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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

REVISION APPLICATION NO. 81 OF 2001

Union of India ..Applicant.
Vs.
Kalakhandattil Polliyathodi Hamza & Anr. ...Respondents.

Mr. N. Natrajan, Special P.P. for Applicant.
Mr. Deepak Thakare, APP for State.

CORAM: A.S. GADKARI, J.

DATE : 21st April 2016.

P.C.

1 Heard the learned Counsel for the Applicant-Union of India. I have also perused the entire record annexed to the application and produced by the learned Counsel for the applicant.

2 The respondent No.1 has been served by the Department and the affidavit of service dated 12.9.2008 has already been filed on record. The respondent No.1 is absent though duly served.

3 The present Revision Application is directed against the order dated 6th October 2000 passed by the learned Chief Metropolitan Magistrate-III Court, Esplanade, Mumbai, discharging the respondent No.1 from the offences under Sections 135(1)(a)(i) and 135(1)(b)(i) of the Customs Act.

4 The prosecution case in brief is that, on 17.7.1994, the officers of Air Intelligence Unit N.I.P.T., Sahar Airport, Mumbai on suspicion intercepted the respondent No.1 who had arrived by Saudi Arabia Airlines flight No.SV 754 from Riyadh. That the respondent No.1 gave his baggage declaration to the tune of Rs.3800/- to the counter officer in the Red Channel. Being suspicious about the contents of the baggage which was consisting of one card board carton and a brief case, the same was throughly screened and examined in the presence of panch witnesses by the officers of the Air Intelligence Unit. After through examination of the bag and baggage of the respondent No.1, it was revealed that the respondent no.1 had concealed in it 38 gold bars of 10 tolas each, totaling to 4433.08 grams valued at Rs.17,06,735.30 international market value and Rs.20,34,783.72 in local market value. That the said gold bars were concealed in two car horns, mixer, emergency light and table cloth. The said gold bars were seized by effecting panchnama which is at Exhibit P-1. The respondent No.1 did not declare the said gold bars, after his arrival at International Airport, the same were found concealed in suspicious manner and therefore it was a reasonable belief for the Customs Department that the said gold bars were smuggled into India and therefore were liable for confiscation under the provisions of the Customs Act, 1962. During the course of investigation, the

Customs officers recorded the statement of the respondent No.1 under Section 108 of the Customs Act. The said statement is at Exhibit P-2. After completion of the investigation, the Investigating Officer sought sanction from the competent authority and subsequently filed the complaint bearing C.C.No.50/CW/1998 against the respondent No.1 on 1st December 1995 before the Court of competent jurisdiction. As the said complaint is being a warrant case instituted otherwise than on a police report, the applicant adduced evidence before framing charge. The applicant examined three witnesses namely Vinod Nautiyal (PW-1), the Intelligence Officer, Ashok A. Chorankar (PW-2) the Superintendent of Intelligence Unit and Manjeeet Kaushal (PW-3) the Superintendent of Customs Department and also adduced documentary evidence as contemplated under Section 244 of Cr.P.C.

5 The learned Trial Court after recording the evidence of the said witnesses and after hearing the respondent No.1 was pleased to discharge the respondent No.1 from the charges levelled against the respondent No.1 as per Section 245(1) of the Code of Criminal Procedure by its order dated 6th October 2000.

The learned Trial Court while discharging the respondent No.1 has held that the panchnama which is at Exhibit P-1 shows that the respondent No.1 was repeatedly questioned before and after arrival of the panchas to ascertain whether he was carrying any contraband like gold and the respondent No.1 repeatedly denied the same. The Trial Court has also proceeded to record a finding that if the respondent No.1 had any knowledge that the said items contained gold bars of foreign origin in it, on his repeated questioning, the respondent No.1 would have admitted that they contained gold and therefore it shows that the respondent no.1 was not aware that the said items were containing gold bars. It is further held by the Trial Court that the statement of the respondent No.1 under Section 108 of the Customs Act also shows that one Mohammed from Riyadh had given the said articles to the respondent No.1 for carrying it to India keep the same at his residence and to further hand it over to Mohammed's brother who would contact the respondent No.1 at his residence and collect it from him. The Trial Court further held that in the cross-examination of PW-2, he has admitted that the respondent No.1-accused did not admit in his statement that he was knowing about concealment of the gold in all the items referred in the panchnama. The Trial Court further proceeded to record the finding that, in the instant case, presumption regarding the existence of culpable mental state as contemplated under Section 138A of the Customs Act cannot be drawn against the respondent No.1. In the premise the learned Trial Court has discharged the respondent No.1 from charges levelled against him.

6 At the outset a useful reference can be made to the decision of the Supreme Court in the case of R.S. Nayak Vs. A.R. Antulay reported in AIR 1986 SC 2045. The Supreme Court in the said decision has held that, the stage at which the Magistrate is required to consider the question of framing of charge under Section 245 (1) is a preliminary one and the test of “prima facie” case has to be applied. The the legal position is that if the trial Court is satisfied that a prima facie cause is made out, charge has to be framed. In the present case the Magistrate instead of considering a prima facie case against the respondent No.1, has taken into consideration his defence which has emerged in the cross-examination which is not permissible.

It is further to be noted here that under Section 138-A of the Customs Act, the presumption of culpable mental state is against the accused person who has been charged with the provisions of the said Act. The Section makes it clear that, in any prosecution for an offence under the Customs Act, 1962 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 the 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. Section 123 of the Customs Act also mandates that the burden of proving that the goods are not smuggled goods shall be on the person from whose possession the goods were seized.

In the present case, the respondent No.1 was found in possession of 38 gold bards of foreign make which were concealed in various consumable items as stated above. Mere denial of the respondent No.1 that he was not aware of the concealment of the gold bars in the consumable items, is not sufficient to rebut the presumption as contemplated under Section 138-A read with Section 123 of the Customs Act. The evidence on record shows that the respondent No.1 was carrying the said articles from his personal baggage and cardboard carton box which he himself submitted for clearing at the counter of Red Channel. It is the settled position of law that the accused is entitled to take a plea of total denial and his admission or denial otherwise than provided under the provisions of law, is of no consequence to the prosecution. The finding of gold bars concealed in the consumable articles which were in the possession of the respondent No.1 itself is sufficient for the presumption under Section 138-A of the Customs Act, unless and until the respondent No.1 rebuts the same by leading substantial evidence at the time of trial. The burden of proof that the said goods were not smuggled goods shall be on the respondent No.1 in view of Section 123(1)(a)(i) of the Customs Act, 1962.

7 In view of the above, I find that the learned Trail Court has committed error not only in interpreting the sections of the Customs Act, but also in evaluating the evidence on record which was in the form of statement of the respondent No.1, panchnama and the evidence adduced by the officers of the Customs Department at the time of framing of charge as contemplated under Section 244 of the Cr. P.C. I am of the considered opinion that the Trial Court has committed not only an error of law, but has also committed grave error in appreciating the facts on record and proceeded to pass the impugned Order.

8 In view of the aforesaid discussion, the impugned Order dated 6th October 2000 passed by the learned Additional Chief Metropolitan Magistrate-III Court, Esplanade, Mumbai is quashed and set aside. The learned Trial Court seized of C.C. No.50/CW/1998 is hereby directed to be proceed with the complaint lodged by the applicant herein and to conclude the same within a period of one year from the date of receipt of this order.

9 The Revision Application is allowed in the aforesaid terms.

(A.S. GADKARI,J.)