

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

% Reserved on: 10th January, 2017
Decided on: 17th January, 2017

+ **CRL.M.C. 1004/2010**

DEPARTMENT OF CUSTOMS

..... Petitioner

Represented by: **Mr. Satish Aggarwala with Mr.
Anish Aggarwala, Advs.**

versus

ARVIND KUMAR

..... Respondent

Represented by: **Dr. Ashutosh, Adv.**

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Aggrieved by two orders dated 8th December, 2009 and 21st December, 2009, the petitioner has filed the present petition under Section 482 read with Section 483 Cr.P.C. The grievance of the petitioner is two folds, firstly unwarranted remarks against the counsel appearing on behalf of the petitioner in the two orders and secondly, dropping the proceedings against the respondent on his application under Section 245(2) Cr.P.C.

2. Brief factual matrix of the case is that on 1st September, 1997 officers of the Customs Preventive, New Delhi intercepted one Mahender Goyal at the exit gate of domestic airport hall of Delhi Airport on his arrival from Kathmandu via Varanasi. His luggage was opened and examined in the presence of witnesses and it was found to contain 131 pieces of mobile phones (Sony and Siemens), 260 pieces of Chargers and adapters, 400 pieces of 8 M.B. RAM, 100 pieces of MPO cooler with leads, all of foreign origin and empty card board cartons of mobile phones bearing marking as Nokia and Siemens. The above goods valued at ₹1,05,20,000/- were seized since Mahender Goyal had not produced any evidence of legal possession/import

of the same. In his statement dated 1st September, 1997 Mahender Goyal admitted that he started carrying mobile phones and computer parts from Kathmandu to Delhi for the last one month on the directions of Vijay Saxena and that Vijay Saxena gave him 3 pieces of baggage to carry to Delhi; that he was to deliver the same to one Tony who had a shop by the name M/s Gift Palace in the Municipal Market, Karol Bagh. On 2nd September, 1997, he further stated that on reaching Customs arrival hall in Varanasi from Kathmandu, he gave the Customs clearance card (portion of the disembarkation card) to Arvind Kumar, the respondent herein who stamped the same; he paid ₹30,000/- to him for customs clearance and had not obtained any receipt for it. Enquiries from the office of the Air Customs, Varanasi showed that the respondent was on duty as Air Customs Officer on 1st September, 1997 and had also attended to the passengers on flight IC-751 by which Mahender Goyal had travelled.

3. In his statement dated 18th February, 1998, the respondent stated that on 1st September, 1997, he was allotted preventive duty for attending departure and arrival of flight IC-752 from Varanasi to Kathmandu and IC-751 from Kathmandu to Varanasi, he did not remember Mahender Goyal and also whether he arrived at the Varanasi Airport from Kathmandu on 1st September, 1997. Based on the above, a show cause notice dated 24th February, 1998 was issued to Mahender Goyal, Vijay Saxena and the respondent herein proposing confiscation of seized goods under Section 111(d) and imposition of penalty under Section 112(b) of the Customs Act, 1962. The adjudication authority ordered absolute confiscation of the seized goods and imposed penalties on Mahender Goyal, Vijay Saxena, Tony and his partner and also imposed a penalty of ₹2 lakhs on the respondent herein.

4. Appeals were filed before the Custom, Excise & Gold (Control) Appellate Tribunal (hereinafter referred to as ‘the Appellate Tribunal’) by the respondent wherein the orders passed by the adjudicating authority were set aside. After detailed consideration of the merits, the Appellate Tribunal held-

“5. In appeal No.C/11/2000, the statements of Rakesh Kumar, Raj Kumar Singhal and Vipin Kumar Bansal have been relied upon to charge the appellant with abetment of smuggling. In his first statement dated 1.9.97, Rakesh Kumar has stated that on 17.8.97, it was the appellant who helped him and Raj Kumar Singhal to clear mobile phones etc. without payment of duty. The contention of the appellant that he was on leave on that day has not been rebutted and there is also no finding that even though he was on leave, the appellant was physically present at Varanasi Airport on 17.8.97. Regarding clearance of goods carried by Rakesh Kumar and Raj Kumar Singhal on 24.8.97, Rakesh Kumar has named B.B. Singh as the officer who helped them to clear the goods without payment of duty. Coming to the clearance on 1.9.97, Rakesh Kumar has stated that Raj Kumar Singhal informed him that the Custom Officer who helped them during their second trip also helped him on 1.9.97 to clear goods without payment of duty. It was only in his second statement recorded on 2.9.97 that Rakesh Kumar has stated that on their earlier visits to Kathmandu on 17.8.97 and 24.8.97, both B.B. Singh and the appellant helped them in the Customs hall. In view of the implication of the appellant only in the second statement, it was necessary to test veracity of his statements by cross-examination. But cross-examination has not taken place for the reason that Rakesh Kumar was not present. We fail to understand the finding of the Commissioner that Rakesh Kumar could not be cross-examined as he was not presented. It is the duty of the Customs authorities to present witnesses for cross-examination, if the request is allowed. On an analysis of the statement of Raj Kumar Singhal, we find that in his statement dated 2.9.97, he has initially stated that he did not know the Customs Officer, who cleared him and his companion, Rakesh Kumar along with the consignment of mobile phones when

they returned from Kathmandu on 25.8.97 because all the handling was done by Rakesh Kumar that he did not know the name of the officer posted at Benaras Airport who cleared him along with his consignment when he arrived from Kathmandu on 1.9.97. He has also stated that Rakesh Kumar had told him that on arrival in Varanasi on 1.9.97, he should go to the officer who had cleared their baggage (baggage of Raj Kumar Singhal and Rakesh Kumar) when they arrived at Kathmandu on 24.8.97, and that he went to the same Customs Officer on 1.9.97. Subsequently, in the same statement, Raj Kumar Singhal has stated that he was told by Rakesh Kumar that the person who helped them in customs clearance at Varanasi Airport is Arvind and that he has seen Arvind on all the 3 occasions during his entry in the Customs hall, on his return from Kathmandu to Delhi via Varanasi and that he had met Arvind on 1.9.97 in the Customs Hall. That the appellant was on leave on 17.8.97 is not disputed by the Department, and it is also not the finding of the adjudicating authority that the appellant, although on leave, was physically present in Varanasi Airport on 17.8.97. Therefore, this portion of the statement of Raj Kumar Singhal that he has seen the appellant on all 3 occasions viz. 17.8.97, 24.8.97 and 1.9.97 is not true. In these circumstances, cross examination of Raj Kumar Singhal was absolutely necessary and it is not open to the Commissioner to state that cross-examination could not take place because Raj Kumar Singhal was not presented, since it was the duty of the customs authorities to present him for cross-examination. Further, neither Rakesh Kumar nor Raj Kumar Singhal and Vipin Kumar Bansal have identified the appellant as the person who helped them to clear the goods without payment of duty. Nothing incriminating has been recovered from the appellant. The stand of the appellant that he was not on customs clearance duty on 24.8.97 and 1.9.97 has not been found to be untrue and in fact, his contention stands indirectly accepted by the Commissioner who has held the appellant guilty of abetment by getting dutiable goods cleared free of duty through other customs officers posted in the Customs clearance counter at Varanasi Airport on the relevant dates. The evidence on record is not sufficient for the purpose of

upholding the charge of abetment. Hence, we set aside the penalty imposed on the appellant and allow this appeal.”

5. Pursuant to this order passed, the respondent filed an application under Section 245(2) Cr.P.C. before the learned ACMM. Vide the impugned order dated 8th December, 2009, the learned ACMM observed that the plea of the counsel for the petitioner that she was not having a copy of application under Section 245(2) Cr.P.C. only showed that either the Spl.PP was only interested in taking adjournments or does not brief his juniors and that arguments on the said application had been heard earlier and if the proceedings were conducted in such a manner, the Court would not entertain the juniors of the Spl.PP. Adjourning the hearing on the application under Section 245(2) Cr.P.C., a copy of the order was sent to the Commissioner, Customs.

6. Vide the impugned order dated 21st December, 2009, considering the reply to the application and the written submissions filed by the petitioner, learned ACMM held that the order of the Appellate Tribunal had been accepted by the Commissioner of Customs and in view of decision of this Court reported as (2007) 145 DLT 612 Sunil Gulati Vs. R.K. Vohra, the respondent having been exonerated in the adjudication proceedings, the proceedings against him for criminal prosecution could not continue as the standard of proof was lesser in the adjudication proceedings. Hence, accepting the application of the respondent under Section 245(2) Cr.P.C., the proceedings against him were dropped.

7. Learned counsel for the petitioner contends that relying upon the decision in Sunil Gulati (supra), a Single Bench of this Court in CrI.M.C. 1833/2007 decided on 25th August, 2008 titled Ajay Kumar Tyagi Vs. State

quashed the criminal prosecution against the accused therein which order was set aside by the Supreme Court in the decision reported as 2012 (9) SCC 685 State of NCT OF Delhi Vs. Ajay Kumar Tyagi holding that exoneration of the accused in disciplinary proceedings would not ipso facto result into quashing of the criminal prosecution and criminal proceedings cannot be terminated on evidence in departmental proceedings. Similar view was expressed by the Supreme Court in the decision reported as 2015(1) RCR (Criminal) 445 State of Bihar Vs. Dhirendra Prasad Shrivastava & Ors.

8. Per contra, learned counsel for the respondent relying upon three judgment bench decision in the case reported as (2011) 3 SCC 581 Radheshyam Kejriwal Vs. State of West Bengal & Anr. states that there is a distinction between exoneration in the disciplinary proceedings and quashing of adjudication proceedings in Foreign Exchange Regulation Act (FERA) as the evidence in both the adjudication proceedings and the complaint case filed was same with the standard of proof being lower i.e. not beyond reasonable doubt. Hence continuation of the criminal proceedings against the respondent was an exercise in futility and required to be quashed.

9. The issue whether the criminal proceedings can be quashed in case a person has been exonerated by the adjudicating authority was decided by the Supreme Court in Radheshyam Kejriwal (supra) wherein it was held that if a person has been exonerated on merits and not on a technical ground, then the criminal proceedings can be quashed. The relevant extract of the report is as under:

“38. The ratio which can be culled out from these decisions can broadly be stated as follows:

(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;

- (ii) *Decision in adjudication proceedings is not necessary before initiating criminal prosecution;*
- (iii) *Adjudication proceedings and criminal proceedings are independent in nature to each other;*
- (iv) *The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;*
- (v) *Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;*
- (vi) *The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and*
- (vii) *In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.*

39. *In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court. ”*

10. The law laid down in Radheshyam Kejriwal (supra) has been reiterated in the decisions of the Supreme Court reported as (2016) 4 SCC 153 Air Customs Officer v. Pramod Kumar Dhamija and AIR 2016 SC 2843 M/s Videocon Industries Ltd. & Anr. Vs. State of Maharashtra & Ors.

11. This Court in the decision reported as (2007) 145 DLT 612 Sunil Gulati (supra) culled out the various principles as under:

“25. The conclusion arrived at by the Andhra Pradesh High Court, in my respectful submission, after relying upon Assistant Collector of Customs v. L.R. Malwani (supra), ratio whereof was misread and ignoring other judgments of the apex court would not be correct. What is needed is the harmonious reading of all these judgments as I do not even see any contradiction. In fact, various cases of the Supreme Court, note whereof is taken above, deal with different situations. The principles which can be culled out from the aforesaid judgments, when all these judgments are read out harmoniously, would be the following:

1. On the same violation alleged against a person, if adjudication proceedings as well as criminal proceedings are permissible, both can be initiated simultaneously. For initiating criminal proceedings one does not have to wait for the outcome of the adjudication proceedings as the two proceedings are independent in nature.

2. The findings in the departmental proceedings would not amount to resjudicata and initiation of criminal proceedings in these circumstances can be treated as double jeopardy as they are not in the nature of “prosecution”.

3. In case adjudication proceedings are decided against a person who is facing prosecution as well and the Tribunal has also upheld the findings of the adjudicators/assessing authority, that would have no bearing on the criminal proceedings and the criminal proceedings are to be determined on its own merits in accordance with law, uninhibited by the findings of the Tribunal. It is because of the reason that in so far as criminal action is concerned, it has to be proved as per the strict standards fixed for criminal cases before the criminal court by producing necessary evidence.

4. 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 could 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 it is found that allegations are not substantiated at all 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.”

12. In Ajay Kumar Tyagi (supra) this Court quashed the prosecution for offence punishable under Sections 7 and 13 of the Prevention of Corruption Act (PC Act) on the ground that the accused had been exonerated in disciplinary proceedings. In disciplinary proceedings, the authority

adjudicates on the desirability/suitability of the officer incumbent to continue in service. The Supreme Court in Ajay Kumar Tyagi (supra) referring to earlier decision of the larger bench in P.S. Rajya Vs. State of Bihar 1996 (9) SCC 1 held that High Court quashed the prosecution on total misreading of the judgment in case of P.S. Rajya (supra). The Supreme Court held that in P.S. Rajya (supra) the Court did not lay down any proposition that on exoneration of an employee in the departmental proceedings, the criminal prosecution on identical charge or evidence has to be quashed. It is well settled that the decision is an authority for what it actually decides and not what flows from it. Mere fact that in P.S. Rajya (supra) the Supreme Court quashed the prosecution when the accused was exonerated in the departmental proceedings would not mean that it was quashed on that ground. Thus, the ratio laid down by the Supreme Court in Ajay Kumar Tyagi (supra) and Dhirendra Prasad Shrivastava (supra) is that exoneration in the departmental proceedings ipso facto would not lead to the acquittal of the accused in the criminal trial.

13. In Videocon Industries Ltd. (supra) the Supreme Court held that the yardstick would be to judge as to whether the allegations in the adjudication proceedings and proceedings for prosecution are identical and the exoneration of the person concerned in adjudication proceedings is on merits, the trial would be an abuse of process of Court and there is no contravention of any provision in the adjudication proceedings. Thus, independently assessing the merits of the case, it should be seen whether the evidence led in the adjudication proceedings and the criminal trial are the same and whether on proper appreciation of evidence which is para-materia

the same in the criminal case, no case is made out against the accused even if taken on the face value.

14. Further present is not a case where the respondent was exonerated in departmental inquiry proceedings but in adjudication proceedings for levying penalty under Section 112(B) of the Customs Act, 1962 by the Appellate Tribunal which is a quasi-criminal adjudicatory authority. Further the Appellate Tribunal set aside the penalty after examining the witnesses and not on technical grounds. Following the decision in Radheshyam Kejriwal (supra) the Supreme Court in the decision reported as (2016) 4 SCC 153 Air Customs Officer IGI, New Delhi Vs. Pramod Kumar Dhamija held that exoneration of the respondent therein in the adjudication proceedings was not on merits nor that he was found completely innocent. As noted above, in the present case though some witnesses were not cross-examined even without presenting the witnesses for cross-examination, it was found out that their statements did not implicate the respondent and at best the allegations against him were in the realm of suspicion which could not reach the pedestal of proof beyond reasonable doubt. Hence, this Court finds no infirmity in the impugned order dated 21st December, 2009 dropping the proceedings against the respondent. As regards the second prayer of the petitioner of expunging the remarks in the two orders dated 8th December, 2009 and 21st December, 2009, a perusal of the same reveals that they were wholly unwarranted and are thus expunged.

15. Petition is disposed of.

(MUKTA GUPTA)
JUDGE

JANUARY 17, 2017
‘v mittal’