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

RESERVED ON : DECEMBER 08, 2016
DECIDED ON : JANUARY 23, 2017

\+ **CRL.M.C.4143/2016 & CRL.M.A.17270/2016**

ATUL DIKSHIT

..... Petitioner

Through : Mr.Dayan Krishnan, Sr.Advocate, with Mr.Kumar Vaibhav, Mr.Vaibhav Sethi and Mr.Ramaditiya Tiwari, Advocates.

versus

C.B.I.

..... Respondent

Through : Ms.Rajdipa Behura, SPP with Ms.Garima Singh Yadav, Mr.Philomon Kant and Ms.Kriti Handa, Advocates.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Present petition under Section 482 Cr.P.C. has been filed by the petitioner-Atul Dixit to challenge the legality and correctness of an order dated 14.10.2016 of learned Special Judge-03, CBI whereby the application filed under Section 155 of Customs Act was dismissed. The petition is contested by the respondent-CBI.

2. I have heard the learned Senior counsel for the petitioner and learned SPP for the respondent and have examined the file.

3. Admitted position is that petitioner is facing trial in case RC No.21A/2015/ACB/CBI/ND for commission of offences punishable under Section 120B read with Section 420 IPC and under Section 13(2) read with Section 13(1) (d) of P.C. Act along with others. FIR in question was registered on the basis of source information on 11.08.2015. The petitioner was arrested on 14.08.2015. Upon completion of investigation, a charge-sheet has been filed on 19.09.2015. Initially, the bail application moved on behalf of the petitioner was dismissed by an order dated 6.10.2015. Finally, after submission of the charge-sheet, the petitioner was granted bail.

4. It is also not in dispute that the petitioner is an officer of Indian Revenue Services and on the relevant date, was working as Commissioner of Customs, ICD-Tughlaqabad, New Delhi.

5. The petitioner had also filed similar petition bearing No.Crl.M.C.2487/2016 before this Court which was withdrawn without addressing arguments with liberty to move applications before the Trial Court under Section 155 of Customs Act and under Section 197 Cr.P.C., if so permissible under law vide order dated 23.09.2016, Subsequently, the petitioner moved the application under Section 155 of Customs Act before the Trial Court which came to be dismissed by the impugned order.

6. Learned Senior counsel for the petitioner restricted arguments to urge that the criminal prosecution initiated against the petitioner was beyond limitation as prescribed under Section 155(2) Customs Act. Learned Senior counsel urged that the plea was taken by the petitioner at the time of moving first bail application but no specific findings were recorded that

time. The petitioner has a right of protection under Section 155(2) of the Customs Act; no proceedings other than a 'suit' can be initiated against him after expiration of three months from the accrual of cause of action. It is respondent's case that the alleged cause of action accrued on 31.03.2014 and the FIR was registered only on 11.08.2015 after an unexplained delay of around one year and five months. Section 155(2) of the Customs Act is a special provision providing immunity to the custom officials for the decisions taken by such them under the provisions of Customs Act. Reliance has been placed on *Ashok Kumar Singh vs. State of West Bengal & Anr.* CRR No.4062 of 2009 dated 19.05.2016) High Court at Calcutta in PNU/WB/03941/2016; *Public Prosecutor, Madras v.R.Raju and Anr.*ETC (1972) 2 SCC 410; *Costao Fernandes v.State at the instance of D.S.P.,*CBI, Bombay (1996) 7 SCC 516; *Prof Sumer Chand v.Union of India & Ors.* (1994) 1 SCC 64 and *Jeevan Kumar Raut and Anr. V.Central Bureau of Investigation* (2009) 7 SCC 526.

7. Learned SPP for CBI urged that the impugned order warrants no intervention as it is based upon fair appreciation of facts and law. Provisions of Section 155 (2) of the Customs Act are not applicable to the facts and circumstances of this case. She further urged that the instant application has been filed to delay the disposal of the case as trial has commenced on day-to-day basis and most of the witnesses have already been examined. Reliance has been placed on *Ravindra Kumar Vs. Union of India* MANU/RH/0997/2016; *Brij Bhushan Vs. State and Anr.* MANU/DE/0673/2010; *PP.Unnikrishnan & Anr. Vs. Puttiyottil Alikutty & Anr.* (2002) 8SCC 131; *P.K.Pradhan Vs. The State of Sikkim* AIR 2001 SC 2547.

8. At the outset, it may be mentioned that the petitioner had never raised objection regarding criminal prosecution to be barred being beyond limitation under Section 155 (2) of the Customs Act before the Trial Court before moving the application in question. The petitioner did not challenge the order taking cognizance of the offence as well as the order framing charge against him. When the trial is at its fag end, the petitioner has opted to move the instant application under Section 155(2) Customs Act.

It is urged that at the time of moving first bail application initially this plea under Section 155 Customs Act was taken and specific findings were not recorded by the court concerned that time. On perusal of the bail order dated 06.10.2015, it reveals that plea taken was only under Section 155(1) Customs Act. Apparently, no specific plea regarding the prosecution to be barred under Section 155(2) Customs Act was raised even that time. Nevertheless, limitation being a question of law can be permitted to be agitated.

9. Learned Senior counsel for the petitioner heavily relies on the judgments *Public Prosecutor, Madras v.R.Raju and Anr.* (supra) and *Ashok Kumar Singh vs. State of West Bengal & Anr.* (supra) to emphasize that the criminal prosecution against the petitioner being beyond limitation under Section 155(2) of the Customs Act is unsustainable. In my considered view *R.Raju's judgment* (supra) is not applicable to the facts and circumstances of the case. The said judgment was delivered on 8.8.1972 under Section 40(2) of the Central Excise and Salt Act, 1944. After amendment, Central Excise Act 1944 (Act No.1 of 1944) has come into force with effect from 28.02.1944.

10. Section 40 of Central Excise Act was substituted w.e.f. 01.9.1973. The former Section reads as follows:

> ***S. "40. Bar of suits and limitation of suits and other legal proceedings.-(1)*** *No suit shall lie against the Central Government or against any officer of the Government in respect of any order, passed in good faith, or any act, in good faith, done, or ordered to be done, under this Act.*
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> *(2) No suit,* ***prosecution,*** *or other legal proceeding shall be instituted for anything done or ordered to be done, under this Act, after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of."*
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> (Emphasis given)

The amendment introduces important changes:-

> *Sub-section (1) now bars not only a suit but also "any other legal proceeding". The protection is now in respect of things done "in pursuance" of this Act or Rules as against things 'under' the Act before the amendment;*
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> *Sub-section (2) contains a major change. There is a bar against any proceedings, except a suit, against Central and State Government and their officers. The requirement of a notice has been introduced and the limitation period has been reduced to three months.*

11. Material change brought after amendment is that the word 'prosecution' earlier appearing in the former Section 40(2) of the Act has since been omitted. Hon'ble Apex Court in *R.Raju's* case (Supra) while dealing with Section 40(2) of Central Excise and Salt Act, 1944 had held that the limitation as provided under sub-section (2) of Section 40 would be

applicable as no suit, prosecution or other legal proceedings can be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action. Apparently in the former Act, there was specific mention under Section 40 (2) that the limitation prescribed therein would be applicable not only to 'suits' and 'other legal proceedings' but to **'prosecution'** also. Apparently, the said judgment was under the unamended provisions which existed prior to 1973.

12. It is to be noted that the amended Section 40 as it exists at present is pari-materia with Section 155(2) of the Customs Act. Section 155(2) of the Customs Act does not prescribe any limitation for initiation of any criminal prosecution. The word 'prosecution' is conspicuously missing in Section 155(2) of the Customs Act. By no stretch of imagination, it can be inferred that limitation as prescribed under Section 155(2) Cr.P.C. would be applicable to the criminal proceedings/prosecution.

13. In *R.Raju's case* (supra), Hon'ble Supreme Court had referred various enactments i.e. Section 20 of the Medicinal and Toilet Preparations (Excise Duties) Act; 1955 (16 of 1955); Section 50 of the Madras General Sales Tax Act, 1959; Section 24(1) of the Bombay (District) Tobacco Act, 1953 and Section 25 of the Madhya Pradesh Motor Vehicles (Taxation of Goods) Act, 1962. In all these enactments, there were specific mention of bar of suit, **prosecution** or other legal proceedings beyond the period of limitation prescribed therein. Since Section 155(2) Customs Act does contain the word **'prosecution'**, the petitioner cannot avail any benefit under that provision.

14. Learned Senior counsel urged that the words 'no proceedings' appearing in sub-section (2) of Section 155 of the Customs Act would

include criminal prosecution. In my humble opinion, this submission is devoid of merits. The words 'no proceedings' occurring in sub-section (2) of Section 155 of the Customs Act do not include 'criminal proceedings'. It is to be noted that there is a specific provision under Section (1) of Section 155 of the Customs Act where protection is available against suit, prosecution or other legal proceedings.

15. Sub-section (2) of Section 40 of the Central Excise and Salt Act dealt with in *R.Raju's case* (supra) is not pari-materia with sub-section (2) of Section 155 of the Customs Act. The limitation period prescribed under Section 40(2) of the Central Excise and Salt Act cannot be made applicable to criminal prosecution under Section 155(2) of the Customs Act.

16. In *Ashok Kumar Singh vs. State of West Bengal & Anr.*(supra) and *Sunil Kumar vs.Central Bureau of Investigation* (MANU/PH/0193/2016 decided on 11.2.2016, it appears that reliance was placed on *R.Raju's* case (supra) without taking note of the fact that existing sub-section (2) of Section 40 of the Central Excise Act 1942 has since been amended. The said judgments are of no assistance to the petitioner.

17. In *D.K.Kapur vs. Reserve Bank of India & Ors.* 2001 IIAD (Delhi) 259, the Division Bench of this Court dealing with Section 433 and 446 of Companies Act, 1956 observed as under:

> "*A Suit or other 'legal proceedings' in Section 446(1) and expression 'Suit or proceedings' under Section 446(2) of Chapter in para 7 of Companies Act 1956 did not include 'criminal prosecution'.*"

18. Recently in a case *Ravindra Kumar vs.Union of India (*Criminal Revision Petition No.1282/2016) (Manu/RH/0997/2016), decided 8.11.2016

High Court of Rajasthan (Jodhpur Bench) has taken the view that protection under 155(2) of the Customs Act is not available in criminal prosecution. I am in agreement with the said judgment.

19. Reliance on judgment in *Costao Fernandes v.State* (supra) is of no assistance. In that case, the Hon'ble Supreme Court of India had held that the Customs Officer was entitled for protection from Criminal Prosecution under Section 155 read with Section 106 of Customs Act. The appellant in that case was on official duty as Preventive Officer and in the discharge of his official duty, he had chased a speedy Contessa car driven by the deceased. In an attempt to stop the car for searching it, he overtook the car and having disclosed his identity asked the deceased to stop it but when the driver had attempted to flee with the car, he jumped into the same and tried to take the ignition key in order to stop the vehicle. It was also revealed that the appellant had received various injuries including incise wounds which on the basis of medical report were likely to have been caused at the time when attempt to stop the car was made. Scuffle was between the appellant and the smuggler during the course of which big size (dagger) carried by the smuggler was used. The smuggler died because of the injuries sustained at the hands of the appellant, who had as many as 22 injuries on his person. The smuggler was having close connection with the political leaders in the State of Goa. It was observed as under:

> *"A valiant and dutiful Customs Officer risked his life to fight the mighty under world of smugglers; unarmed and single handedly. And see he succeeded after hot chase on his motorcycle-smuggler being in a car. The result was smuggling of gold worth Rs.8 crores was prevented. The reward? He has been made to face a prosecution under*

Section 302 of the I.P.C. at the behest of the CBI, who is brought hurriedly and for undisclosed reasons to investigate, inasmuch as in the scuffle which had taken place between the appellant official and suspected smuggler, during the course of which big size (dagger) carried by the run away was used. The smuggler died because of the injuries sustained at the hand of the appellant, who had as many as 22 injuries on his person."

20. The Supreme Court after detailed discussion of the facts and legal position came to the conclusion that the prosecution which was for offences under Section 302 of IPC was liable to be quashed.

21. In the present case, allegations against the petitioner are that instead of securing government revenue, he hatched conspiracy with co-accused to cause undue pecuniary advantage to the private party and ordered release of duty draw back.

22. In view of above discussion, I find no merit in the present petition. The impugned order based upon fair appreciation of facts and law warrants no intervention. The petition is dismissed. Pending application also stands disposed of.

23. Observations in the order shall have no impact on the merits of the case.

(S.P.GARG)
JUDGE

JANUARY 23, 2017
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