**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-28998 of 2014
Date of decision:-18.9.2017

Rajeev Kumar and another

...Petitioners

Versus

M.K. Sondhi

...Respondent

CORAM : HON'BLE MR. JUSTICE H.S. MADAAN

Present : Mr.S.S. Narula, Advocate
for the petitioners.

Mr.Amit Goyal, Senior Standing counsel
for CBEC - respondent.

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H.S. MADAAN, J.

Petitioners Rajeev Kumar son of Sant Parkash, Proprietor of M/s Hindustan Products, Ugrakheri Mor, Sanoli, Road, Panipat, Haryana and M/s Hindustan Products, through its Proprietor Rajeev Kumar above-said, have brought the instant petition under Section 482 Cr.P.C. against Sh.M.K. Sondhi, Assistant Commissioner, Central Excise, Panipat, Haryana seeking quashing of complaint No.99 of 2005 dated 25.2.2005 titled *M.K.Sondhi Versus Rajeev Kumar and another*, under Sections 9, 9AA of the Central Excise and Salt Act, 1944 (hereinafter referred to as the Act) along with all subsequent proceedings arising therefrom including order dated 25.2.2005 of Chief Judicial Magistrate, Panipat summoning the petitioners for offence under Section 9 of the Act, order dated 29.3.2014 framing charge as well as the charge-sheet under Section 9(1) of the Act besides order dated 7.8.2014 of Additional Sessions Judge, Panipat dismissing the revision petition filed against the framing of charge.

Inter alia, in the petition, it is contended that the petitioners are engaged in the work of doubling cotton yarn since the year 1992; that a fire broke out in the factory of petitioners on 13.5.1997 for which insurance claim was granted to them; that the Surveyor at that point of time mentioned in his report that machines installed at the factory were only for doubling/manufacturing of cotton yarn and not that of chenille yarn; that the petitioners thereafter purchased new machines in January 1999, which were primarily for doubling cotton yarn but could be later on upgraded for spinning of chenille yarn also; that on 16.02.1999 a raid was conducted by the officials of the Central Excise Department at the premises of petitioners as a result of which 1350 kg of chenille yarn of the value of Rs.1,11,150/- was found lying there; that it was alleged that 65 machines were found installed in the premises of the petitioners for spinning of chenille yarn, proceedings were taken up against petitioner No.1 on the presumption that he was manufacturing chenille yarn right from the year 1995 and chenille yarn worth Rs.6,65,95,695/- had been cleared, upon which Central Excise duty of Rs.99,89,349/- was payable; that interest on the said duty was also demanded while imposing penalty of the same amount vide order of the Commissioner Central Excise dated 28.9.2001; that immediately after adjudication proceedings on the basis of order dated 28.9.2001, The Chief Commissioner Central Excise gave permission to the Commissioner Central Excise to launch prosecution against the petitioners; that the said demand along with penalty was challenged by the petitioners before the Customs, Excise and Service Tax Appellate Tribunal, where the order of the Commissioner Central Excise was set aside on 6.11.2003 holding that the clearance allegedly made by the petitioners could not be presumed and adjudicating authority ought to re-quantify the demand on the basis of actual manufacture and clearance of chenille yarn; that although the order of demand and penalty had been set aside by the Tribunal vide order dated 6.11.2003, the Assistant Commissioner Central Excise, Panipat filed a complaint under Sections 9 and 9AA of the Act on 25.2.2005, which was numbered as complaint No.99 of 2005; that after filing of the complaint, the accused were summoned by Chief Judicial Magistrate vide order dated 25.2.2005 for the offences under Sections 9, 9AA of the Act, thereafter, the complainant led pre-charge evidence and on the basis thereof, charge for offence under Section 9(1) of Central Excise Act was framed against the petitioners vide order dated 29.3.2014; that the petitioners challenged that order by way of filing of a revision petition, however, the said revision petition was dismissed by learned Additional Sessions Judge, Panipat vide order dated 7.8.2014; that the charge framed against the petitioners was upheld.

The petitioners have challenged their prosecution on various grounds which are as under:

(a) that once order of Commissioner Central Excise dated 28.7.2001 was set aside in appeal by Appellate Tribunal vide order dated 6.11.2003, the complaint which was based primarily on the order of demand dated

28.7.2001 could not be sustained since the genesis of the complaint had disappeared;

(b) that once adjudication of demand/excise duty itself stood abolished by order of Appellate Tribunal and even the demand was not finalized, the complaint could not be allowed to continue, the operative part of the order reads as under:

"10. Regarding quantification we find that the appellants produced the evidence on record and the Revenue also made some enquiries from their customers to show that they were also trading in the cotton yarn which is not dutiable. The demand was quantified taking into consideration all the clearance made by the appellants as chenille yarn which according to our opinion is not sustainable. The Revenue duty bound to raise the demand in respect of chenille yarn manufactured and cleared by the appellants without payment of duty. As the appellants were also trading in the cotton yarn which is exempted, therefore all the clearance made by the appellants shall not be presumed to be in respect of chenille yarn manufactured by them. This aspect requires reconsideration. Therefore, the impugned order is set aside and the matter is remanded to the adjudicating authority for requantification of the demand on the basis of chenille yarn manufactured and cleared by the appellants during the relevant period. This appeal is disposed of by way of remand."

(c) that in case the demand based on alleged non-payment of central excise duty is adjudicated at less than Rs.25 lacs, the complaint by itself would not be maintainable which is is duly set out in the circular of the Central Excise Board, circulated vide memo No.FNo.208/31/97/CX.6 dated 12.12.1997;

(d) that after the remand, proceedings were taken up by Central Excise Department again, evidence was recorded and collected by Superintendent Central Excise, the petitioners had placed on record bills of machines for manufacturing chenille yarn which were of January, 1999. In addition to that various documents and affidavits were placed on record which revealed that from the year 1.4.1996 to 31.12.1998 only cotton yarn was manufactured and supplied by the petitioners whereas it was not so regarding the chenille yarn. Various bills and reports of the Insurance Surveyor pertaining to the fire that took in the factory of the petitioners on 13.5.1997 were placed on record. The machinery for manufacturing of chenille yarn was acquired by the petitioners only in January, 1999, in that way chenille yarn was manufactured from January, 1999 to 16.2.1999. The total sale/clearance amount being Rs.30,45,572/- upon which excise duty of Rs.4,56,836/- was payable;

(e) that the Courts below have completely failed to appreciate the fact that in absence of quantification of the excise duty alleged to have been evaded/not paid, prosecution could not be launched and the complaint is not maintainable for the reason that matter is still pending before Commissioner for adjudication, therefore, prosecution launched can continue to co-exist with the adjudication proceedings, although civil and criminal proceedings can continue to co-exists but prosecution launched on the basis of a particular order which is non-existent, cannot be allowed to continue;

(f) that the Courts below have further failed to notice that even the second adjudication done by the Commissioner Central Excise on 7.10.2004 stands nullified vide order of Appellate Tribunal dated 30.4.2013. The matter is pending before the Commissioner for adjudication;

(g) that the Courts below have failed to appreciate the legal position that sanction for launching prosecution is itself not a valid order for the reason that order of the Commissioner dated 28.7.2001 based upon which the sanction had been granted is no longer in existence; and

(h) that criminal proceedings against the petitioners cannot be continued till proceedings pending before the Appellate Court are adjudicated.

In the end, the petitioners prayed that their petition be accepted.

When the petition came up for hearing, notice thereof was issued to the respondent, who put in appearance through counsel and opposed the petition.

I have heard learned counsel for the parties besides going through the record.

Learned counsel for the petitioners has reiterated the contentions raised in the petition by way of advancing arguments. He has referred to various authorities, first being ***Richman Silks Ltd. Versus Asstt. Commr.(Legal), Cus. & C. Ex., Hyderabad, 2005(182) ELT 318*** by High Court of Andhra Pradesh, wherein it was observed that when the adjudication order set aside by the Appellate Authority and same is remanded to pass fresh order, the prosecution filed and pending on the basis of such adjudication order is not maintainable, though the customs and central excise authorities are free to file a fresh prosecution depending upon the order of adjudication, subsequently to be passed by application of mind. He has referred to a few other authorities on this point i.e. ***Sanghvi Electronics Pvt.Ltd. Versus State of Maharashtra, 2010(254) ELT206(Bombay)***, ***Lakme Limited Versus State of Gujarat, 2001(132) ELT 20(Guj.)***, ***Radhesham Kejriwal Versus State of West bengal and another, 2011 AIR(SCW) 1479*** by Hon'ble Supreme Court in that regard.

On the other hand, learned counsel appearing for the respondent has countered such contentions/arguments put forward by learned counsel for the petitioners contending that the Tribunal has not set aside the order of Commissioner but had rather remanded the matter to requantify the demand. The Commissioner by second adjudication has upheld demand of Rs.99.89 lacs though the Appellate Tribunal had sent the matter back to Commissioner again, therefore, there is no reason to quash the complaint and the proceedings passed thereon. He has further contended that the criminal prosecution and adjudication proceedings are separate which can proceed simultaneously and further decision in adjudication proceedings is not necessary before initiating criminal prosecution, rather those two are independent in nature to each other. Furthermore, the finding given in the adjudication proceedings is not binding in criminal prosecution. Therefore, there is no ground to quash the proceedings. In support of his contentions, learned counsel for the respondent has referred to citation ***M/s Henna Export Corporation Versus Rakesh Mathur, 1994(3) R.C.R.(Criminal) 605*** by a Co-ordinate Bench of this Court, wherein the contention that no prosecution be lodged when matter with regard to imposition of penalty was pending before the Tribunal under Central Excise and Salt Act, 1944 was repelled for the reason that under Excise Act not only penalty can be imposed, but prosecution can also be launched and there was no ground to quash criminal proceedings under Section 482 Cr.P.C. He has further pressed into service ***State of Rajasthan Versus Fatehkaran Mehdu, 2017(2) R.C.R.(Criminal) 1*** by Hon'ble Supreme Court where principles of quashing of charge-sheet is culled out in ***Amit Kapoor and Ramesh Chander and another, 2012(4) R.C.R.(Criminal)377*** were reiterated observing that:

1. It is not only difficult but is inherently impossible to state with precision such principles.
2. The power to quash charge sheet be exercised in the

rarest of rate cases.

3. Court may interfere if the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion.
4. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not a the stage of framing of charge or quashing of charge.
5. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather then its quashing at that initial stage.

In that very judgment, it has been observed as under:

The Court in para 27 has recorded its conclusion and laid down principles to be considered for exercise of jurisdiction under Section 397 particularly in context of quashing of charge framed under Section 228 Cr. P. C. Para 27, 27(1), (2), (3), (9), (13) are extracted as follows:

> "27. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:
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> 27.1) Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The

> power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.
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> 27.2) The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.
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> 27.3) The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.
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> 27.9) Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.
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> 27.13) Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie."

After hearing learned counsel for the parties and going through the authorities referred to by them, I am of the considered view that there is no ground to accept the petition and quash the complaint besides ancillary proceedings. As per the authorities pressed into service by learned counsel for the petitioners, the adjudication proceedings had been set aside/dropped, whereas it is not so in the instant case rather the case has been remanded by the Tribunal to Commissioner, Central Excise to requantify the demand, that means the point out difference is the amount of penalty which is to be imposed and not that no penalty is to be imposed for non-contravention of provisions of the Excise Act in question. The prosecution has been launched against the accused for committing an offences under Sections 9 and 9AA of the Act for the reason that chenille yarn was found in the factory premises of the accused without any record being maintained in that regard, rather it was wrongly described as cotton yarn. The complaint is based upon such allegations. When charge was framed against the accused by Chief Judicial Magistrate, Panipat, these very contentions had been raised there but were rejected by learned Chief Judicial Magistrate and accused was served with charge-sheet. They had filed a representation against the order framing charge but again were unsuccessful as their revision petition was dismissed by learned Additional Sessions Judge vide order dated 7.8.2014 giving detailed reasoning citing case law and observing that adjudication proceedings and criminal proceedings are independent and can go on simultaneously and finding in adjudication proceedings is not binding on criminal proceedings. It has been taken into note that demand of duty has been upheld by the Tribunal and has not been set aside. The only question to be determined is the amount which is to be charged in that regard. The case has been remanded to Commissioner for re-quantification of the demand on the basis of chenille yarn manufactured and cleared by the firm during the relevant period. The specific plea in that regard has been taken in the reply filed by the respondent and this very position comes out to be there from the record. The order passed by the Commissioner is a relevant piece of evidence to support the contentions in the complaint but besides that there is other evidence also both oral as well as documentary as it comes out from the perusal of the complaint. Therefore, no ground is made out to accept the petition and to quash the complaint and subsequent ancillary proceedings.

Findings no merits in the petition, the same stands dismissed.

Copy of the order be sent to the trial Court for information and necessary action.

(H.S.MADAAN)
JUDGE

18.9.2017
Brij

Whether reasoned/speaking : Yes/No

Whether reportable : Yes/No