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*   **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment delivered on:08th February, 2016

\+   **CRL.M.C. 1990/2010**

PREM KUMAR ..... Petitioner

Represented by: Mr. Yogesh Verma, Advocate.

Versus

CUSTOMS ..... Respondent

Represented by: Mrs. Sonia Sharma, Senior Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

\+   **CRL.M.C. 1990/2010**

1. By way of the present petition, filed under Section 482 Cr.P.C. petitioner has sought to quash the proceedings of the complaint case no. 19/1/06 titled as Sh. Anil Kumar (Air Customs Officer) vs. Prem Kumar, pending before the court of ld. ACMM, New Delhi for the offences punishable under Section 132 and 135 (1) (a) of the Customs Act, 1962.

2. Mr. Yogesh Verma, ld. Counsel appearing on behalf of the petitioner argued that vide order dated 12.03.2007 passed in Original no. 12/2007, Additional Commissioner of Customs, IGI Airport, New Delhi opined that out of 36110 Euros, 34000 Euros were acquired illegally in as much as no evidence as regards their lawful acquisition from an authorized dealer or money changer or otherwise was proved at the time of seizure or in their reply to show cause notice or at the

time of personal hearing. Both the notices, however, placed sufficient evidence in support of the lawful acquisition of 1000 Euros each for authorized dealer. As regards 110 Euros, in his opinion, were lying unspent from their previous foreign visit. These lawfully acquired 2110 Euros, were, however, used to conceal the 34000 Euros.

3. Accordingly vide order dated 12.03.2007, the Additional Commissioner passed the order as under:-

> *"(i) Absolute confiscation of Euros 22075 and Euros 11925 out of 23185 and 12925 Euros recovered and seized respectively from Sh. Prem Kumar & Sh. Sachin Bharti Under Section 113 (d)(e) & (h) of the Customs Act, 1962.*
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> *(ii) Confiscation of 1110 and 1000 Euros out of 23185 and 12925 Euros recovered and seized respectively from Sh. Prem Kumar & Sh. Sachin Bharti under Section 119 of the Customs Act, 1962. However, I give an option to Sh. Prem Kumar to redeem the same on payment of redemption fine of Rs.6000/- and to Sh. Sachin Bharti on payment of redemption fine of Rs.5000/-. The Euros would however be released after obtaining a no objection certificate from the competent Court where the trial of the notices is pending.*
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> *(ii) Confiscation of trousers, Olive green suit case of hard top bearing brand name American Tourister and bluish green suit case cum stroller bearing brand name 'SONADA' under Section 118 (b) read with Section 119 of the Customs Act, 1962. However, I give an option to Sh. Prem Kumar & Sh. Sachin Bharti to redeem their respective trouser, suit case and stroller on payment of redemption fine of Rs.500/- each. These would however be released after obtaining a no objection certificate from the competent court where the trial of the notices is pending.*
> *(iv) I also impose a personal penalty of Rs.4,00,000/- (Four Lakhs only) on Sh. Prem Kumar under Section 114(1) of the said Act.*
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> *(v) I also impose a personal penalty of Rs.2,00,000/- (Two*

Lakhs only) on Sh. Sachin Bharti under Section 114 (1) of the said Act."

4. Being aggrieved, the petitioner challenged the aforesaid impugned order in Appeal, wherein it is observed by the appellate authority in its order dated 17.10.2007 as under:-

> *"The issue involved here is whether the seized foreign currency is prohibited good and whether it can be released on payment of fine. The foreign currency has not been declared as prohibited under Customs Act, 1962 or FEMA.*
> *The Adjudicating Authority in the impugned order has mentioned that as per Regulation 5 of Foreign Exchange management (Export and import of Currency) Regulations 2000 wherein Reserve Bank of India may by regulations, prohibit, restrict of regulate the export, import or holding of currency notes. The said Regulation 5 reads as under:*
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> > *"Except as otherwise provide in these regulations no person shall without the general or special permission of the Reserve Bank of India import or send out of India, any Foreign Currency'.*
> > *A plain reading of the Regulation makes it clear the Foreign Currency as such is not prohibited good and its import or export is subject to the permission given by the Reserve Bank of India. Further as per Regulation 7 (2)(ii) of the said Regulations '(2) any person may take or send out of India (ii) foreign exchange obtained by him by drawl from an authorized person in accordance with the provisions of the Act or the rules or regulations or directions made or issued thereunder."*
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> *Thus Foreign currency is not prohibited and it import or export is subject to law and rules and regulations issued by a competent authority. The foreign currency is not notified as 'prohibited' under Customs Act, 1962 and FEMA.*
> *Foreign Currency being not prohibited under Customs Act and no special circumstances shown by the Adjudicating Authority to warrant absolute confiscation, it (Adjudicating Authority) was required to give option to redeem the same for*

home consumption in terms of Section 125 of the Customs Act, 1962. In this context it is considered necessary to refer to the relevant portion of Section 125 of Customs Act.

In his voluntary statement dated 28.09.2005 tendered under Section 108 of Customs Act, 1962 the appellant 1 admitted and claimed that out of EUROS 12925 recovered from appellant 2 EUROS 11925 belonged to him and EUROS 1000 were legally procured by appellant 2. The same fact was admitted by appellant 2 in his statement dated 28.09.2005. Thus the total foreign currency of EUROS 34000 confiscated absolutely belong to the appellant 1 (Sh. Prem Kumar).

Therefore the total foreign currency of EUROS 34000 (including EUROS 22075 recovered from the appellant 1 and EUROS 11925 from the appellant 2) is hereby released to the appellant 1(Sh. Prem Kumar) being the claimant and the owner of the impugned foreign currency on payment of a fine of Rs.4,00,000/- (Rupees four lacs) under Section 125 of the Customs Act, 1962. The penalty imposed on the appellant 1 is also reduced from Rs.4,00,000/- to Rs.2,00,000/-.

The adjudicating authority also imposed a penalty of Rs.2,00,000/- on the appellant 2 which is on higher side as the entire foreign currency belonged to the appellant 1 as admitted by appellant 1 and as discussed above, the same is therefore reduced to Rs.50,000/-.

It is also on record that both appellant 1 and appellant 2 purchased EUROS 1000 each lawfully and their passports had endorsement to the effect and that the appellant had residual amount of EUROS 110 from the previous visit. The Adjudicating Authority found the same correct. Therefore confiscation of EUROS 1110 from the appellant 1 (Sh. Prem Kumar) and EUROS 1000 from the appellant 2 (Sh. Sachin Bharti) and their release on payment of fine of Rs.6000/- and Rs.5,000/- respectively is unwarranted and not legal. Hence the order of confiscation is set aside and EUROS 1110 and EUROS 1000 released to the appellant 1 and the appellant 2 respectively without any fine.

The impugned order-in-original no. 12/2007 dated 12.03.2007 passed by the Additional Commissioner of Customs, IGI Airport, New Delhi is upheld as modified above."

5. Ld. Counsel further submitted that as per the opinion of the appellate authority foreign currency was not prohibited under Customs Acts. Therefore, the currency in question was released in favour of the petitioner and redemption duty was reduced.

6. Mr. Yogesh Verma, ld. Counsel appearing on behalf of the petitioner submitted that since the petitioner has been exonerated for the offences punishable under Section 135 of the Customs Act, 1962 therefore, the proceedings before the trial court cannot continue.

7. To strengthen his arguments, he has relied upon a case of ***Karamveer Singh v. Rajesh Arora*** decided by this Court in ***Crl. M.C. 2910/2011 on 13.12.2012***, wherein in Para 14 it is observed as under:

> *"14..*
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> *..*
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> *22. While allowing the case of Sunil Gulati & Anr. V. R.K. Vohra, [145 (2007) DLT 612] this Court held that where the accused persons are exonerated by the competent authorities/Tribunal in adjudication proceedings, one will have to see the reasons for such exoneration to determine whether these criminal proceedings should still continue. If the exoneration in departmental adjudication is on technical ground or by giving benefit of doubt and not on merits of the adjudication proceedings were on different facts, it would have no bearing on criminal proceedings.*
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> *xxxxxxxxxxxxxxxxxxxxxxxxxx*
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> *24. Keeping in view, the view taken in Sunil Gulati & Anr.(supra), I am of the opinion, that the criminal proceedings pending before the trial court cannot go*

on, against the petitioner, since the petitioner has been fully exonerated by the Joint Secretary to the Government of India, and same has attained the finality.

25. In view of the above submissions and discussions, I quash the proceedings in the criminal complaint dated 08.08.2002, under Sections 132 & 135 (1)(a) of the said Act, pending against the petitioner in the Court of Ld. ACMM, New Delhi."

15. Even otherwise, this Court is of the view that the argument raised by the learned counsel for respondent-Department is no longer res integra in view of the judgment of the Supreme Court in Radheyshyam Kejriwal vs. State of West Bengal & Anr., JT 2011 (2) SC 443. In the said judgment, the Supreme Court has held as under:-

"22.1 The Delhi High Court also considered this question arising out of a case under Foreign Exchange Regulation Act, in detail in the case of Sunil Gulati &Anr. V. R.K. Vohra [145 (2007) DLT 612], and held as follows :-

"In case of converse situation namely where the accused persons are exonerated by the competent authorities/Tribunal in adjudication proceedings, one will have to see the reasons for such exoneration to determine whether these criminal proceedings should still continue. If the exoneration in departmental adjudication is on technical ground or by giving benefit of doubt and not on merits or the adjudication proceedings were on different facts, it would have no bearing on criminal proceedings. If, on the other hand, the exoneration in the adjudication proceedings is on merits and the concerned person(s) is/are innocent, and the criminal prosecution is also on the same set of facts and circumstances, the criminal

prosecution cannot be allowed to continue. The reason is obvious criminal complaint is filed by the departmental authorities alleging violation/contravention of the provisions of the Act on the part of the accused persons. However, if the departmental authorities themselves, in adjudication proceedings, record a categorical and unambiguous finding that there is no such contravention of the provisions of the Act, it would be unjust for such departmental authorities to continue with the criminal complaint and say that there is sufficient evidence to foist the accused persons with criminal liability when it is stated in the departmental proceedings that ex facie there is no such violation. The yardstick would, therefore, be to see as to whether charges in the departmental proceedings as well as criminal complaint are identical and the exoneration of the concerned person in the departmental proceedings is on merits holding that there is no contravention of the provisions of any Act.

22.2 We respectfully endorse the view taken by the Bombay High Court in the case of Hemendra M. Mothari (supra) and Delhi High Court in Sunil Gulati (supra)"

16. In view of the aforesaid discussion, this Court is of the view that the issue raised by the respondent in the present petition is squarely covered by the judgment passed by a Coordinate Bench of this Court in Chinta Devi Vs. Rajesh Arora Air Custom Officer (supra).

17. Consequently, present petition is allowed and the impugned order dated 25th November, 2010 passed by the Special Judge, NDPS, Patiala House Courts, New Delhi, is set aside and proceedings in CC No.971/1/02 are also quashed."

8. Ms. Sonia Sharma, Sr. Standing Counsel for Customs submitted

that she has filed a counter-affidavit, wherein the stand of the Department is as under:-

> *"(i) The writ petition needs no reply. However, that foreign currency is not prohibited goods under Customs Act, 1962 and the Commissioner of Customs (Appeal) rightly released the seized foreign currency on payment of redemption fine and has upheld that there was violation of provisions of Customs Act and as such upheld the seizure and penalty. However, the Commissioner of Customs (Appeal) has set aside the absolute confiscation into release on payment of redemption Fine U/s. 125 of Customs Act and has also upheld the personal penalty (in short PP) imposed upon both the passengers and however only reduced the amount of PP.*
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> *(ii) Further submitted writ petition is wrong and denied. However, ld. ACMM vide order dated 04.11.2009 ordered for release of foreign currency to the petitioner in terms of Orders of the Commissioner of Customs (Appeal) on consideration of the statement of both the accused that they will not dispute the circumstance of seizure and will not dispute identity of the seized foreign currency during the trial.*
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> *(iii) Further it is submitted that writ petition is wrong and denied. However, petitioner by way of not declaring the seized foreign currency and obtaining from unauthorized sources is clear violation of the provisions and restrictions imposed under Customs Act, 1962 and Export & Import of Currency Regulation, 2000. The violation of various provisions of law has been dealt with in Order in Original no.12/2007 dated 12.03.2007."*

9. Ld. Counsel further submitted that there was violation of Provision of Customs Act, 1962 as the currency was obtained from unauthorized sources which were in violation of Export and Import of Currency Regulations, 2000. She further submitted that vide order

dated 04.11.2009, ld. ACMM ordered to release the currency to the petitioner in terms of order of Commissioner (appeal) on consideration of the statements of the petitioner that he will not dispute the circumstances of the seizure and will not dispute the identity of the seized foreign currency during the Trial. Thus, at this stage, the relief sought by the petitioner cannot be given.

10. I have heard ld. Counsel for the parties.

11. It is pertinent to mention here that vide order dated 29.03.2012, this Court directed the respondent to decide the reference of the petitioner expeditiously, which was filed on 22.02.2012, same was rejected on 26.03.2013 on delay but not on merit.

12. On perusal of order dated 17.10.2007 passed by the Appellate Authority whereby it is opined that the petitioner purchased Euros 1,000 lawfully and his passport had an endorsement to this effect. The petitioner had residual amount of Euros 110 from the previous visit. The Adjudicating Authority found the same to be correct. Therefore confiscation of Euros 1110 from the petitioner and its release on payment of fine of Rs.6000/- was unwarranted and illegal. Accordingly, vide order dated 17.10.2007, the Appellate Authority set aside the confiscation of Euros 1110 and directed the same to be released in favour of the petitioner without any fine. Therefore, nothing remained against the petitioner under Section 135 of Customs Act. The only case pending against the petitioner is under Section 132 of the Customs Act, 1962 which reads as under:

*"**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 extend to two years, or with fine, or with both."

13. A perusal of the aforesaid Section shows that the said provision is applicable if there is any false declaration and due to which, if there is any evasion of duty, then the person would be dealt under Section 135 of the Customs Act, 1962

14. Since, the petitioner has already been exonerated vide order dated 17.10.2007 under Section 135 of the Customs Act and the EUROS in question were directed to be released in his favour, the consequence of Section 132 of Customs Act becomes irrelevant.

15. It is not in dispute that foreign currency possessed by the petitioner consisted of Euros 23195 and Euros totalling Euros 36120. Considering the provisions of the Customs and FEMA Act, the Appellate Authority, i.e. Commissioner of Customs (Appeals) upheld the petitioner's contention that foreign currency is not declared to be "prohibited goods" under provisions of either of above Acts, accordingly vide order dated 17.10.2007 directed the respondent department to release entirety of above described foreign currency to the petitioner. Thus, if the Department has accepted the contention of the petitioner in adjudication proceedings and released the foreign currency in his favour, then he cannot be held liable under Section 132 of the Customs Act.

16. It cannot be disputed that above mentioned adjudication order dated 17.10.2007 was passed on merit. In case where accused person has already been exonerated by the competent authority, on the same set of facts and circumstances, the criminal prosecution cannot be allowed to continue against him.

17. In view of above discussion and the legal position, I hereby quash the complaint no. 19/1/06 pending before the Trial Court with all proceedings emanating therefrom against the petitioner.

18. Accordingly, the petition is allowed with no order as to costs.

Crl. M.A. 7634/2010

Dismissed as infructuous.

SURESH KAIT, J

FEBRUARY 08, 2016

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