IN THE HIGHCOURT OF JUDICATURE AT MADRAS

Date of Reservation : 11.07.2017

Date of Pronouncement : 24.07.2017

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL.RC.No.1173 of 2016
and
CRL.MP.No.10402 of 2016

K. Kuppusami ..Petitioner/Accused NO.4

versus

State represented by
Inspector of Police,
CBI/EOW/ Chennai.
..Respondent/Complainant

Prayer: Criminal Revision Case filed under Sections 397 & 401 of Criminal Procedure Code to set aside the order made in Crl.RC.No.46 of 2012 dated 04.07.2016 passed by the IV Additional Sessions Judge, Chennai reversing the order made in Crl.MP.No.276 of 2011 in CC.NO.5271 of 2010 of the Additional Chief Metropolitan Magistrate Court, Egmore, Chennai.

For Petitioner :Mr.S. Murugappan

For Respondent : Mr. K. Srinivasan
Special Public Prosecutor for CBI

O R D E R

This Criminal Revision Case has been filed by the petitioner against the order passed by the IV Additional Sessions Judge, Chennai in Crl.RC.No.46 of 2012 dated 04.07.2016 in which, the learned Judge had set aside the order passed by the Additional Chief Metropolitan Magistrate, Egmore, Chennai and directed to frame charges against the petitioner who is charged for the offences under Sections 120-B r/w 420, 471, 482 IPC, 13(1) (a) (b) r/w. 9(B) (e), 10 (A), (bb) (c) of Drugs and Cosmetic Act, 1940 and Section 132 and 135 of Customs Act, 1962 and substantiate offences thereof.

2. It is alleged in the complaint that when the

proceedings were initiated by the Assistant Drugs Controller in respect of the case covered by Bill of Entry No.228654 dated 02.06.2009, A1 to A3 entered into criminal conspiracy with the petitioner to clear the goods mentioned in the table without reference to Assistant Drugs Controller. The case was registered under Sections 120-B r/w 420, 471, 482 IPC, 13(1) (a) (b) r/w. 9(B) (e), 10(A), (bb) (c) of Drugs and Cosmetic Act, 1940 and Sections 132 and 135 of Customs Act, 1962 and substantiate offences thereof in RC.No.13/E/2009 CBI/EOW/Chennai dated 02.09.2009.

3. After the investigation, the respondent laid the charge sheet before the Additional Chief Metropolitan Magistrate, Egmore, Chennai.

4. The case of the respondent as per the charge sheet is that during the year 2009, A1 Company represented by A2, A3 and this petitioner, CHA (Customs House Agent) entered into criminal conspiracy to import spurious and sub-standard drugs into India by using forged documents and without proper license and thereby to cheat the Customs Department in public in general. A1 Company imported 300 kgs of Cefotaxime Sodium USP vide Invoice No. HX9ZF12F097 dated 09.04.2009 through Chennai Sea Port from M/s.Zhejian Chemical Import and Export Corporation, China. While importing, A1 Company submitted Bill of Entry No.228654 dated 02.06.2009 through A4. The petitioners furnished Manufacturer Certificate, Batch Release Certificate and Certificate of Analysis along with invoice and packing list claiming that the product was manufactured by the registered manufacturer M/s.Zheijang Yongning Pharmaceuticals Factory, China. The fact is proved by LW5, LW6 and LD12. During the mandatory clearances, the Assistant Drug Controller, Customs House, Chennai referred the matter to the manufacturer for confirmation. M/s.Zheijang Yongning Pharmaceuticals Factory, China disowned the product imported by A1 company.

5. After laying charge sheet, it was taken on the file of the Additional Chief Metropolitan Magistrate, Egmore, in in C.C.No.5271/2010 after furnishing copies to A1 to A3 and the present petitioner, the matter was pending before the trial court and this petitioner had filed the petition in Crl.MP.No.276/2011 to discharge him from the C.C.No.5271/2010.

6. After the filing of counter by the respondent and also on hearing both sides, the Additional Chief Metropolitan Magistrate, Egmore, allowed the petition filed by the petitioner and discharged him from C.C.No.5271/2010.

7. Aggrieved against the order passed by the Additional Chief Metropolitan Magistrate, Egmore, Chennai, the respondent/ prosecution had filed revision petition before

the Principal Sessions Judge, Chennai and in turn, Sessions Judge had taken on file Crl.RC.No.46/2012 and made over the same to the IV Additional Sessions Judge, Chennai.

8. The IV Additional Sessions Judge, Chennai, after hearing both sides, allowed the revision petition and set aside the order passed by the Additional Chief Metropolitan Magistrate, Egmore, Chennai in Crl.MP.No.276/2011 dated 17.02.2012 and allowed the revision. Aggrieved against the said order in Crl.RC.No.46/2012 on the file of the IV Additional Sessions Judge dated 04.07.2016, the petitioner/A4 has preferred the present revision petition before this court.

9. The case of the prosecution is that A2 and A3 on behalf of A1 company along with the revision petitioner had entered into the criminal conspiracy among themselves and with foreign supplier and had made false declaration and used forged test analysis certificates counterfeit labels and imported the spurious and sub-standard drugs without a valid license and distributed the same as genuine drug declared that it was manufacutred by the registered manufacturer and thereby cheated the customs officials in importing the prohibited articles and also the public in general and thereby committed offences punishable under Sections 120-B r/w 420, 471, 482 IPC, 13(1) (a) (b) r/w. 9(B) (e), 10(A), (bb) (c) of Drugs and Cosmetic Act, 1940 and Section 132 and 135 of Customs Act, 1962.

10. Learned counsel for the petitioner would submit that the petitioner's role is limited and that he has acted only as a customs house agent on behalf of A2 and A3 and the petitioner had no personal knowledge about the manufacturer in China. The petitioner accused is not a technical person to know the formula for manufacturing the drugs etc., and he is a clearing agent, who handles several other goods, including drugs consignments. There is no proof regarding conspiracy of petitioner with the importers. There is no mis-declaration in the documents by petitioner. There is no evidence for forging of documents by the petitioner. The customs officials have to scrutinise the documents and if there is negligence on the part of the Customs Officials, they have to take the responsibility for such negligence. Though negligence is attributed to the customs officials they are not arrayed as accused. Investigation had failed to show how the manufacturer, supplier, distributor and packing unit at China, criminally conspired with the petitioner, manufacturer, packer, etc, are not arrayed as accused or cited as witnesses and there is no monetary benefit to the petitioner and nothing is recovered from the petitioner. He would further submit that the petitioner had carried out his responsibility only according to the law and the trial court had appreciated the above mentioned facts and correctly has come to the conclusion that there is no prima facie case

made out against the petitioner and discharged the petitioner from the criminal case.

11. Learned IV Additional Sessions Judge, Chennai, in his order dated 04.07.2016 in Crl.RC.No.46 of 2012 has not considered the facts and legal position of the case properly but has simply allowed the revision without giving any valid reason and set aside the order passed by the trial court. Further the provisions referred to by the learned IV Additional Sessions Judge, Chennai, and also the citations referred by the learned counsel for the petitioner shows that there is no quarrel with the propositions laid down in the referred cases but at the same time, the facts and circumstances of the cases are not applicable to the present case. The learned IV Additional Sessions Judge, Chennai while passing order in the revision has not considered these aspects.

12. Per contra, the learned Special Public Prosecutor would submit that the Customs House Agent (CHA) is bound by Regulation 13 of Customs House Agent's Licensing Regulation under the Customs Law and Procedure. The CHA is duty bound to advise the client to comply with the provisions of the Act and the regulations. If there is non-compliance of provisions by any client, CHA is required to bring it to the knowledge of the customs officials. Hence, he is a licensed and authorised person and not a postman. Though he may not know the formula for manufacturing of drug he is expected to extract his truthful details from the documents supplied by his clients when furnishing information to the Customs. He is an authorised and qualified clearing agent and cannot be called as a non-technical person. The consignment vide Bill of Entry No.228654 was detained by the Assistant Drugs Controller with an intention to escape the mandatory clearance by the Assistant Drugs Controller furnished a certificate falsely declaring contents as "Organic Chemical". This is inspite of the suffice "USP" to the imported substance in the Bill of Entry which clearly indicates it as a drug.

13. The customs officials have been dealt with departmentally for their lapse and it vindicates the stand that the CHA who has cleared goods for A-1 to A-3 on previous occasions has knowledge of the offence. Customs officials could not be prosecuted as A4 had written in the date entry form that the consignment is "Organic Chemical" and they have claimed defence of oversight for the consignment being a drug in the Bill of Entry. The finding of the trial court is perverse and fails to consider the fact that there is a prima facie case and also incriminating materials are available against the petitioner to proceed further and therefore, the IV Additional Sessions Judge while

dealing with the revision in Crl.RC.No.46/2012 has correctly set aside the order passed by the learned Additional Chief Metropolitan Magistrate, Egmore, Chennai vide order dated 17.02.2012 in Crl.MP.No.276/2011. The reason assigned by the learned IV Additional Sessions Judge is perfectly correct and there is no need to interfere with the said order.

14. Heard Both sides and perused the charge sheet submitted by the respondent/prosecution and also statement of witnesses recorded during the investigation and documents collected during the investigation and annexure with the chargesheet and the order passed by the trial Judge in Crl.MP.No.276/2011 dated 17.02.2012 and also the order passed by the IV Additional Sessions Judge in Crl.RC.No.46/2012 dated 04.07.2016 and also the grounds of revision raised in this Criminal Revision Petition and the rival submissions made by the counsel for the parties.

15. On perusal of the records, it is admitted by both parties that A1 to A3 had imported certain materials for which the revision petitioner had acted as Customs Housing Agent for the disputed period. According to the prosecution, the accused A1 to A3 conspired with the present petitioner had imported spurious drugs and declared the goods as "Organic Chemicals".

16. According to the petitioner, there is no evidence against the petitioner either with regard to conspiracy or with regard to other offences as alleged by the prosecution and the petitioner is only an intermediator between the customs officials and importers. The petitioner is not responsible for any criminal act done by A2 and A3 unless it is proved by the evidence. The petitioner had no knowledge about the manufacturers and suppliers address and he is not a technical person to know the formula of manufacturing drugs and the respondent/petitioner is acted as a postman and there is no mis-declaration by the petitioner to the Customs Officials and if there is any deviation, the Custom Officials have to take the responsibility for their own negligence.

17. As stated earlier, the petitioner himself admitted that he had acted as Customs Housing Agent during the disputed period. Therefore, he cannot say that he has no role in this case. The Customs Officials independently have to dealt with in accordance with law departmentally unless there is an allegation that the customs official also conspired either with this petitioner or with his client. The contention raised by the petitioner is not acceptable since there is no allegation that the Customs Officials also

conspired with this petitioner and his clients. Therefore, under these circumstances, the contention regarding non-impleading of Custom Officials as an accused in this case are not sustainable under law, at the best, if negligence as attributed against the customs officials established, they can be dealt with departmentally and not otherwise. There is no materials to implicate them as accused.

18. The main allegation against this petitioner is that A1 Company had imported 300 kgs of Cefataxime Sodium USP vide invoice No.HX9ZF12F097 dated 09.04.2009 through Chennai Seaports. While importing them, he had submitted the Bill of Entry No.228654 dated 02.06.2009 through this petitioner. Whereas the importer had submitted Manufacturer Certificate, Batch Release Certificate and Certificate of Analysis along with invoice and packing list claiming that the product was manufactured by the registered manufacturer M/s.Zhejiang Yongning Pharmaceuticals Factory, China.

19. During verification, the manufacturer disowned the project imported by A1 Company and the drug was found to be spurious and after the said consignment was detained by the authority, the A1 Company had imported Cefotaxime Sodium Sterile vide Bill of Entry No.244751 dated 23.06.2009. Further, the Company had imported the said drugs by Bill of Entry No.244751 dated 23.06.2009. A1 Company had placed the order for the said Cefotaxime Sodium Sterile Since it is not available with the registered manufacturers, A1 Company had amended letter of credit by deleting the manufacturers name and imported the same vide Bill of Entry No.886446 dated 23.07.2009. The investigation reveals that the petitioner had filed a declaration form along with the Bill of Entry by showing the product "Organic Chemical". The Commercial Invoice Packing list was issued by M/s. Zhejiang Chemicals Import and Export Corporation, China and Certificate of Analysis was issued by the purported manufacturer M/s. Wangchangtongtai Pharmaceutical (Zibo) Limited. Further, the records would disclose that A1 Company represented by A2 and A3 had been issued with import license for importing Roxithromycin EP/IP from the manufacturer M/s.Zhejiang Zhenyuan Pharmaceuticals Company Limited, China and other licence for importing Cefotaxime Sodium USP from the manufacturer M/s.Zhejiang Yongning Pharmaceuticals Factory, China. Further, the petitioner has processed papers for import from M/s. Zhejiang Yongning Pharmaceuticals Factory, China for which A1 did not obtain any license.

20. The petitioner cannot plead ignorance of the details of the goods because in the bill of entries, the substance imported was suffixed with the letter USP which is to refer that substance imported was drug. Duty of this

petitioner as Customs House Agent is bound to verify the name of the importer or exporter and to mention the same in every document. In this case, the petitioner had very well mentioned the name of the petitioner as mentioned above and failed to confirm whether the importer got license for consignment for importing to the said company having process to the Bill of Entry No.228654 dated 02.06.2009 as well as every consignment of A1 Company.

21. On careful perusal of the final report filed by the respondent and the statement recorded during the investigation and also documents collected would reveal that there is a prima facie case against this petitioner and there are incriminating materials against this petitioner to proceed further. But whereas the trial court as well as first appellate court have conducted mini trial except the fact that they have not examined the witnesses and discussed elaborately and passed the orders. On the other hand fact as to whether he is a qualified person to say about the materials and whether he has knowledge about the chemicals can be decided only after the trial and not at this stage.

22. One thing is clear that having gone in details of discussions and giving reason for allowing the discharge petition in CMP.No.276/2011 by the trial court and also further dismissal order of learned IV Additional Sessions Judge while considering the revision, it is relevant to mention that this court and Apex court time and again reiterated that at this stage of framing of charge, it is enough to see the final report and documents annexed with as to whether a prima facie case is made out and an incriminating material available to proceed against the accused and further the Hon'ble Apex Court has time and again has held that at the time of framing of charge roving enquiry need not be conducted and also the defence taken by the accused need not be looked into. At this stage, the Court has to see from the oral and documentary evidence collected during the investigation reveal as to whether any incriminating materials are available against the accused to proceed further.

23. Admittedly in this case, on reading of a final report and also oral and documentary evidence annexed with the final report, this court finds that there is a prima facie case against the accused and also there are incriminating materials against this petitioner/4th accused to proceed further. The order passed by the IV Additional Sessions Judge by setting aside the order passed in Crl.RC.No.46/2012 dated 04.07.2016 is perfectly correct and there is no need to interfere with the order passed by the learned IV Additional Sessions Judge.

In the result, this Criminal Revision Case is dismissed and the Order passed in Crl.RC.No.46/2012 by the learned IV Additional Sessions Judge dated 04.07.2016 is confirmed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

gv
To

1. The Principal Sessions Judge, Chennai.

2. The IV Additional Sessions Judge,
   Chennai

3. The Additional Chief Metropolitan
   Magistrate, Egmore, Chennai.

4. -do- Through the Chief Metropolitan Magistrate,
   Egmore, Chennai.

5. The Inspector of Police,
   CBI/EOW/ Chennai.

6. The Public Prosecutor, High Court, Madras.

7. The Section Officer, Criminal Section,
   High Court, Madras.

+ 1 cc to Mr.S. Marugappan, Advocate SR.52122

CRL.RC.No.1173 of 2016
and
CRL.MP.No.10402 of 2016

GJ(CO)
EU 3.08.17