IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: 13th March, 2015
Judgment Pronounced on: 27th March, 2015

CRL.REV.P. 41/2006

DEPARTMENT OF CUSTOMS ..... **Petitioner**
Through: Mr. Satish Aggarwal and Mr.Anish Aggarwal, Advocates

versus

SHARAD GANDHI ..... **Respondent**
Through: None.

CORAM:
HON'BLE MR. JUSTICE P.S.TEJI

P.S.TEJI, J.

1. Aggrieved by the order dated 16.11.2005 passed by the learned Additional Chief Metropolitan Magistrate dismissing the complaint and discharging the respondent, the present revision petition has been filed by the petitioner.

2. Factual matrix, as emerges from the record, is that on 18.02.1995 during the course of clearance of courier bags of M/s DHL Worldwide Express, a wooden box was intercepted on suspicion and was examined by the Customs Preventive Officers of IGI Airport. The wooden box had contained Stone Figure Handicrafts

in the courier manifest. In the airway bill, sender was shown as Mr.Robert Jaeger and receiver was shown as M/s DHL Worldwide Express. On examination of wooden box, it was found containing one partly mutilated stone head. The officers of Archaeological Survey of India were called to examine the said stone head. The officers of Archaeological Survey of India identified the sand stone head as of Budha and declared the same to be an Antiquity. The same was, therefore, seized. The allegation against the respondent was that the sand stone head of Budha was booked by him for Robert Jaeger through M/s DHL Worldwide Express. The airway bill was signed by the accused and thus the accused was the owner of the consignment and he had attempted to export the seized antique piece of sand stone of Budha illegally. The respondent was arrested on 06.07.1995 in accordance with law.

3. After completion of enquiries, a complaint for offences punishable under Section 132 & 135 (i) (a) of the Customs Act was filed by the Department of Customs against the respondent. Cognizance of offences was taken.

4. To prove its case, the petitioner examined seven witnesses in pre-charge evidence. While the evidence was being recorded, the respondent moved an application for discharge and dropping the proceedings against him. The respondent in his application for discharge had taken the plea that the criminal proceedings against him were not legally maintainable in view of the decision of the High Court of Delhi in the case of ***Dr. V.J.A. Flynn vs. S.S.***

Chauhan & Another 1996 (2) CC Cases 321. The learned Additional Chief Metropolitan Magistrate vide order dated 16.11.2005 discharged the respondent holding that there is complete bar with regard to prosecution under the Customs Act and under the Customs Act only the Collector of Customs has power to confiscate the goods and impose penalty for having committed the breach of Section 3 of the Antiquities Act and nothing more.

5. Feeling aggrieved by the same, the petitioner has preferred the present revision petition to set aside the order dated 16.11.2005.

6. Argument advanced by the learned counsel for the petitioner is that the order of discharge passed by the learned Additional Chief Metropolitan Magistrate is based on the judgment of ***Dr. V.J.A. Flynn*** (supra) and the present case is different from the case of ***Dr. V.J.A. Flynn*** (supra). He has further contended that in the present case there is clear violation of the provisions of the Customs Act, 1962. The judgment in the case of ***Dr. V.J.A. Flynn*** (supra) is not applicable in the present case as the same has already been challenged in the Hon'ble Supreme Court vide SLP No.1525/1996 and the same is pending for decision.

7. Learned counsel for the petitioner has also referred to judgment in the case of ***Om Prakash Bhatia vs. Commissioner of Customs, Delhi (2003) 6 SCC 161.*** The facts of the said case are that the appellant sought to export skirts. The exporter claimed a drawback of money on the consignment on the basis that the value of each

skirt was higher. During the enquiry, the exporter admitted that the market price of skirt was less and the claim of drawback was withdrawn. The Hon'ble Apex Court held that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. On similar point, learned counsel for the petitioner has also referred to judgment in case of ***Commissioner of Customs & Central Excise vs. Achiever International (CISAA No.42/2011 delivered by this Court on 28.03.2012)***.

8. On the other hand, learned counsel for the respondent has argued that the complaint filed by the Customs under the Customs Act was not sustainable as the prosecution can be launched only under the Antiquities Act. There was specific provision in the Antiquities Act for launching prosecution and only the penalty can be imposed under the Customs Act.

9. To deal with the rival contentions of the parties, this Court has gone through the above referred case law. This Court in case of ***Dr. V.J.A. Flynn vs. S.S. Chauhan and another*** (supra) has observed that Section 4 of the Antiquities Act, 1947 made all the provisions of the Customs Act, 1962 applicable to an offence committed under Section 3 of the 1947 Act. Relevant paras from the judgment read as under :

> "*19. After the amendment in the Antiquities Act it is apparent that the Legislature with full conscience departed from the previous provisions of Section 4 of*

1947 Act thereby making it sure that all the provisions of Customs Act are not made applicable to the Antiquities Act. Only the provisions whenever confiscation has to be applied then Customs Act provisions would be invoked. Therefore, no reliance on the provisions of Section 127 or for that matter Chapter-XVI of the Customs Act can be taken help of. Section 127 of the Customs Act seemingly stipulates adjudication before confiscation and thereafter prosecution under Chapter XVI but not before that. Hence, reading of Section 127 of the Customs Act and Section 4 of the Antiquities Act nullifies the arguments Mr. M. Chandrasekharan that these are parallel proceedings.

22. A comparison of Section 4 of Antiquities Act of 1947 with Section 4 of the Antiquities Act of 1972 would show that all the provisions of the Customs Act under section 4 of the Act of 1947 were applicable and were to operate in case there was any violation or breach of the prohibitions under the Antiquities Act. But after the amendment applicability of all the provisions of the Customs Act have been given up. In this regard, I am supported by the decision of the Supreme Court in the case of The Collector of Customs, Madras v. Nathella Sampathu Chetty MANU/SC/0089/1961 : 1983 ECR 2198D (SC). Considering the language of Section 19 of the Sea Customs Act, 1878 and Section 23A of Foreign Exchange Regulation Act of 1947 the Supreme Court observed in that case that there was no scope for any argument that there has been any incorporation of the provisions of the earlier statute in the later. Similarly in the present case, there is no provision for incorporation of the Customs Act, which was under Section 4 of the Antiquities Act of 1947 getting attracted in the Antiquities Act of 1972.

23. After analysing the provisions of both the Act and relying on the observations of the Supreme Court and the facts stated above, I find that the complaint filed in this case under the Customs Act is not sustainable. Accordingly, the complaint in question is quashed and the proceedings initiated on the basis of that complaint are ordered to be dropped."

10. In view of the law laid down by this Court in ***Dr.V.J.N. Flynn's*** case (supra), it is a settled law that Section 4 of the Antiquities Act, 1947 made all the provisions of the Customs Act, 1962 applicable to an offence committed under Section 3 of the 1947 Act. An amendment was brought into force vide Section 4 of the Act of 1972 vide which the Legislature omitted the applicability of all the provisions of the Customs Act. Provisions of the Customs Act are now applicable only for confiscation and not for prosecution. Section 25 of the Antiquities Act stipulates that if any person contravenes the provision of Section 3, he shall be liable for punishment without prejudice to the action of confiscation or penalty for which he has rendered himself liable under the Customs Act. A reading of Section 25 shows that confiscation and penalty has to be under the Customs Act, whereas the punishment and prosecution has to be under the Antiquities Act for breach of Section 3 of the Antiquities Act. There is no force in the argument of the learned counsel for the petitioner that once the confiscation is done under the Customs Act, all the provisions of the Customs Act would come into operation and the Customs department would get power to launch prosecution against the respondent. Section 25 of

the Antiquities Act clearly creates a bar with regard to the prosecution under the Customs Act.

11. The judgments referred by the learned counsel for the petitioner in case of ***Om Prakash Bhatia*** (supra) and ***Achiever International*** (supra) are of no assistance to the petitioner inasmuch as the judgment in case of ***Dr.V.J.N. Flynn's*** case (supra) was applicable at the time of passing the order by the learned Additional Chief Metropolitan Magistrate and today as well. The learned counsel for the petitioner has argued that the said judgment has been challenged in Hon'ble Supreme Court by filing a Special Leave Petition, but he has failed to show that the judgment in case of ***Dr. V.J.N. Flynn's*** case (supra) has been reversed or any stay has been granted by the Hon'ble Supreme Court. Neither there was any reversal of the said judgment nor there was any stay by the Hon'ble Supreme Court either at the time of passing the order by the learned ACMM nor today as well.

12. In view of discussion made above, the order dated 16.11.2005 passed by the learned Additional Chief Metropolitan Magistrate is upheld.

13. The present revision petition is dismissed. File of the trial court be sent back.

P.S.TEJI, J.

March 27, 2015/ns