IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 26.04.2018

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

W.P.No.3208 of 2018 and W.M.P.No.3947 of 2018

S.Gugan .. Petitioner

/versus/

1.The Commissioner of Customs,
Sea Import/Vigilance-CHI-VIII Commissionerate,
Customs House,
Rajaji Salai,
Chennai 600 001.

2.The Additional Superintendent of Police,
Central Bureau of Investigation,
Shastri Bhavan, Haddows Road,
Nungambakkam,
Chennai 600 006. .. Respondents

Writ Petition filed under Article 226 of Constitution of India praying to issue a Writ of Certiorari to call for the records of the Impugned Sanction Order issued against the petitioner dated 30.09.2013 by the first respondent and quash the same.

For Petitioner :Mr. K.Gandhikumar

For Respondents :Mr.S.R.Sundar for R1
Mr.K.Srinivasan,
Spl.P.P(for CBI Cases) for R2

ORDER

The petition is filed seeking for issuance of a Writ of Certiorari to quash the proceedings initiated against the petitioner herein, who served as an Examiner in the Customs Department and prosecuted for abuse of his official position.

2. The matter centers around mis-declaration of goods, which were fully fitted air-conditioner, but declared as part of air-conditioner and Imported into India through Chennai Port, thereby committing revenue loss to the exchequer of Customs Department.

3. It is an admitted fact that the petition to discharge the petitioner is pending before the trial Court. The learned counsel for the petitioner would submit that he does not know the fate of the discharge petition, however, he canvasses this writ petition on a different ground.

4. The learned Special Public Prosecutor appearing for the 2nd respondent stated that the discharge petition has already been dismissed. In any event, the present writ petition seeking Certiorari is based on the short point that the sanctioning Authority to prosecute the petitioner herein, viz., the Commissioner of Customs, had earlier gone through the material placed by the Investigation Agency and had declined to accord sanction. However, after intervention of CVC, the very same officer has accorded sanction to prosecute the petitioner, without any new material to review the earlier order. Therefore, the sanction order is erroneous, illegal and liable to be quashed.

5. The learned counsel appearing for the respondents viz., the Commissioner of Customs and ASP, CBI would submit that, the competent authority to accord sanction, after perusal of the materials placed by the Investigation Agency, had expressed doubt regarding the mens rea of the officers and deferred with the opinion of CBI in respect of according sanction. Therefore, vide letter dated 13.08.2013 referred the matter to CVC as per paragraph 11.2(i) of Chapter VII of Vigilance Manual Volume 1 for further action. On receipt of his letter, CVC had gone through the papers and passed the following order on 30.08.2013:-

> "Commission has perused the SP's report and views of Disciplinary Authority and CVO, CBEC thereon. The Commission in agreement with CBI & CVO, CBEC would advise sanction of prosecution and simultaneous RDA for major penalty against S/Sh P.Kathirvel, Asst.Commissioner, Sanjay Kakkar and R.Mani, Appraisers and S.Gugan, Examiner".

Thereafter, on 30.09.2013 the sanction order was issued by the Commissioner, the competent Authority, which is legal and permissible in law and there is no grounds survive for quashing the prosecution.

6. It is submitted by the learned counsel for the petitioner that in the earlier writ petition in W.P.No.210 of 2016, one Sanjay Kakkar, the co-accused of this case challenged the very same sanction order and this Court has allowed the

writ petition by an order dated 11.08.2017, in which the facts are in pari materia to that of this petitioner. Therefore, following the judgment passed in W.P.No.210 of 2016 dated 11.08.2017, this petition is to be allowed.

7. This submission is strongly opposed by the learned counsel appearing for the first respondent pointing out the factual difference between the case of the petitioner, who is the examiner and the case of the petitioner in W.P.No.210 of 2016 Sanjay Kakkal, who was exercising the duty of Assessing Officer. According to the learned counsel for the respondents, the examiner is a person, who is responsible for opening the goods and examining the goods sought to be imported and physically verify the nature of the goods in the shed. Whereas, the Assessing Officer who sits in a remote place, act upon the note forwarded by the examiner. Further against the order passed in W.P.No.210 of 2016, CBI is contemplating to file SLP before the Supreme Court.

8. Be that as it may, as far as the point canvassed before this Court whether the decision of the sanctioning authority can be interfered by some external agency and owing to the pressure of the external agency, the sanction order without any new material could be issued.

9. It is now well settled by the decision of the Hon'ble Superme Court that power of review is possible only when there is a provision explicitly under law. As far as the order according sanction is concerned, once it is rejected, it could not be reviewed without any fresh material.

10. In the light of the above settled principle of law, the letter of the Competent Authority dated 13.08.2013 and sanction order of the Competent Authority dated 30.08.2013 have to be compared and scrutinized as to whether it is one and the same or whether there was any reason for the authority to change his view, subsequently after intervention of the CVC.

11. This Court, after careful scrutiny of the documents finds that the first communication from the Competent Authority viz., the Commissioner of Customs dated 30.08.2013, discuss about the facts of the case and had formed a opinion as below:-

> "7.The main ingredient for the criminal conspiracy is to establish that there was an agreement between the parties for doing an unlawful Act. To draw an inference of conspiracy the acts or conduct of parties should clearly reveal their concurrence. Even if there is no direct evidence available, circumstantial evidence in the form of a

chain of events is required in order to alleged conspiracy. In the instant case, not even circumstantial evidence is available to prove the involvement of the officers with the importer in the conspiracy. In the subject case without substantiating and unearthing the element of collusion of the assessing officer (Shri Sanjay Kakkar-AO) and examining officer (Shri.S.Gugan-EO) with the fraudulent importers (who had hoodwinked the department), charges of criminal conspiracy under Section 120 B of IPC have been made against them.

8. In view of the foregoing, it is seen that the DRI investigations has revealed that the actual importers had intentionally prepared forged/fabricated invoice and packing list and submitted to Customs Department and cleared the consignments by concealing the fact that the imported goods are complete air conditioners and thus, evaded Customs duty. This has also been admitted by them in their statements under Section 108 of Customs Act, 1962 before DRI. However, there can be no case made out of any offence under Section 120B r/w 420, 468 and 471 of IPC r/w Section 13(2) and 13(1)(d) of PC Act, 1988 either against the assessment officials or the shed officers when there is no prima facie evidence of criminal conspiracy, abuse of official position, receipt of any quid pro quo for their allege din-action.

9. In view of the above said discussion, it is opined that there is no lapse on the part of assessment officials viz., Shri Sanjay Kakkar, Apparising officer and Shri.P.Kathirvel, Assistant Commissioner with reference to Bill of Entry No.4524368, dated 02.09.2011. However, there is a lapse on the part of the Shed Officials viz., Shri S.Gugan, Examiner and Shri.R.Mani, Appraiser (Retired) as they had observed that the goods presented for examination were Air conditioners, but failed to return the Bill of Entry to the Group for re-assessment/Adjudication and have definitely been responsible for the revenue loss of

Rs.42,05,597/- and merit action for Major Penalty under CCS(CCA) Rules. In the absence of any prima facie evidence relating to criminal conspiracy, abuse of official position and receipt of illegal gratification, prosecution is not warranted.

10.Further, Section 155 of Customs Act, 1962, extends protection from suit, proseeution or other legal proceedings to any Government officer for anything which is done or intended to be done in good faith. In the present case, the assessing officers viz., Shri.Sanjay Kakkar, Appraising officer and Shri.P.Kathirvel, Asst.Commissioner, in good faith have assessed the said Bill of entry based on the declared description of the goods by the importer".

Ultimately the Commissioner of Customs has referred the matter to CVC in consonance with the Vigilance Manual, in view of the difference of opinion between the competent authority and CVC.

12. This communication is only an opinion. It is not the final order of the competent authority as he has rightly said in his letter. He differs from the opinion of CBI and therefore, sought advice and guidance of CVC which is the superior authority and empowered to take a decision in matters of this kind, as per the vigilance Manual. After considering all the facts, CVC had issued an official memorandum to the competent authority on 30.08.2013 as below:

> "Commission has perused the SP's report and views of Disciplinary Authority and CVO, CBEC thereon. The Commission in agreement with CBI & CVO, CBEC would advise sanction of prosecution and simultaneous RDA for major penalty against S/Sh P.Kathirvel, Asst.Commissioner, Sanjay Kakkar and R.Mani, Appraisers and S.Gugan, Examiner".

13. Thereafter, the sanctioning order has been passed by the competent authority on 13.09.2013, wherein he has stated that he had applied his mind and after careful examination of the materials, he accord sanction to prosecute Shri.Gugan, Examiner of the Customs the petitioner herein.

14. The sequence of communication which has been referred to above would clearly indicate that what was expressed by the Commissioner of Customs vide his letter dated 13.08.2013 is not

an order but only an opinion. Nowhere it is stated that he had applied his mind and arrived at a conclusive decision for not according sanction or refusal to accord sanction. Whereas in the subsequent communication dated 30.08.2013, this Court could see that the competent authority has stated after applying his mind, consider that prima facie case has been made out against the petitioner to accord sanction to prosecute. This expression is conspicuously absent in the earlier communication dated 13.08.2013.

15. Hence, this Court hold that on the factual matrix, there is no two sanction orders passed by the same authority, without any material. The earlier communication is only a letter of opinion seeking further course of action has been expressed. Whereas, the second communication is the order issued after complete exercise of application of mind. Therefore, this Court find no merits in the writ petition. Accordingly, the same is dismissed. Consequently, connected Miscellaneous Petition is also closed. No costs.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

rpl

To

1.The Commissioner of Customs,
Sea Import/Vigilance-CH-VIII Commissionerate,
Customs House, Rajaji Salai, Chennai 600 001.

2.The Additional Superintendent of Police,
Central Bureau of Investigation,
Shastri Bhavan, Haddows Road,
Nungambakkam, Chennai 600 006.

3 The Special Public Prosecutor for CBI,
High Court, Madras.

+1cc to Mr.S.R.SUNDAR, Advocate, S.R.No.31692
+1cc to Mr.K.GANDHIKUMAR, Advocate, S.R.No. 31086

W.P.No.3208 of 2018

NRJK(CO)
TR(17/05/2018)