

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.04.2016

Pronounced on : 25.04.2016

Coram

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

CrI.R.C.No.462 of 2016

Sheik Madhani Lafir ... Petitioner/Petitioner/Accused
V.

Senior Intelligence Officer,
Directorate of Revenue Intelligence,
G.N. Chetty Road,
T.Nagar, Chennai - 600 017. ...Respondent/Respondent/Complainant

Prayer: Criminal Revision Petition filed under Section 397 & 401 of the Code of Criminal Procedure, 1973 against the order dated 11.03.2016 passed in CrI.M.P.No.3808 of 2015 by the learned Additional Chief Metropolitan Magistrate, EO-I, Egmore, Chennai (in short "the learned ACMM EO-I) dismissing the petition to drop the proceedings.

For Petitioner : Mr.R.Sankarasubbu

For Respondent : Mr.M.Venkateswaran
Special Public Prosecutor

ORDER

The Petitioner has preferred the instant Criminal Revision Petition as against the order dated 11.03.2016 in Cr.M.P.No.3808 of 2015 passed by the Learned Additional Chief Metropolitan Magistrate, EO-1, Emgore, Chennai.

2.The Learned Additional Chief Metropolitan Magistrate, EO-1, Egmore, Chennai, while passing the impugned order in CrI.M.P. No.3808 of 2015 dated 11.03.2016 in R.R.No.22 of 2009 (filed by the Petitioner/Accused), at paragraph 5, had observed as under:
"5.Point:-

"This petition is filed by the Petitioner to drop the proceedings. The counsel for the petitioner stated that he 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.21,61,150/- 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.21,61,150/- was arrived by the respondent based on the price details available from the internet and the same is not an acceptable method of valuation and if the respondent valued the goods properly it would be below 20 lakhs. The Union Ministry of Finance on 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 petitioner 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 is 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.Challenging the order of dismissal dated 11.03.2016 in

Crl.M.P.No.3808 of 2016 in R.R.No.22 of 2009 passed by the Learned Additional Chief Metropolitan Magistrate, Egmore, Chennai in dismissing the Miscellaneous Petition, the Petitioner has filed the present Revision Petition before this Court contending that the impugned order is incorrect, illegal and unjust in regard to the facts of the case and as such, the same is liable to be set aside in the interest of Justice.

4. According to the Learned Counsel for the Petitioner, the trial Court had not appreciated the decision rendered by the Hon'ble Supreme Court in K.M.Mathew V. State of Kerala reported in 1992 AIR 2206 wherein it was mentioned that the Magistrate can very well drop the proceedings at the instance of Accused persons. Therefore, it is represented on behalf of the Petitioner that the view of the trial Court that prosecution alone could file a petition to drop the proceedings is quite contrary of Law.

5. The Learned Counsel for the Petitioner emphatically submits that the Ministry of Finance in Circular No.27/2015 dated 23.10.2015 with retrospective effect had mentioned a fact that the Government of India had fixed a threshold limit for launching prosecution and also decided to drop the proceedings in respect of matters coming within the aforesaid limit.

6. The Learned Counsel for the Petitioner draws the attention of this Court that the finding rendered in 'adjudication proceedings', no way bind the parties facing criminal prosecution as per decision of the Hon'ble Supreme Court of India in Radhey Shyam Kejriwal V. State of West Bengal reported in (2011) 3 SCC 581. Also, the stand of the Petitioner is that the 'criminal prosecution' and 'adjudication proceedings' are independent in character.

7. Lastly, it is the submission of the Learned Counsel for the Petitioner that the Respondent/Prosecution's objection is that the Petitioner had failed to pay penalty levied in the 'adjudication proceedings'.

8. The Learned Counsel for the Petitioner cites the decision in Aggarwal Distributors (P) Ltd., V. Commissioner of Customs, New Delhi, 2000 (117) E.L.T. 49 (Tribunal), whereby and whereunder, at paragraph 4, it is observed as follows:

"4. We have carefully considered the pleas advanced from both sides. We agree with the submission of the learned Advocate that department's reliance on the document displayed on the interest is totally misplaced for the reasons advanced by the

learned Advocate, as mentioned above, namely:-

1)The document is unsigned.

2)It is not known as to who has introduced the said document on the internet, and

3)What is the nature of price indicated in the said document, whether it is a retail price or a wholesale price.

In short, the document displayed on the Internet is not worthy of reliance. It is doubtful whether this document can at all be taken as the "computer print out" fulfilling the conditions of sub-section (2) of Section 138 c of the Customs Act. It cannot be considered to be "computer print out" merely because it has been displayed on Internet. Similarly, the baggage price relied on in the show cause notice has no evidentiary value for import of goods in the course of international trade. Further, as is rightly pointed out by the learned Advocate, these prices are merely the assertion of the customs authorities in the show cause notice without any documentary evidence in support of that assertion."

9.Conversely, it is the contention of the Learned Special Public Prosecutor for the Respondent that the Tamil Nadu Government issued a Detention Order under COFEPOSA Act, 1974 vide G.O.S.R.No.1/570-2/2009 dated 14.10.2009 against the Petitioner and since he was absconding, the same was notified by the Secretary to Government of Tamil Nadu as per Order in G.O.No.S.R.1/570-9/2009 dated 06.12.2009 and the same was published in the Tamil Nadu Government Gazette No.50 dated 23.12.2009. Also that, his representation dated 02.03.2010 was rejected by the Director, CEIB vide order F.No.686/09/2010 dated 27.04.2010.

10.The Learned Special Public Prosecutor for the Respondent brings it to the notice of this Court that the Petitioner filed W.P.No.4741 of 2010 and obtained an interim stay of the execution of the Judicial Order and further that, the interim stay was periodically extended and that the stay is still in force. Furthermore, the said Writ Petition is pending for final orders.

11.The Learned Special Public Prosecutor for the Respondent projects an argument that in the instant case (O.S.No.5/2010-

INT), the market value of the goods smuggled by the Petitioner was approximately Rs.31.83 lakhs and in fact, the valuation of smuggled goods at Rs.21,22,150/- 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 last price of such goods available on the internet.

12.The Learned Special Public Prosecutor for the Respondent takes a stand that the Petitioner was provided with a reasonable opportunity of being heard prior to the adjudication of O.S.No.5/2010, wherein the penalty of Rs.1,50,000/- was imposed on him. However, the Petitioner had not availed the opportunity before the Adjudicatory Authority in regard to the aspect of 'Valuation of seized goods', or any other relevant fact.

13.The Learned Special Public Prosecutor for the Respondent projects a plea that if the Petitioner was really aggrieved against the Order-in-Original No.12/2010-ADC(Air) passed by the Additional Commissioner of Customs, Airport & Air Cargo Complex, Chennai, then, there is a remedy for him to prefer Appeal before the Commissioner of Customs (Appeals) within the specified time limit. However, the Petitioner had not filed the Appeal in question and therefore, the order in Reference No.12/2010-ADC (Air) dated 17.04.2010 passed by the concerned authority has attained finality in all respects (including the aspect of valuation of the seized goods).

14.The strenuous argument advanced on behalf of the Respondent is that the Circular No.27/2015-Customs dated 23.10.2015 does not prescribe a mere mechanical dropping of all proceedings, but merely directs the concerned authorities to review the cases pending for filing of complaint, in the light of the Circular, and take necessary action for preferring of complaint or withdrawal of prosecution. In effect, the categorical stand of the Respondent is that the Petitioner/Accused cannot seek for 'Withdrawal of Prosecution' as a matter of right and it is very well open to the sanctioning authority to proceed in terms of the Circular No.27/2015-Customs dated 23.10.2015.

15.The Learned Special Public Prosecutor for the Respondent contends that the CBEC Circular No.996/3/2015- CX dated 28.02.2015 relied on by the Petitioner relates to the arrears of duty of Central Exercise recoverable from manufacturers and in the instant case on hand, the Petitioner/Accused is a Chinese Passport Holder, who attempted to smuggle the goods into India, had not appeared before the Adjudicatory Authority in any of the proceedings. All the more, he had not paid the penalty even

after elapse of six years of adjudication. In substance, the Circular No.996/3/2015- CX dated 28.02.2015 banked on by the Petitioner is not applicable to the facts of his case.

16.As far as the present case is concerned, the Petitioner places heavy reliance on the contents of Circular No.27/2015-Customs dated 23.10.2015 and takes a plea that the communication sent to the Customs Officials reference to the dropping of Criminal Proceedings pending against the Accused committed offences to the value of Rs.20,00,000/- in case of baggage and outright smuggling cases and Rs.1 crore in case of appraising cases and commercial frauds.

17.In the present case, the significant stand taken on behalf of the Respondent is that the market value of the goods smuggled by the Petitioner in the instant case (O.S.No.5/2010 INT) was approximately Rs.31.83 lakhs and that the valuation of smuggled goods at Rs.21,22,150/- 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 and that too on the least price of such goods available on the internet.

18.In this connection, this Court very pertinently pointed out that in the decision 2000 (117) E.L.T. 53 (Tribunal) cited on behalf of the Petitioner, it is clearly observed that the document displayed on internet is not reliable being unsigned and nature of price not being indicated therein.

19.It is to be pointed out that in the case of Assistant Collector of Customs V. L.R.Malani, 1999 (110) E.L.T. 317, 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.

20.Besides the above, it is to be noted that Section 132 of the Customs Act, 1962 is a Bailable one. Section 135 of the Act speaks of 'Evasion of customs duty' and prescribes punishment thereof. An Accused must have knowledge of goods being smuggled goods in order that he may be held guilty under Section 135 of the Act. One of the essential ingredients of an offence under Section 135 of the Act is that an Accused must have acquired possession or carried, 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, in the considered opinion of this Court. Further, the offence under Section 135 of the Act is a compoundable one in terms of Section 137 (3) of the Customs Act.

21.As far as the present case is concerned, even though on the side of the Respondent/Complainant, at paragraph 5 of the counter, it is observed in candid terms that 'the market value of the goods smuggled by the Petitioner in the instant case (O.S.No.5/2010 INT) was approximately Rs.31.83 lakhs and further the valuation of smuggled goods at Rs.21,22,150/- 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 etc., the necessary qualitative and quantitative details relating to the valuation of the smuggled goods at Rs.21,22,150/- were not furnished on the side of the Respondent before this Court. Also, the Petitioner had not availed a valuable/ reasonable opportunity of being heard before adjudication of O.S.No.5 of 2010 wherein admittedly, a penalty of Rs.1,50,000/- was imposed upon the Petitioner. As such, in view of the aforesaid divergent stand taken by the respective parties in regard to the valuation of the goods smuggled by the Petitioner in India in the subject manner in issue and also as to the applicability of the Circular No.27/2015-Customs dated 23.10.2015, this Court, in the interest of Justice, Fair Play, Equity, Good Conscience and even as a matter of prudence, sets aside the impugned order dated 11.03.2016 passed by the trial Court and allows the Criminal Revision Petition.

22.In the result, the Criminal Revision Petition is allowed and the impugned order dated 11.03.2016 in Crl.M.P.No.3808 of 2015 in R.R.No.22 of 2009 is hereby set aside by this Court for the reasons ascribed in this Criminal Revision. The trial Court is directed to restore the Crl.M.P.No.3808 of 2015 to its file and to dispose of the same afresh, by calling for necessary materials/details from the Respondent as to how the valuation of the goods smuggled by the Petitioner in O.S.No.5/2010 INT was approximately arrived at Rs.31.83 lakhs and further, how the valuation of smuggled goods was arrived at Rs.21,22,150/- as per the Order-in-Original No.12/ 2010-ADC(Air). Further, the trial Court, after securing the aforesaid details/particulars, is to look into the same coupled with tenor and spirit of Circular No.27/2015 -Customs dated 23.10.2015 with meticulous care and caution and to pass a reasoned speaking order in an effective, efficacious and dispassionate manner, 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.27/2015-Customs dated 23.10.2015; (ii) whether the non-payment of penalty in question (imposed by the Departmental Authority) 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.27/2015-Customs, dated 23.10.2015 and relevant provisions of the Customs Act, 1962; and (iii) in the light of Circular No.27/2015-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], of course after providing enough opportunities to the Petitioner to raise all factual and legal pleas by adhering to the Principles of Natural Justice, within a period of six weeks from the date of receipt of copy of this order.

Sd/-

Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

Sgl

To

- 1.The Additional Chief Metropolitan Magistrate,
(EO-I), Egmore, Chennai.
 - 2.The Senior Intelligence Officer,
Directorate of Revenue Intelligence,
G.N. Chetty Road,
T.Nagar, Chennai - 600 017.
 - 3.The Public Prosecutor, High Court, Madras 104.
- 1 cc to M/s.M.Seeni Sulthan, Advocate, sr.26407

Cr1.R.C.No.462 of 2016

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kra 11.05.2016

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