

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.04.2016

Pronounced on : 25.04.2016

CORAM

THE HONOURABLE Mr. JUSTICE M. VENUGOPAL

Crl.R.C.No.461 of 2016

Haja Najimudeen Sulaiman
S/o.Haja Najimudeen

... Petitioner

Vs

The Senior Intelligence Officer,
Directorate of Revenue Intelligence,
G.N.Chetty Road,
T.Nagar,
Chennai-600 017.;

... Respondent

PRAYER: This Criminal Revision Case is filed under Section 397 and 401 Cr.P.C., praying to set aside the order dated 11.03.2016 passed in Crl.M.P.No.3809 of 2015 by the Learned Additional Chief Metropolitan Magistrate, EO-I, Egmore, Chennai.

For Petitioner : Mr.R.Sankarasubbu

For Respondent : Mr.M.Venkateswaran,
Special Public Prosecutor for DRI

O R D E R

The Petitioner has projected the instant Criminal Revision Petition before this Court as against the order dated 11.03.2016 in Crl.M.P.No.3809 of 2015, passed by the Learned Additional Chief Metropolitan Magistrate (E.O.I), Egmore, Chennai-600 008.

2. The Learned Additional Chief Metropolitan Magistrate, [E.O.I], Egmore, Chennai, while passing the impugned order on 11.03.2016 in Crl.M.P.No.3809 of 2015 in R.R.No.23 of 2009 [filed by the Petitioner/Accused] at para-5 had observed the following:

5.Point:-

"The petition is filed by the Petitioner to drop the proceedings. The Petitioner was arrested by the Respondent on 2.8.2009 for an alleged offence under section

135 of Customs Act on the allegation of illegal import RAMS & CD PLAYERS worth Rs.7,50,000/- and subsequently the Petitioner was released on bail. Even after a period of six years the Respondent has not filed any complaint before the court and due to the same the Petitioner suffered a lot. The value sum of Rs.7,50,000/- was arrived by the Respondent based on the price details available from the internet and the same is not an acceptable method of valuation. The Union Ministry of Finance o 23.10.2015 vide circular No.27/2015 communicated the customs officials to drop the criminal proceedings pending against the accused committed offence to the value of Rs.20 lakhs in case of baggage and outright smuggling cases and Rs.1 crore in case of appraising cases and commercial frauds. On perusal of the above circular the Petitioner is falling under both categories. Hence the proceedings pending against the eptitioner deserves to be dropped. Whereas the Learned Special Public Prosecutor stated that the Petitioner has not preferred any appeal against the adjudication orders passed in Order-in-Original dated 17.4.2010 in O.S.No.05/2010 and a penalty of Rs.1,50,000/- was imposed upon him. Since, he has not preferred any appeal against the same it has attained finally. Hence the present petition filed by the Petitioner is not at all maintainable and deserves to be dismissed. Therefore considering both side arguments, the Petitioner has no locus standi to file the petition to drop the proceedings. If at all the Petitioner has aggrieved by the pendency of the R.R.No.23/2009 he has to approach the Hon'ble High Court to quash the proceedings. It is true that the complainant only can file a petition to drop the proceedings as per the Union of Ministry of Finance on 23.10.2015 vide circular No.27/2015 Customs and the petition is dismissed."

3. Assailing the validity and legality of the order of dismissal dated 11.03.2016 in CrI.M.P.No.3809/2016 in R.R.No.23 of 2009 passed by the Learned Additional Chief Metropolitan Magistrate, [E.O.I] Court, Chennai, the Learned Counsel for the Revision Petitioner/Accused submits that the trial Court had committed an error in not appreciating the vital fact that the Learned Metropolitan Magistrate can very well drop the proceedings at the instance of the Accused. To

lend support to this plea, the Learned Counsel for the Petitioner seeks an aid of the decision of the Hon'ble Supreme Court in K.M.MATHEW VS. STATE OF KERALA reported in AIR 1992 SUPREME COURT AT PAGE 2206.

4. The Learned Counsel for the Petitioner projects an argument that the trial Court had failed to take into consideration the Circular No.27 of 2015 with retrospective effect issued by the Union Ministry of Finance dated 23.10.2015, whereby and whereunder the Government of India had fixed a threshold limit for launching a prosecution and also decided to drop the proceedings in respect of matters coming below the aforesaid limit.

5. The Learned Counsel for the Petitioner emphatically takes a stand that the trial Court had failed to take into account that the 'Criminal Prosecution' and 'Adjudication Proceedings' are independent in nature and the finding rendered in the 'Adjudication Proceedings' does not bind the parties facing Criminal Prosecution as per the decision of the Hon'ble Supreme Court in RADHESHYAM KEJRIWAL V. STATE OF WEST BENGAL AND ANOTHER reported in (2011) 3 SUPREME COURT CASES at page 581.

6. The Learned Counsel for the Petitioner draws the attention of this Court that the Respondent/Prosecution has an objection to the effect that 'for dropping the proceedings' by the prosecution, the Petitioner is to pay the penalty levied in the 'Adjudication Proceedings' and the same cannot be countenanced in the eye of law.

7. Per contra, it is the submission of the Learned Counsel for the Respondent that the Petitioner / Accused had arrested on 03.08.2009 in respect of the offence under Sections 132 and 135 of the Customs Act, while attempting to smuggle electronic goods in commercial quantity on his arrival at Chennai Airport. It is also represented that the Petitioner was later released on 'Bail' with condition and all the cases in this regard are pending before the Learned Additional Chief Metropolitan Magistrate in R.R.No.23 of 2009. As a matter of fact, the arrest of the Petitioner was made on the allegation of illegal import of electronic goods, valued in all at Rs.7,98,150/-.

8. Expatiating his submission, the Learned Special Public Prosecutor strenuously contends that the Government of Tamil Nadu had issued the detention order against the Petitioner under COFEPOSA G.O.No.SR.1/569-2/2009 dated 15.10.2009 and that since the said Detention Order could not be served on him, the Government had issued a Gazette Notification calling upon him to surrender before the Police Authorities and publication in Newspaper in this regard was

also effected. Continuing further, it was represented on behalf of the Respondent that in the mean while, the Petitioner approached in WP.No.11539 of 2011 on the file of this Court, questioning the Detention Order and the same is pending for final orders.

9. The Learned Special Public Prosecutor for the Respondent submits that the market value of the goods smuggled by the Petitioner in the instant case comes [O.S.No.04/2010-INT] approximately Rs.11.97 lakhs and the valuation of smuggled goods at Rs.7,98,150/- as per the Order-in-Original No. 12/2010-ADC (Air) was not merely a mechanical replication of the internet prices of the smuggled goods, but an abatement of 40% was allowed towards duty and profit, that too on the least price of such goods available on the internet.

10. The Learned Special Public Prosecutor takes a stand that the Revision Petitioner was provided with reasonable opportunity of being heard prior to the adjudication of O.S.No.04/2010 and by means of an order in reference No.15/2010-ADC (Air), the penalty of Rs.1,00,000/- was imposed on him. Further, the Petitioner had not opted to project his arguments in regard to the valuation of seized goods or any other relevant fact before the 'Adjudicating Authority' during the pendency of Adjudication.

11. The Special Public Prosecutor for the Respondent contends that the Circular No.27 of 2015-Customs, dated 23.10.2015, issued by the Central Board of Excise and Customs, whereby and whereunder it was communicated by the Ministry to all Customs Officials to drop the criminal proceedings in respect of offended value below Rs.20 lakhs in case of baggages and Rupees One Crore in the matter of appraising cases and commercial frauds, the said Circular does not prescribe a mere mechanical dropping of all proceedings, but merely directs the concerned authorities to review the cases pending for filing complaint, in the light of the Circular and take necessary action for filing of the complaint or withdrawal of prosecution. As such, the Revision Petitioner/Accused cannot seek a withdrawal of prosecution as a matter of right inasmuch as it is very much open to the sanctioning authority to proceed in accordance with the Circular No.27 of 2015-Customs dated 23.10.2015.

12. The Learned Special Public Prosecutor for Respondent proceeds to take a plea that the Revision Petitioner in the 'Grounds of Revision' in para - E had stated that he is ready to pay the penalty imposed in the adjudication on 'instalments' by citing the CBEC Circular No.996/3/2015-CX dated 28.02.2015, but this Circular was issued in respect of arrears of duty of Central Excise Recoverable from Manufacturers and that the Manufacturers are

the assessees who normally have factory/premises where production facilities and Capital Goods are installed and they are registered with Central Excise Department, etc. and therefore, the ingredients of the said Circular are not applicable to this case. More over, the Revision Petitioner/Accused attempted to smuggle the goods into 'India' and did not appear before the Adjudicating Authority in any of the proceedings and did not pay penalty even after six years of adjudication.

13. At this stage, this Court on perusal of the contents of the petition in Crl.M.P.No.3809 of 2015 in R.R.No.23 of 2009 on the file of the trial Court [seeking to drop the proceedings against the Petitioner] finds that the Petitioner had averred that for the alleged offence under Section 135 of the Customs Act, 1962, the Petitioner was arrested by the Respondent/Complainant on 02.08.2009, on the allegation of illegal import of RAMS AND CD players worth about Rs.7,50,000/- and subsequently, he was released on bail. Further, even after lapse of six years, the Respondent/Complainant had not filed any complaint and therefore, the Petitioner suffers a lot.

14. The clear cut stand taken on behalf of the Revision Petitioner in Crl.M.P.No.3809 of 2015 in R.R.No.23 of 2009 on the file of trial Court is that the Petitioner comes within a purview of Circular No.27 of 2015 dated 23.10.2015 issued by the Union Ministry of Finance which was communicated to the Customs Officials to drop the Criminal Proceedings pending against the accused persons who had committed offence relating to the value of Rs.20 lakhs in case of 'baggages' and outright 'smuggling cases' and Rupees One Crore in case of appraising cases and commercial frauds and therefore, in this background, the proceedings pending against him deserves to be dropped.

15. At this juncture, this Court for a fuller and better appreciation of the subject matter in issue, refers to Circular No.27 of 2015-Customs dated 23.10.2015 in F.No.394/68/2013-Cus (AS), Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs (Anti-Smuggling Unit) on the subject of Guidelines for launching of prosecution in relation to offences punishable under Customs Act. 1962 at Sl.Nos.4.2, 4.2.1, 4.2.1.1. which run as follows:

"4.2. Threshold limit for launching prosecution and exceptions:

4.2.1. Prosecution may be considered in the following categories of cases:

4.2.1.1. Baggage and Outright smuggling cases:

(i) Cases involving unauthorized importation in

baggage / cases under Transfer of Residence Rules, where the CIF value of the goods involved is Rs.20,00,000/- (Rupees twenty lakh) or more;
(ii) Outright smuggling of high value goods such as precious metal, restricted items or prohibited items notified under section 11 of the Customs Act, 1962 or goods notified under section 123 of the Customs Act, 1962 or foreign currency where the value of offending goods is Rs.20,00,000/- (Rupees twenty lakh or more;"

16. That apart, in the aforesaid circular, Sl.No.4.2.2. under the caption 'Exceptions' it is mentioned as under:

"The above threshold limits would not apply in case of persons indulging habitually in such violations or where criminal intent is evident in ingenious way of concealment, where prosecutions can be considered irrespective of the value of goods/currency involved in such professional or habitual offenders, etc. provided the cumulative value of 3 or more such offences in past five years from the date of the decision exceeds the threshold limit(s) indicated at sub para 4.2.1 above respectively."

17. Besides above, in the aforesaid Circular No.27 of 2015 dated 23.10.2015, Sl.No.11, 11.1, 11.2, 11.2 and 11.2.3 of the guidelines enjoin as under:

"11. Procedure for withdrawal of prosecution
11.1. Procedure for withdrawal of sanction order of prosecution

In cases where prosecution has been sanctioned but not filed and new facts or evidences have come to the notice of the Commissionerate or the DGRI which warrant review of the sanction for prosecution, it should be immediately brought to the notice of the sanctioning authority may recommend withdrawal of sanction order to the next higher authority. In case Commissioner/Pr. Commr. or ADGRI/Pr. ADGRI is the sanctioning authority, the recommendation will be submitted to Chief Commissioner/Principal CC or DGRI/Pr. DGRI. The recommendation will be submitted to the Board (Member of Policy Wing concerned) in such cases where sanctioning authority is Chief Commissioner/Principal CC or DGRI/ Pr.DGRI. All past cases where filing of prosecution is pending beyond three months of the sanction for prosecution shall be reviewed in the light of these instructions and necessary action taken to either file complaint expeditiously or to

propose withdrawal of sanction.

11.2. Prosecution for withdrawal of Complaint already filed for prosecution

11.2.1. In cases where the complaint has already been filed in the court, it will be up to the court to decide whether or not to pursue prosecution in terms of section 257 and 321 of Cr.P.C., 1973. If the order for withdrawal has been given by a court, the prosecution can be withdrawn by the Assistant/Deputy Commissioner or Assistant/Deputy Director after getting a formal order from the Chief Commissioner/Principal CC or DGRI/Pr. DGRI as the case may be.

11.2.2. As per decision of Hon'ble Supreme Court in the case of Radhe Shyam Kejriwal [2011(266) ELT 294 (SC)]:

(a) the findings in the adjudication proceeding in favour of the petition facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue, and

(b) in case of exoneration, however, on merit where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of circumstances cannot be allowed to continue, underlying principle being the higher standard of proof in criminal cases.

11.2.3. In respect of cases covered under clause (b) above, the Chief Commissioner / Principal CC or DGRI/Pr. DGRI would ensure moving an application through Public Prosecutor in the court for withdrawal of prosecution in accordance with law. The withdrawal can only be effected with the approval of the court."

18. It is to be noted that the Circular No.996/3/2015-CX dated 28.02.2015 [F.No.207/02/2015-CX.6, Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs] speaks of recovery of arrears of instalments and amendment of Garnishee Notice. To put it precisely, the said Circular at para Nos.5 to 7 contain the following:

5. It has been decided by the Board to allow recovery of arrears of taxes, interest and penalty in instalments. The power to allow such payment in monthly instalments shall be discretionary and shall be exercised by the Commissioners for granting sanction to pay arrears in instalments upto a maximum of 24 monthly instalments and by

the Chief Commissioners for granting sanction to pay arrears in monthly instalments greater than 24 and upto a maximum of 36 monthly instalments.

6. The facility to pay arrears in instalments shall generally be granted to companies which show a reasonable cause for payment of arrears in instalments such as the company being under temporary financial distress. Approval to pay in instalments and the number of instalments should be fixed such that an appropriate balance between recovery of arrears and survival of business is maintained taking into consideration the overall financial situation of the company, its assets, liabilities, income and expenses. Frequent defaulters may not be allowed payment of arrears in instalments. The decision shall be taken on a case to case basis taking into consideration the facts of the case, interest of the revenue, track record of the company its financial situation.

7. The application for allowing payment of arrears shall be made to the jurisdictional Commissioner giving full justification for the same. The approval of the application should be in writing with due acknowledgement taken on record. The permission should clearly identify the number of instalment and the month from which the payments of instalments should begin and should also clearly stipulates that in case of default in payment of instalments, the permission shall be withdrawn and action shall be taken for recovery of arrears."

19. In this connection, this Court aptly points out that Section 128 of the Customs Act, 1962, speaks about 'filing of Appeal before the Commissioner (Appeal)' by any person aggrieved by any decision or order passed under this Court by an officer of customs lower in rank than a [Commissioner of Customs] [within six days] from the date of the communication to him of such decision or order. Indeed, the power exercised under Section 128 of the Act by the Collector [Appeals] or by the Appellate Tribunal being of a quasi-judicial in nature, in the considered opinion of this Court, in reality, the Customs Act, 1962, itself is an independent Act and further a complete code.

20. It is an axiomatic principle in law that without preferring an 'Appeal, it is not open to a litigant to assail the correctness of the decision / order of an 'Adjudicatory Authority'. In this regard, this Court worth recollects and recalls the decision of the Hon'ble Supreme Court in CCE, KANPUR V. FLOCK INDIA PRIVATE LIMITED reported

in 2000 (120) E.L.T. at page 285 (S.C.) wherein it was held that where an adjudicating authority has passed an order which is appealable in the statute and the party aggrieved did not choose to exercise the right of filing of appeal, it is not open to the party to question the correctness of the order of the 'Adjudicatory Authority' subsequently, by filing a claim for refund on the ground that the 'Adjudicating Authority' had committed an error in passing the order.

21. It cannot be gainsaid that only an order passed under the provisions of the Customs Act, 1962, is an appealable one. Also that, the Section 132 dealing with 'False declaration, false documents, etc.' provides for Imposition of Fine, in case, the person 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 belief that such declaration, statement or document is false in any material particular.

22. One of the essential ingredients of an offence under Section 135 of the Customs Act, 1962, is that the person / accused should have acquired or carried, removed, deposited, harboured, kept, concealed, sold or purchased or in any other manner dealt with any goods which he knew or had reason to believe were liable to confiscation under Section 111 of the Act. In fact, the accused must have knowledge of goods being smuggled in order that he may be held guilty under Section 135 of the Customs Act. As per the decision of the Union of India bv. Kanchanlal Trikam Lal, (1977)-32 Excise C/234 at page C/238.

23. One cannot ignore a relevant fact that in the decision of the Hon'ble Supreme Court in JOSEPH P. BANGERA V. STATE OF MAHARASHTRA reported in 2006 (199) E.L.T. at page 195 (S.C) at Special Page 196 at para-3, it is observed and held as follows:

"3. It appears that after interception of a vessel on 24th October, 1982 adjudication proceeding started in which the vessel in question was confiscated and penalty was imposed against the appellant. Arising out of the penalty proceeding, the matter was taken to Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as "CEGAT") and, by order dated 18th April, 1995, the appeal has been allowed and penalty has been deleted on merit. It has been submitted that in view of the fact that penalty imposed, against the appellant under the provisions of the Act, has been deleted by CEGAT on merit, it would be just and expedient to quash the prosecution as continuance thereof would amount to an abuse of the process of Court.

In support of his submission, the Learned

counsel has placed reliance upon judgement of this Court in K.C.Builders & Anr. v. Assistant Commissioner of Income-tax -m (2004) 2 SCC 731, in which, following its early decisions, this Court quashed criminal prosecution of the allowing its early decisions, this Court quashed criminal prosecution of the accused under the provisions of the Income-Tax Act on the sole ground that penalty imposed against him was deleted on merit. In our view, the present case is squarely covered by the aforesaid decision of this Court, as such, it would be just and expedient to quash the prosecution of the appellant."

24. It is quite appropriate for this Court to point out that the decision of the Hon'ble Supreme Court in K.M.MATHEW V. STATE OF KERALA AND ANOTHER reported in AIR 1992 SUPREME COURT 2206 at Special Page 2208 at para-10, it is observed as follows:

10. "It is important to state that for a Magistrate to take cognizance of the offence as against the Chief Editor, there must be positive averments in the complaint of knowledge of the objectionable character of the matter. The complaint in the instant case does not contain any such allegation. In the absence of such allegation, the Magistrate was justified in directing that the complaint so far as it relates to the Chief Editor could not be proceeded with To ask the Chief Editor to undergo the trial of the case merely on the ground of the issue of process would be oppressive. No person should be tried without a prima facie case. The view taken by the High Court is untenable. The appeal is accordingly allowed. The order of the High Court is set aside."

25. Also in the decision of the Hon'ble Supreme Court in RADHESHYAM KEJRIWAL V. STATE OF WEST BENGAL AND ANOTHER reported in (2011) 3 SUPREME COURT CASES 581 at Special Page 583, it is laid down as follows:

"Adjudication proceedings are decided on the basis of preponderance of evidence of a little higher degree whereas in a criminal case the entire burden to prove beyond all reasonable doubt lies on the prosecution. The standard of proof in a criminal case is much higher than that of the adjudication proceedings. The Enforcement Directorate has not been able to prove its case in the adjudication proceedings and the appellant has been exonerated on the same allegation. The appellant is facing trial in the criminal case. Therefore, the determination of facts in the adjudication

proceedings cannot be said to be irrelevant in the criminal case."

26. As far as the present case is concerned, the Petitioner/Accused had not preferred any 'Appeal' as against the Adjudication Order dated 17.04.2010 in O.S.No.05 of 2010, wherein the penalty of Rs.1,50,000/- was imposed on him. The said order has become final, conclusive and binding between the parties.

27. Also that, the Circular No.27 of 2015-Customs, dated 23.10.2015 of the Ministry of Finance, Government of India, does not point out expressly that payment of penalty imposed upon a person in Adjudication Proceeding is a condition precedent for 'withdrawal of prosecution' by the Respondent/complainant. In the present case, for nearly six years, the Respondent/complainant had not filed any complaint before the Competent Court, notwithstanding the fact that in terms of Customs Act, 1962, the prosecution must not be imposed any one in respect of offences covered under Sections viz., 132, 133, 134, 135A or 1136 of the Customs Act, 1962. It is for the 'Appropriate Authority' to take into consideration of the nature of the offence, the role of the individual concerned and evidence available on record to substantiate the guilty mind of the person for launching prosecution.

28. Be that as it may, in the light of the detailed qualitative and quantitative discussions and also this Court, taking note of the respective contentions and taking into the facts and circumstances of the case which floats on the surface comes to an inevitable conclusion that the Circular No.27 of 2015-Customs dated 23.10.2015, directs the concerned Authorities to review the cases pending for filing of complaint based on the ingredients of Circular and take necessary action for filing of complaint or withdrawal of prosecution, as the case may be.

29. It may not be out of place for this Court to make a significant mention that the circular No.27/2015-Customs dated 23.10.2015 at Sl.Nos.6. to 7.5 read as under:

"6. Stage for launching of prosecution: Normally, prosecution may be launched immediately on completion of adjudicating proceedings. However, prosecution in respect of cases involving offences relating to items i.e. FICN, arms, ammunitions and explosives, antiques, art treasures, wild life items and endangered species of flora and fauna may be preferably be launched immediately after issuance of show case notice.

6.1. Further, in following cases investigation may be

completed in time bound manner preferably within six months and adjudication may be expedited to facilitate launching of prosecution. These cases are:

(a) In case where arrest has been made during investigation (for commercial fraud cases as well as outright smuggling cases) or in the case of a habitual offender.

(b) In case where arrest has not been made but it relates to outright smuggling of high value goods such as precious metal, restricted items or prohibited items notified under section 11 or goods notified under Section 123 of the Customs Act, 1962 or foreign currency where the value of goods is Rs.20,00,000/- (Rupees twenty lakh) or more.

6.2. In a recent judgment passed by Hon'ble Supreme Court of India in the case of Radhe Shyam Kejriwal [2011(266)ELT 294(S)], the Apex court had, inter alia, observed that (i) adjudication proceedings and criminal proceedings can be launched simultaneously; (ii) decision in adjudicating proceedings is not necessary before initiating criminal prosecution; (iii) adjudication proceedings and criminal proceedings are independent of each other in nature and (iv) the findings against the person facing prosecution in the adjudicating proceedings is not binding on the proceeding for criminal prosecution. In view of aforesaid observations of Hon'ble Supreme court, it is reiterated that if the party deliberately delays completion of adjudication proceedings, prosecution may be launched even during the pendency of the adjudication proceedings, where offence is grave and qualitative evidences are available.

6.3. Prosecution need not be kept in abeyance on the ground that the party has gone in appeal/revision. However, in order to ensure that the proceeding in appeal/revision are not unduly delayed because the case record are required for purpose of prosecution, a parallel file containing copies of the essential documents relating to adjudication should be maintained.

6.4. The Superintendent in charge of adjudication section should endorse copy of all adjudication orders to the prosecution section. The Superintendent in charge of prosecution section should monitor receipt of all serially numbered adjudication orders and obtain copies of adjudication orders of missing serial numbers from the

adjudication section every month.

7. Procedure for launching prosecution:

7.1. In all such cases, where prior approval of Chief Commissioner/Principal CC or DGRI/Pr. DGRI is necessary for launching prosecution, an investigation report for the purpose of launching prosecution (as per Annexure-I), should be carefully prepared and signed by the Assistant Commissioner/Assistant Director concerned. The investigation report, after careful scrutiny (for incorporation of all relevant facts) should be endorsed by the Commissioner/Pr. Commr. or ADGRI/Pr. ADGRI. The Chief Commissioner/Principal CC or DGRI/Pr. DGRI should ensure that a decision about launching of prosecution or otherwise, is taken after careful analysis of evidence available on record and communicated to the Commissioner/ Principal CC or ADGRI/Pr. ADGRI within a month of the receipt of the proposal.

7.2. In all other cases, where prior approval of Chief Commissioner/Principal CC or DGRI/Pr. DGRI is not required, the decision about launching of prosecution or otherwise should be taken by the Commissioner/Pr. Commr. or ADGRI/Pr. ADGRI after careful application of mind and analysis of evidence brought on record. This should be completed within a month of adjudication of the case (unless it is decided to go for prosecution even prior to adjudication in certain category of cases mentioned at para 6 above)

7.3. Prosecution should not be filed merely because a demand has been confirmed in the adjudication proceedings particularly in cases of technical nature or where interpretation of law is involved. One of the important considerations for deciding whether prosecution should be launched is the availability of adequate evidence. The standard of proof required in a criminal prosecution is higher as the case has to be established beyond reasonable doubt whereas the standard of proof in adjudication proceedings is decided on the bases of preponderance of probability. Therefore, even cases where demand is confirmed in adjudication proceedings, evidence collected should be weighed so as to likely meet the test of being reasonable doubt for recommending & sanctioning prosecution. Decision should be taken on case-to-case basis considering various factors, such as, gravity of offence, quantum of duty evaded and the nature as well as quality of evidence collected.

7.4. It is reiterated that in order to avoid delays, Commissioner/Pr. Commr. or ADGRI/Pr.ADGRI/adjudicating authority should indicate, at the time of passing the adjudication order itself as to whether he considers the case fit for prosecution so that it could be further processed for launching prosecution. Where at the time of adjudication proceedings, no view has been taken on prosecution by the adjudicating authority, the adjudication section shall resubmit the file within 15 days from the days of issue of adjudication order to the adjudicating authority/Commissioner to take a view of prosecution. Where the prosecution is proposed before the adjudication of the case, Commissioner/Pr. Commr. Or ADGRI/Pr.ADGRI shall record the reason for the same and the adjudicating authority shall be informed of the decision so that there is no need for him to examine the case subsequently from the perspective of prosecution.

7.5. It is observed that the delays in the Court proceedings occur due to the non-availability of records required to be produced before the Magistrate. As a matter of practice, whenever a case is taken up for seeking the approval for launching prosecution, an officer should be nominated/designated, who shall immediately take charge of all documents, statements and other exhibits, that would be required to be produced before a Court. The list of exhibits should be finalised in consultation with the Public Prosecutor at the time of drafting of the complaint. Such exhibits should be kept in the safe custody. Where a complaint has not been filed even after a lapse of three months from the receipt of sanction for prosecution, the reason for delay shall be brought to the notice of Chief Commissioner/Principal CC or DGRI/Pr. DGRI by the Commissioner/Pr. Commr. or ADGRI/Pr. ADGRI, as the case may be, who are responsible in the case for ensuring the timely filing of the complaint."

30. Further, Sl.Nos.15 and 16 of the aforesaid Circular dated 23.10.2015 read as under:

15. Transitional Provisions:

All cases, where sanction for prosecution is accorded after the issue of this circular, shall be dealt in accordance with the provisions of this circular irrespective of the date of the offence.

Cases where prosecution has been sanctioned but no complaint has been filed before the Magistrate

shall also be reviewed by the prosecution sanctioning authority in light of the provisions of this circular.

16. Where a case is considered suitable for launching prosecution and where adequate evidence is forthcoming, securing conviction largely depends on the quality of investigation. It is, therefore, necessary for senior officers to take personal interest in investigations of important cases of smuggling / duty evasion and also in respect of cases having money laundering angle and to provide guidance and support to the investigating officers."

31. It is to be pointed out that in the case of Assistant Collector of Customs Vs L.R.Malani 1999 (110) E.L.T. 317 (Supreme Court), the Hon'ble Supreme Court has held that 'Departmental Authority' is not a Court within the meaning of Article 20(2) of the Constitution of India.

32. Besides the above, it is to be noted that Section 132 of the Customs Act is a Bailable one. Further, the offence under Section 135 of the Act is a compoundable one, in terms of Section 137 (3) of the Customs Act.

33. On going through the impugned order dated 11.03.2016 in Crl.M.P.No.3809 of 2015, this Court is of the considered view that the spirit and tenor of the guidelines issued for launching the prosecution, procedure for withdrawal of prosecution, procedure for withdrawal of sanction order, procedure for withdrawal of complaint already filed for prosecution, etc., were not evaluated/appreciated and looked into in a proper and real perspective by the trial Court which has resulted in dismissal of the said Miscellaneous Petition. Therefore, this Court, to secure the ends of justice and in furtherance of substantial cause of justice, at this stage without expressing any opinion on merits of the case, sets aside the impugned order dated 11.03.2016 in Crl.M.P.No.3809 of 2015. Consequently, the Revision succeeds.

34. In the result, the Criminal Revision Petition is allowed and the order dated 11.03.2016 passed by the Learned Additional Chief Metropolitan Magistrate, (E.O.I), Egmore, Chennai in Crl.M.P.No.3809 of 2015, is hereby sets aside by this Court for the reasons assigned in this Criminal Revision. The trial Court is directed to restore the Crl.M.P.No.3809 of 2015 to its file and to dispose of the same by passing a reasoned speaking order afresh, on merits, in a diligent and dispassionate manner and also by adverting to the salient necessary ingredients of the guidelines mentioned in the Circular No.27 of 2015, dated 23.10.2015, and answering

the same by applying its judicial mind [(i)with specific reference as to whether the petitioner as a condition precedent 'for withdrawal of prosecution' is to pay mandatorily the penalty imposed before embarking upon an endeavour to reap the benefits of the Circular No.27 of 2015-Customs dated 23.10.2015; (ii) Whether the non-payment of penalty (imposed by the Departmental Authority) in question by the Revision Petitioner operates as a bar/the issue of Estoppel to drop the prosecution proceedings/proceedings for withdrawal of prosecution in the teeth of Circular No.27 of 2015-Customs, dated 23.10.2015 and relevant provisions of the Customs Act, 1962; (iii) in the light of Circular No.27 of 2015-Customs, dated 23.10.2015, whether it is obligatory or expedient on the part of respondent/complainant to act in filing a petition to drop the prosecution proceedings/withdrawal of prosecution proceedings before the Competent Forum] in true letter and spirit, within a period of six weeks from the date of receipt of a copy of this order. Moreover, the respective parties are to be provided with adequate opportunities to raise all factual and legal pleas at the time of fresh hearing of the Crl.M.P.No.3809 of 2015 by adhering to the principles of natural justice.

Sd/-

Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

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To

1)The Learned Additional Chief Metropolitan Magistrate,
EO-I, Egmore,
Chennai.

2)The Senior Intelligence Officer,
Directorate of Revenue Intelligence3,
G.N.Chetty Road,
T.Nagar, Chennai 17.

Crl.R.C.No.461 of 2016

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kra 11.05.2016