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

+ LPA 91/2017 & CM Nos.4374, 4376/2017

SUNNY KAKKAR

..... Appellant

Through: Dr.Ashutosh, Adv.

Versus

DRI

..... Respondent

Through: Mr.Satish Aggarwala with Mr.Amish
Aggarwala, Adv.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

ORDER

15.03.2017

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1. This appeal is preferred against the order of the learned Single Judge dated 18.11.2016 in CrI.M.C.No.4316/2016.
2. In the first instance, we have heard the learned counsel for both the parties on the issue of maintainability of this appeal under Clause 10 of the Letter Patent.
3. The learned counsel appearing for the respondent/DRI placed reliance upon a decision of the Full Bench of this Court in ***C.S. Agarwal vs. State & Ors.*****(2011) 125 DRJ 241 (Del.) FB** to substantiate his contention that no appeal can be maintained under Clause 10 of Letters Patent against an order passed by the learned Single Judge in exercise of criminal jurisdiction. It is pointed out by the learned counsel that CrI.M.C. No.4316/2016 has been filed

under Section 482 of Cr.P.C. assailing an order passed by the Chief Metropolitan Magistrate, Patiala House Court.

4. However, it is vehemently contended by the learned counsel for the appellant that as the learned Chief Metropolitan Magistrate passed the order dated 31.08.2016 in exercise of civil jurisdiction, the objection raised by the respondents as to the maintainability of the appeal is not tenable. While distinguishing the decision of the Full Bench in *C.S. Agarwal vs. State (supra)*, the learned counsel has relied upon a decision of the Division Bench in *Harvinder Singh vs. Union of India & Ors.* **55 (1994) DLJ 187; 1994 (29) DRJ 535** in support of his submission that the Letters Patent Appeal is maintainable.

5. A perusal of the material available on record shows that the vehicle belonging to the appellant herein, allegedly carrying smuggled gold, was seized by the respondent/Directorate of Revenue Intelligence (DRI) on 07.12.2015 under the provisions of the Customs Act, 1962. Pending the confiscation proceedings under Section 115 of the Customs Act, 1962, the appellant filed an application in the court of Chief Metropolitan Magistrate, Patiala House Courts for release of the vehicle and having heard the same, the learned Chief Metropolitan Magistrate passed the order dated 31.08.2016 directing release of the vehicle in question subject to certain terms and conditions. The said order has been challenged by DRI in this Court by filing CrI.M.C.No.4316/2016 under Section 482 of Cr.P.C. and by order dated 18.11.2016, the order of the learned Chief Metropolitan Magistrate dated 31.08.2016 has been stayed. The appellant filed CrI.M.A. 20232/2016 for vacating the order dated 18.11.2016.

However, the learned Single Judge by order dated 23.12.2016 adjourned the said Miscellaneous Application to 25.05.2017.

6. Aggrieved by the same, the present appeal under Clause 10 of the Letters Patent has been filed.

7. In *Harvinder Singh vs. Union of India (supra)*, the appellant's writ petition seeking his release from detention under Section 3(1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPSA) was dismissed by the learned Single Judge. In the Letters Patent Appeal preferred by the writ petitioner against the dismissal of the writ petition a preliminary objection was raised by the respondent as to the maintainability of the appeal on the ground that the appeal arises out of an order made in exercise of criminal jurisdiction. Overruling the said objection, the Division Bench held:

"12. We are also of the view that, only because for the sake of convenience, such a writ petition filed under Article 226 of the constitution of India is identified by the nomenclature of "Criminal Writ", it cannot be considered as a proceeding under the Criminal jurisdiction. Article 226 itself refers to several writs which could be issued by the High Court. It creates a constitutional jurisdiction, which is entirely original; in ordinary parlance, it can be referred as a Special Jurisdiction; it cannot be classified as a Criminal jurisdiction, at all, only because, a person in detention can invoke it for his release. In fact, the right sought to be projected and enforced by the petitioner, is a fundamental right and his case is that his fundamental right is violated.

13. A detention under COFEPSA is not a detention consequent on any finding of guilt; it is not penal at all. Detention order is made on the basis of "suspicion" based on relevant materials; the detention order is purely preventive, to prevent the detenu from

indulging in certain activities for a specified period. We over rule the petitioner's objection."

8. Drawing analogy from the above analysis, the learned counsel for the appellant would contend that the seizure of the vehicle under the provisions of the Customs Act, 1962 on mere suspicion that the same is liable to confiscation under the said Act cannot be considered as a proceeding under the criminal jurisdiction and consequently, the order under appeal passed by the learned Single Judge cannot be considered as an order passed in exercise of criminal jurisdiction.

9. Similar contention made on behalf of the appellants in *C.S. Agarwal vs. State & Ors. (supra)* was not accepted by the Full Bench of this Court. Placing reliance upon the decision of the Constitution Bench of the Supreme Court in *S.A.L. Narayan Row and Anr. vs. Ishwar Lal Bhagwan Das and Anr.* **AIR 1965 SC 1818**, wherein it was observed that the nature of the proceedings whether civil or criminal would depend upon the nature of the right violated and the nature of relief sought in the said petition, the Full Bench held:

"20. For this reason, we cannot agree with the extreme position taken by the appellants that the exercise of powers under Article 226 of the Constitution would never tantamount to exercising criminal jurisdiction, irrespective of the nature of proceedings. We, further, are of the opinion that if such a petition relates to criminal proceedings while dealing with this petition under Article 226 of the Constitution, the Court would be exercising "criminal jurisdiction". In this context, it would be relevant to refer to the judgment of the Supreme Court in *S.A.L. Narayan Row And Anr. vs Ishwarlal Bhagwandas and Anr.* [AIR 1965 SC 1818]. In that case, proceedings were initiated under the Income Tax Act, 1922. At the conclusion of proceedings before the High Court under Article 226, a certificate for fitness was sought under Article 131 (1)(c) read

with Article 132(1) of the Constitution. The question before the Apex Court was as to whether the proceedings before the High Court under Article 226 are “civil proceedings”. The Constitution Bench opined that whether the proceedings are civil or not depends upon the nature of the right violated and the appropriate relief which may be claimed and not upon the nature of the Tribunal which is invested with authority to grant relief. In the process, following pertinent observations were made which are apposite in our context:

“A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property.”

The Court was, thus, categorical that even in a petition under Article 226 of the Constitution when the High Court is exercising extraordinary jurisdiction, the nature of proceedings, whether civil or criminal, would depend upon the nature of right violated and the nature of relief sought in the said petition."

10. Referring to the Division Bench judgment in *Harvinder Singh vs. Union of India (supra)*, it was made clear by the Full Bench in *C.S. Agarwal vs. State (supra)* that the said decision which dealt with habeas corpus petition is of no assistance to decide the controversy since while dealing with such a petition, the Court is not exercising criminal jurisdiction as no criminal proceedings are pending. It was observed in that context:

"29.....In fact, the order of preventive detention is made without any trial under the criminal law. Likewise, when a person is convicted and sentenced after the conclusion of criminal trial and such an order of conviction has attained finality and he files writ petition under Article 226 of the Constitution challenging the orders of the Government refusing to grant parole while dealing with such a petition, the Single Judge is not exercising criminal jurisdiction, as no criminal proceedings are pending."

11. Thus the Full Bench in ***C.S. Agarwal (supra)*** concluded that the test is whether criminal proceedings are pending or not and the petition under Article 226 of the Constitution is preferred concerning those criminal proceedings which could result in conviction and order or sentence.

12. In the light of the law laid by the Full Bench in ***C.S. Agarwal vs. State (supra)*** following the Constitution Bench of the Supreme Court in ***S.A.L. Narayan Row and Anr. vs. Ishwar Lal Bhagwan Das and Anr. (supra)***, we have no manner of doubt to conclude that the order under appeal passed by the learned Single Judge was made in the exercise of criminal jurisdiction. In fact, the appellant himself invoked the criminal law proceedings and the entire matter was looked into from the criminal law perspective.

13. It may also be added that unlike ***Harvinder Singh vs. Union of India (surpa)*** and ***C.S. Agarwal vs. State (supra)*** which arose out of the orders passed by the learned Single Judge in exercise of the writ jurisdiction under Article 226 of the Constitution of India, the present case arises out of the proceedings in a Criminal Miscellaneous Case pending before the learned Single Judge under Section 482 of Cr.P.C. Therefore, the question as to whether the jurisdiction exercised by the learned Single Judge is to be classified as criminal jurisdiction or not does not arise at all.

14. For the aforesaid reasons, we hold that the present appeal under Clause 10 of the Letters Patent is not maintainable.

15. Accordingly, without expressing any opinion on merits of the case, the appeal is dismissed as not maintainable.

CHIEF JUSTICE

SANGITA DHINGRA SEHGAL, J

MARCH 15, 2017/pmc