

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

Criminal Petition No.2265 of 2015

Between:

Anil Kumar Aggarwal.

... Petitioner/Accused No.4

AND

The State of Andhra Pradesh,

Inspector of Police, Central Bureau of Investigation,

Visakhapatnam,

Rep. By its Public Prosecutor.

... Respondent

DATE OF JUDGMENT PRONOUNCED: **02.03.2018**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers
may be allowed to see the judgments? Yes / No
2. Whether the copies of judgment may be
marked to Law Reporters / Journals? Yes / No
3. Whether Their Lordship wish to
see the fair copy of the Judgment? Yes / No

U. DURGA PRASAD RAO, J

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... Respondent

! Counsel for Petitioner : Pillix Law Firm

**^ Counsel for Respondent : Sri K. Surender,
Special Public Prosecutor for CBI**

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> Head Note:

? Cases referred:

- 1) AIR 1992 SC 604
- 2) AIR 2010 SC 3624
- 3) AIR 2002 SC 3372 = 2002 CrI.L.J. 43143
- 4) AIR 2009 SC 2195
- 5) (2008) 9 SCC 677
- 6) (2009) 13 SCC 729

HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

CRIMINAL PETITION No.2265 of 2015

ORDER:

This petition is filed under Section 482 Cr.P.C by the petitioner/A4 seeking to quash the proceedings against him in C.C.No.29 of 2006 on the file of Special Judge for CBI cases, Visakhapatnam.

2) The Inspector of Police, CBI, SPE, Visakhapatnam filed charge sheet against A1 to A5 for the offences under Sections 120B, 420, 468, 471 IPC and under Section 13(2) r/w 13(1)(d)(ii) of Prevention of Corruption Act, 1988.

a) A1 to A3 are the officials of Customs Department. A4—Anil Kumar Aggarwal is the Managing Director and A5 is the Director of M/s.Kumar's Cotex Limited (M/s.KCL). A4 and A5 were engaged in manufacture and clearance of cotton yarn and cotton waste having their factory at Dokiparu in Guntur District.

b) A4—Company imported six numbers of autoconers (capital goods) during the year 1996 valuing Rs.5,91,84,990/- availing 100% Customs Duty Waiver facility as per Notification No.13/81-Customs. While so, on 05.02.2002 it made an application to the Development Commissioner, Visakhapatnam Export Processing Zone, Visakhapatnam seeking permission to destroy two autoconers out of six, stating that the said two autoconers were burnt due to short circuit and not serviceable. Accordingly, on 27.02.2002 the Development Commissioner accorded

permission for disposal of two autoconers subject to observance of customs formalities. Then, A4 requested the Deputy Commissioner, Central Excise, Guntur to pass orders for destruction, who in turn passed orders on 24.07.2002 permitting the petitioner/A4 to destruct two autoconers in the presence of Central Excise Officials.

c) When the matter stood thus, A1 to A3—Excise Officials entered into criminal conspiracy with A4 and in pursuance of the same they went to the premises of A4—Company on 25.07.2002 to supervise the destruction of two autoconers, but did not ensure destruction. A1 by abusing his position as a public servant sent compliance report to Deputy Commissioner as if two autoconers were destroyed by breaking into pieces in their presence; the scrap was transported through lorry bearing No.AP 7T 1436 and sold the same to M.Venkateswar Rao—scrap dealer for Rs.1,90,000/- and a sum of Rs.30,400/- was deposited in the bank towards Central Excise Duty. However, the investigation revealed, on 09.10.2003, A4 sold the said two autoconers to M/s.Sri Jayalakshimi spinning Mills limited, Chebrolu (M/s.SJSML) for of Rs.50 lakhs. In fact, the said two autoconers were found in working condition at M/s.SJSML by Superintendent, Preventive, Central Excise, Gu`ntur by evading tax hence they were seized. Therefore, the Central Excise Department issued show cause notice to petitioner/A4 demanding customs duty of Rs.52.61 lakhs. Accordingly charge sheet was filed.

Hence, the instant Criminal Petition for quashment.

3) Heard learned counsel for petitioner and learned Special Public Prosecutor for CBI.

4) Learned counsel for petitioner would challenge the proceedings in C.C.No.29 of 2006 on the main plank of argument that against the order passed by the Commissioner of Customs and Central Excise, Guntur petitioner's Company preferred an appeal—C/270-272/2007 before the Customs Excise and Service Tax Appellate Tribunal (CESTAT), Bangalore and final order was passed in order Nos. 445-447/2012 allowing the appeal in favour of petitioner on 13.06.2012 holding that machinery was dismantled under the supervision of the Central Excise Officers and cleared from the factory as scrap. As such, it should be considered as Domestic Tariff Area (DTA) clearance by the Export Oriented Unit (EOU) attracting Central Excise duty. It was not a clearance of the capital goods from the factory. Therefore, payment of Central Excise duty by the assessee at the time of clearance of the scrap to M/s.SJSML cannot be faulted. Added to it, there is no valid case to hold that there was suppression or wilful misstatement of facts, let alone fraud, with intent to evade payment of duty has been made out against the petitioner. Learned counsel argued that the said order of CESTAT remained unchallenged. In that view of the matter, the prosecution launched by CBI on the same facts and continuation of the criminal proceedings is nothing but abuse of process of law. Hence, the proceedings in C.C.No.29 of 2006 may be quashed.

5a) Opposing the petition, learned Special Public prosecutor for CBI would argue that A1 to A3 who are the officials of Central Excise Department, in collusion with A4 and A5 have created documents as if two autoconers have been destructed without there being any factual destruction. On the other hand, A4 and A5 have sold the said two autoconers to M/s.SJSML for Rs.50 lakhs on 09.10.2003 and those two autoconers were very much found in working condition with M/s.SJSML by Superintendent, Preventive, Central Excise, Guntur, hence they were seized. Since two autoconers were disposed of by A4 and A5 evading customs duty with the conveyance of A1 to A3, who are deputed to witness the physical destruction, which in fact was not done, the prosecution is very much maintainable in view of fraudulent acts committed by the accused.

b) Learned Special Public Prosecutor would staunchly further argue that the order of CESTAT dated 13.06.2012 being the order in civil proceedings is not binding in the criminal proceedings. He submitted that for another reason also the order passed by the CESTAT is not binding in the criminal proceedings. Before CESTAT the department argued that in September, 2004 the department conducted investigation and after seizing the goods in question from the premises of M/s.SJSML, they have issued a show cause notice to appellant and M/s.SJSML clearly stating that A4 and A5 committed fraud, wilful misstatement, suppression of facts and M/s.SJSML have purchased the two autoconers without payment of appropriate duty of customs. In spite of said contention, CESTAT held

as if the department has not disputed the machinery was dismantled under the supervision of Central Excise Range Officers and cleared from the factory as scrap. The allegation of the department that two autoconers were sold by A4 and A5 to M/s.SJSML was not clearly discussed. Therefore, the order of CESTAT is not binding in the criminal proceedings. He thus prayed to dismiss the petition.

6) The point for consideration is:

“Whether there are merits in this Criminal Petition to quash the proceedings in C.C.No.29 of 2006.”

7) **POINT:** The fulcrum of prosecution case is that A4 and A5 having obtained permission from the Deputy Commissioner, Central Excise, Guntur for destruction of two autoconers, indeed, did not do so, but they, with the conspiracy of A1 to A3, fabricated record of destruction in their premises and sold the two autoconers to M/s.SJSML for Rs.50 lakhs and this fact was exhumed when the two autoconers were found in working condition at M/s.SJSML by Superintendent, Preventive, Central Excise, Guntur and thus A4 and A5 evaded tax hence, the charges against all the accused.

8) The Honourable Apex Court in *State of Haryana and others vs. Ch. Bhajan Lal and others*¹ have laid down the following guidelines relating to exercise of inherent power under Section 482 Cr.P.C. to quash the proceedings to prevent abuse of process of Court. They are:

¹ AIR 1992 SC 604

1. *Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.*
 2. *Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*
 3. *Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*
 4. *Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.*
 5. *Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*
 6. *Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*
 7. *Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.*
- 9) When the material placed by the prosecution is tested on the anvil of the above guidelines, the said material if uncontroverted would certainly

shed *prima facie* case against the accused for the offences charged against them. It is pertinent to note here that prosecution claims seizure of two autoconers in working condition in the premises of M/s.SJSML against the contention of the accused that those two autoconers were destructed in the premises of A4—Company on 25.07.2002. If this fact is convincingly established by the prosecution in the trial, the accused will be liable for the offences charged against them. Therefore, as the matter stands, none of the guidelines extracted above in ***Bhajanlal*** (1 supra) would attract in this case to quash the proceedings.

10) Now, coming to the argument of learned counsel for petitioner regarding the order passed by CESTAT, I have gone through the said order dated 13.06.2012 in appeal Nos.C/270-272/2007. Those appeals are filed by A4 against the order passed by Commissioner of Customs and Central Excise, Guntur in his proceedings No.CEX-15/2006 (Commissioner) dated 14.12.2006.

a) A perusal of said order would show that in Para-29 he gave a clear finding thus:

“Para-29: xx xx xx.. From the above facts, it is evident that the entire operation of applying for destruction of autoconers and transferring the same to M/s.Sri Jayalakshimi Spinning Mills Limited M/s.Sri Jayalakshimi Spinning Mills Limited are able to make use of them with the technical adjustments of their own staff is a planned one. xx xx xx.... Though the permission for destruction accorded to them vide Deputy Commissioner, Central Excise, Guntur’s letter C.No.2/2002/DC/Steno dated 24.07.2002, if the destruction was completed, how the obsolete machinery still

available to them for clearance on 09.10.2003 i.e. for one year after permission is accorded. Thus the machinery was not destructed and the same were cleared on 09.10.2003.”

b) With the above and other findings, the learned Commissioner passed an order demanding Customs Duty of Rs.26,83,590/- from M/s.Kumar Cotex Limited, Dokiparru (A4) along with interest and penalty of Rs.26,83,590/-. In the said order the Commissioner also directed confiscation of two numbers of autoconers which were already under seizure from M/s. Sri Jayalakshimi Spinning Mills Limited. Further, he imposed penalty of Rs.25 lakhs on A4 and Rs.20 lakhs on M/s.Sri Jayalakshimi Spinning Mills Limited and Rs.20 lakhs on Sri Anil Kumar Agarwal and Abhishek Aggarwal. Against the aforesaid order appeals were preferred by A4 and others before CESTAT, Bangalore. The CESTAT in its order dated 13.06.2017 has set aside the order of the Commissioner as per its findings mentioned in Paras-6 and 7 which, in my view, are germane in this petition and hence extracted thus:

“Para-6 As it is not in dispute that the machinery was dismantled under the supervision of the Central Excise Range Officers and cleared from the factory as scrap, in our view, it should be considered to be a DTA clearance by the EOU attracting Central Excise duty. It was not the clearance of the capital goods as such from the factory. Therefore the payment of Central Excise Duty by the assessee at the time of clearance of the scrap to M/s.SJSML cannot be faulted. The Department has no case that there can be no penalty on the assessee or co-appellants under the Customs Act in relation to clearance of goods on payment of excise duty under the provisions of the Central Excise Act.

Para-7 Apart from the above, we have also found force in the plea of limitation raised by the assessee. The entire demand is beyond the normal period of limitation. No valid case of suppression or wilful misstatement of facts, let alone fraud, with intend to evade payment of duty has been made out against the assessee by the Revenue. As a matter of fact, no such finding has been recorded in the impugned order. Therefore, the entire demand is also barred by limitation.”

11) The petitioner’s contention is that since CESTAT has held that machinery was dismantled and payment of Central Excise Duty by the assessee as scrap and not as a capital good cannot be faulted, the criminal prosecution on the same accusation that the machinery was not destructed and the accused have fabricated documents in that regard, is unsustainable.

12) I am afraid this argument cannot be countenanced for the following reasons.

a) Firstly, in this case the department has initiated simultaneous civil and criminal proceedings—civil proceedings for recovery of tax evaded with interest and penalty before the Commissioner and criminal proceedings for punishing the accused for their conspiratorial acts of cheating and falsification of records etc.

b) It is a well known principle that when the same cause of action give rise to civil and criminal proceedings, both can be initiated simultaneously. The emancipation of the accused in the corresponding civil proceedings will have no binding effect on the criminal proceedings and vice-versa because the civil and criminal proceedings operate on different spheres.

The civil proceedings proceed on the principle of preponderance of probabilities whereas the criminal proceedings take the course of proof to the hilt.

13) In *Kishan Singh (D) through LR. vs. Gurpal Singh and others*², the question that came up for consideration before the Apex Court was whether criminal proceedings can be quashed by the High Court relying upon the finding of civil court on an issue involved in criminal proceedings in respect of same subject matter. The respondents/accused sought for quashment of FIR on the ground that the appellant after losing the suit for specific performance, lodged a false FIR stating that the signature of Kishori Lal was forged on agreement to sell. The High Court quashed the FIR on the ground that the finding in the civil suit to the effect that agreement to sell was not forged or fabricated is binding in the criminal proceedings. The Apex Court after verifying the previous judgments on the issue, held:

“Para-19: Thus, in view of the above, the law on the issue stands crystallized to the effect that the findings of fact recorded by the Civil Court do not have any bearing so far as the criminal case is concerned and vice-versa. Standard of proof is different in civil and criminal cases. In civil cases it is preponderance of probabilities while in criminal cases it is proof beyond reasonable doubt. There is neither any statutory nor any legal principle that findings recorded by the court either in civil or criminal proceedings shall be binding between the same parties while dealing with the same subject matter and both the cases have to be decided

² AIR 2010 SC 3624

on the basis of the evidence adduced therein. However, there may be cases where the provisions of Sections 41 to 43 of the Indian Evidence Act, 1872 dealing with the relevance of previous Judgments in subsequent cases may be taken into consideration.”

However, in view of the facts peculiar to that case, the Apex Court approved the decision of the High Court.

14) The Apex Court in ***K.G.Premshanker vs. Inspector of Police and another***³ happened to consider the effect of a previous judgment on the subsequent proceedings with reference to Sections 40 to 43 of Evidence Act. The Apex Court observed thus:

“Para-30: What emerges from the aforesaid discussion is -- (1) the previous judgment which is final can be relied upon as provided under Section 40 to 43 of the Evidence Act; (2) in civil suits between the same parties, principle of res-judicata may apply; (3) in a criminal case, Section 300 Cr.P.C. makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil Court would be relevant if conditions of any of the Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein.

Para-31: *Further, the judgment, order or decree passed in a previous civil proceedings, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act*

³ AIR 2002 SC 3372 = 2002 Cri.L.J. 43143

then in each case, Court has to decide to what extent it is binding or conclusive with regard to the matter(s) decided therein.

Take for illustration, in a case of alleged trespass by 'A' on 'B's property, 'B' filed a suit for declaration of its title and to recover possession from 'A' and suit is decreed. Thereafter, in a criminal prosecution by 'B' against 'A' for trespass, judgment passed between the parties in civil proceedings would be relevant and Court may hold that it conclusively establishes the title as well as possession of 'B' over the property. In such case, 'A' may be convicted for trespass. The illustration to Section 42 which is quoted above makes the position clear. Hence, in each and every case, first question which would require consideration is--whether judgment, order or decree is relevant?, if relevant -- its effect. It may be relevant for a limited purpose. Such as, motive or as a fact in issue. This would depend upon facts of each case.

15) In ***Smt. Rumi Dhar vs. State of West Bengal and another***⁴, the Apex Court was considering the application of provision of Section 320 Cr.P.C. The factual background was that the appellant and her husband (A4) along with others including the officers of Oriental Bank of Commerce was facing prosecution for the offences under Sections 120B, 420, 468, 461 IPC and also Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988. The bank for realization of the amount, initiated parallel civil proceedings before the Debt Recovery Tribunal wherein the appellant and bank entered into settlement, pursuant to which, a sum of Rs.25.51 lakhs was paid. Thereafter, the appellant filed a petition under

⁴ AIR 2009 SC 2195

Section 320 Cr.P.C. for discharge submitting that in view of the settlement arrived at by the parties and payment of the amount, no criminal proceedings can be continued. The CBI opposed the petition contending that mere payment of the loan to the bank would not exonerate the appellant from criminal proceedings. The Special Court dismissed the application of the appellant. The matter was carried in revision to the High court and it was dismissed. Then, the appellant went to the Apex Court, which observed thus:

“Para-18: It is now a well settled principle of law that in a given case, a civil proceeding and a criminal proceeding can proceed simultaneously. Bank is entitled to recover the amount of loan given to the debtor. If in connection with obtaining the said loan, criminal offences have been committed by the persons accused thereof including the officers of the bank, criminal proceedings would also indisputably be maintainable. When a settlement is arrived at by and between the creditor and the debtor, the offence committed as such does not come to an end. The judgment of a tribunal in a civil proceeding and that too when it is rendered on the basis of settlement entered into by and between the parties, would not be of much relevance in a criminal proceeding having regard to the provisions contained in Section 43 of the Indian Evidence Act.

Para-19: The judgment in the civil proceedings will be admissible in evidence only for a limited purpose. It is not a case where the parties have entered into a compromise in relation to the criminal charges. In fact, the offence alleged against the accused being an offence against the society and the allegations contained in the first information report having been investigated by the Central Bureau of Investigation, the bank could not have entered into any

settlement at all. The CBI has not filed any application for withdrawal of the case. Not only a charge sheet has been filed, charges have also been framed. At the stage of framing charge, the appellant filed an application for discharge. One of the main accused is the husband of the appellant. The complicity of the accused persons was, thus, required to be taken into consideration for the purpose of determining the application for discharge upon taking a realistic view of the matter. While considering an application for discharge filed in terms of Section 239 of the Code, it was for the learned Judge to go into the details of the allegations made against each of the accused persons so as to form an opinion as to whether any case at all has been made out or not as a strong suspicion in regard thereto shall subserve the requirements of law.

It should be noted, attention of the Apex Court was drawn to the decision in ***Nikhil Merchant vs. Central Bureau of Investigation and another***⁵ wherein the Apex Court, in similar case considering that the dispute between the parties had overtones of a civil dispute with certain criminal facets and also considering the compromise arrived at between the Company and the Bank and observing that continuation of the criminal proceedings in view of compromise arrived at by the parties would be a futile exercise, allowed to quash the proceedings. However, in ***Rumi Dhar***'s case (4 supra) the Apex Court did not incline to follow the said decision and observed thus:

“Para-23: The jurisdiction of the Court under Article 142 of the Constitution of India is not in dispute. Exercise of such power would, however, depend on the facts and circumstance

⁵ (2008) 9 SCC 677

of each case. The High Court, in exercise of its jurisdiction under Section 482 of the Code of Criminal procedure, and this Court, in terms of Article 142 of the Constitution of India, would not direct quashing of a case involving crime against the society particularly when both the learned Special Judge as also the High Court have found that a prima facie case has been made out against the appellant herein for framing charge.”

16) In ***Sh. Vishnu Dutt Sharma vs. Smt. Daya Sapra***⁶ observing that acquittal of the accused in a criminal prosecution under Section 138 of Negotiable Instruments Act would not operate as *res judicata* in the civil suit filed by the plaintiff for recovery of money, the Apex Court held thus:

“Para-11: There cannot be any doubt or dispute that a creditor can maintain a civil and criminal proceeding at the same time. Both the proceeding, thus, can run parallelly. The fact required to be proved for obtaining a decree in the civil suit and a judgment of conviction in the criminal proceedings may be overlapping but the standard of proof in a criminal case vis-a-vis a civil suit, indisputably is different. Whereas in a criminal case the prosecution is bound to prove the commission of the offence on the part of the accused beyond any reasonable doubt; in a civil suit ‘preponderance of probability’ would serve the purpose for obtaining a decree.

17) So, the above precedential jurisprudence would give a clear understanding that civil and criminal proceedings can be initiated simultaneously and judgment in one proceeding will not have impact on the other. In the case on hand also, merely because CESTAT held that A4 and

⁶ (2009) 13 SCC 729

A5 need not pay the tax as claimed before the Commissioner, Customs and Central Excise, Guntur and approved by him, the criminal proceedings cannot be quashed. The judgment in civil case will not be relevant under Sections 40, 41, 42 or 43 of the Evidence Act. At best, the said judgment will be relevant to consider the quantum of punishment to be imposed to the accused in case the criminal proceedings culminate in conviction.

18) Secondly, as extracted supra, in para-6 of its order, the CESTAT observed as if it was not in dispute that machinery was dismantled under the supervision of the Central Excise Range Officers and cleared from the factory as scrap. When the foundation for case of the Department was that two autoconers were not destructed despite obtaining permission, it is quite astounding as to how the CESTAT observed that the destruction of two autoconers was not in dispute. Therefore, though the order of the CESTAT attained finality on civil side, still criminal proceedings against fraud and cheating can be independently established by the prosecution.

19) Thus, on a conspectus, I find no merits in the case of petitioners. Accordingly, the Criminal Petition is dismissed.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 02.03.2018
Murthy