanction of the [369] [Commissioner of Customs].

A cursory reading of the above provision would reveal that only for the offences under the Customs Act, prior sanction of the Commissioner of Customs is mandatory. But, in the instant case, the respondent/CBI has filed the chargesheet for the offences under IPC. In such circumstances, I am of the view that no prior sanction under Section 137 of the Customs Act is necessary.

19. The next issue raised by the learned counsel for the petitioners is that the ingredients of Section 420 IPC has not been made out. However, it is a well settled dictum of the Hon'ble Apex Court that at the time of framing the charges, the Court need not go into the fact whether it is a fit case for conviction, but it has only to consider whether there is prima facie material for framing of charges. In the instant case, prima facie evidence is available to frame the charges. The Trial Court has considered the statements of L.W.1/Santhose Kumar, L.W.2/Syed Rahman, L.W.5/Harinath and L.W.6/Victor Johnson and came to the conclusion that there is a prima facie material for framing the charges against the revision petitioners/accused.

20. Considering all the above facts and circumstances, I am of the view that the Trial Court has rightly dismissed the discharge application filed by the petitioners and the order of the Trial Court does not suffer any infirmity or illegality. Hence, I do not find any merits in these revisions.

21. In fine, these Criminal Revisions deserved to be dismissed and they are hereby dismissed. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

To

1.The learned Additional Chief Metropolitan Magistrate,
Egmore, Chennai.

2.The Public Prosecutor
High Court, Madras.

3.The State rep by
Inspector of Police,
CBI/SCB/Chennai.

+1 cc to Mr.B.Dhanasekaran, Advocate,SR.14718.

ts(co)
krd 27/3

Pre-delivery order made in
Criminal Revision Nos.44 and 45 of 2015