IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 09.02.2018	Pronounced on: 15.02.2018

Coram

The Honourable Dr.Justice G.Jayachandran

Criminal Revision Petition. 1557 of 2017
& Crl.M.P.No. 15676 of 2017
Criminal Revision Petition No.47 of 2018
& Crl.M.P.No.321 of 2018

R.Mani ... Petitioner/Accused No.4 in Crl.R.C.No.1557 of 2017

P.Kathirvel ... Petitioner/Accused No.1 in Crl.R.C.No.47 of 2018

/versus/

The Superintendent of Police,
CBI:ACB:Chennai ... Respondent/Complainant in Crl.R.C.No.1557 of 2017

State rep.by
Additional Superintendent of Police,
CBI/ACB/Chennai,
Chennai. ... Respondent/Complainant in Crl.R.C.No.47 of 2018

PRAYER : Criminal Revision Petitions are filed under Section 397 r/w 401 of the Criminal Procedure Code, to set aside the order of dismissal dated 19.09.2017 made in Crl.M.P.No. 5036 of 2014 and Crl.M.P.No.860 of 2016 in C.C.Nos.1 of 2014 (RC MA1 2012 A 0009, CBI, ACB, Chennai) on the file of the learned Principal Special Judge for CBI Cases, VIII Additional City Civil Court at Chennai.

For Petitioner in Crl.R.C.No.1557 of 2017 : Mr. V.Raghavachari for Mr.R.Jayaprakash

For Petitioner in Crl.R.C.No.47 of 2018 : Mr. V.T.Goplan Senior Counsel for Mr.G.P.Bhargan

For Respondents in both the cases : Mr. K.Srinivasan, Special Public Prosecutor (CBI)

These two Revision Petition was filed by A1 and A4 in C.C.No.1 of 2014 on the file of Principal Special Judge for C.B.I cases, VIII Additional City Civil Court, Chennai.

2. Aggrieved by the dismissal of their petition filed for discharging them. Though separate petition were filed and separate orders have been passed with common results. Since, the facts involved in the matter and legal issues raised by the petitioners are one and the same. This Court passes the following:

COMMON ORDER

Brief facts leading to the Revision Petition

3. Based on the source information, the First Information Report in RC MA 1/2012/A-0009 was registered on 29.02.2013 by C.B.I, ACB-Chennai.

4. According to the First Information Report, under the guise of Air-conditioners parts, full Air Conditioner had been imported by M/s. Majestic Impex and the same has been cleared by the Customs officials causing wrongful loss to the Government a sum of Rs.42,05,597/- causing corresponding wrongful gain to the importers A-6 [Sheikh Parith] and A-7 [Basheer Ahmed]. In the scheme of conspiracy, the petitioners Kathirvel [A-1], Assistant Commissioner of Customs and R.Mani [A4] Superintendent, examining official at SANCO deliberately allowed the clearance of the goods though found that the consignment are not Air Conditioners parts but Full Air Conditioners.

5. Based on the above information, the investigation agency C.B.I conducted the investigation examined witnesses and after found that Shri.P.Kathirvel [A-1] Assistant Commissioner of Customs and Shri Sanjay Kakkar [A-2], Appraiser of Customs department though having prior knowledge that the goods are pre-packaged commodities and the CVD should be assessed on MRP, deliberately did not seek the details of MRP/RSP and deliberately did not assess the CVD on MRP basis. Further they had wrongly assessed the subject Bill of Entry by approving the description of goods as "Part of Air-Conditioner indoor unit only" when Customs Tariff head mentioned by accused importers in the Bill of Entry pertains to full Air Conditioners. Thus, Shri P.Kathirvel [A-1], Assistant Commissioner of Customs and Shri Sanjay Kakkar[A-2], Appraiser of Customs, Customs House, Chennai by abusing their Official position dishonestly did not seek details of MRP/RSP which are required for the purpose of assessing CVD in respect of pre-packaged commodities and by abusing their official position caused pecuniary advantage to A-5, A-6, A-7 and A-10.

6. Shri P.Kathirvel [A-1], Assistant Commissioner of Customs and Shri Sanjay Kakkar [A-2], Appraiser of Customs, Custom House, Chennai abused their Official position by failing to adopt the contemporary value of MRP of the similar/identical goods imported by other importer during the subject period and assess the CVD on such adopted MRP.

7. Even though goods are mentioned as "Air Conditioner" under customs Tariff Head "85141090" in the Bill of Entry, Shri P.Kathirvel and Shri Sanjay Kakkar deliberately did not assess the Bill of Entry with regard to restriction or prohibition of import of Air Conditioners and failed to demand the licence granted by DGFT. As the Custom Tariff Head for 8514 1090 denotes full Air Conditioners the Bill of Entry should have been assessed for full Air-Conditioners.

8. After the assessment by Shri.P.Kathirvel[A-1] and Shri Sanjay Kakkar [A-2] the examination order was passed on 02.09.2011 and then the Bill of entry was referred to Shri.R.Mani [A-4], Appraiser of Customs, Shri S.Gugan [A-3], Examiner had recorded in the Inspector Report that opened and examined 45 packages in the presence of CHA". In the Special observation it is recorded that "SANCO CFS: OPD&INSPECTED S/5% OF THE PKGS FROM S/2 CONTAINERS CONTS: O GENERAL BRAND AIR CONDITIONER MODEL AS PER INV..VEFD DESPN WRT IMPORT DOCTS PL"

9. Shri. R.Mani [A-4], Appraiser of Customs, Shri S.Gugan [A-3], Examiner deliberately omitted to revert the subject Bill of entry to the assessing group for re-assessment inspite of finding the import goods to be Air Conditioners during examination and not part of air conditioner' as described in Bill of Entry. Shri.R.Mani [A-4], Appraiser of Customs, Shri S.Gugan [A-3], Examiner deliberately failed to revert the subject Bill of Entry to the assessing group for re-assessment of unit price and the assessable value inspite of finding the import goods to be Air Conditioners during examination.

10. Shri R.Mani [A-4], Appraiser of Customs, Shri S.Gugan [A-3], Examiner deliberately omitted to inform the assessing group that the goods found during examination were restricted items which require import licence from DGFT and the subject goods were liable to confiscation and further proceedings. They dishonestly omitted to refer/subject the imported Air Conditioners for proper adjudication to facilitate for confiscation of goods, levy of fine and penalty as there was mis-declaration with respect to description & value and non compliance of statutory obligations by the importer and thus cheated the Customs Department.

11. The petitioners herein contended that they are innocent and they are nothing to do with the alleged mis-declaration or evation of customs duty and they have discharged their duty in accordance with the customs manual. Therefore, in the lack of

prima facie evidence against the petitioner they should be d scharged.

12.The said contention of the petitioner has been contested by the prosecution agency by placing material before the trial Court collected during the investigation and the substantial evidence available against the petitioners indicting them for offence of conspiracy, cheating, forgery and misconduct of a public servant. After analysing the material placed and the arguments advanced by the respective parties, the trial Court has passed a detailed order of dismissal which is under challenged in these two Revision Petitions.

13. The Contention of the Revision Petitioner in 1457 of 2017

The petitioner as examiner have very restricted role in the import of goods which is subject matter of the Criminal Prosecution. He as examiner has to conduct inspection of the goods at random and not all the goods imported, only when objection is raised by the examiner then the appraisal will inspect the goods and also inform the same to the superior. Neither the First Information Report nor the final report disclose any offence indicting the petitioner. Following the judgment of Hon'ble Supreme Court reported in 2011 1 SCC 368 and 2011 9SCC 512. Trial Court ought to have discharge the petition.

14. The learned Senior Counsel appearing for the petitioner would further submit that the petitioner[A4], on opening the package has made a special observation that the packages contain "O General Brand Air Conditioner," while so, no criminality could be attributed to the petitioner. The customs manual does not casts upon him any duty on the petitioner to revert the subject bill of entry as alleged in the final report.

The contention of the Revision Petition in 47 of 2018

15. The Criminal prosecution against this petitioner is unsustainable since, the petitioner is not the only person who was involved in the clearance of the complaint transaction. The Official procedure in respect of the bill of entry submitted in online has to be assessed by the appraiser [A2 in this case], after assessment, few bills are checked at random, such cross check is done by the Assistant Commissioner [In this case the petitioner]. Once the document accompanied the bill of entry is verified, the actual physical verification of the goods is done at Container Freight Station(CFS). The examiner at Container Freight Station has to make the physical verification and check whether the description of the goods as declared in the Bills of entry submitted online match the goods actually imported. Unless the official who is responsible for physical examination inform the superior Officer namely appraiser [A1 and A2] at customs

house, it is impossible to find out whether there is any mis-declaration of the goods. In this Case, while the bills of entry disclose the goods imported as "parts of Air Conditioner in door unit" assessment made by appraiser on the line of bill of entry and the connected documents at customs house cannot be faulted. In fact the writ petition filed by A2 [Sanjay Kakkar] has been allowed by Hon'ble High Court quashing the criminal prosecution against him. This petitioner who falls on the same footing is also entitled for the said benefit.

16. Per Contra, the learned Special Public Prosecutor would submit that the case against A2 [Sanjay Kakkar] was quashed on a technical ground for want of proper sanction to prosecution. Therefore, A1 the petitioner in Crl.R.C.No.47 of 2018 cannot seek any parallel and parity citing the order passed in the writ petition. Insofar as the procedure for clearing goods imported, no doubt it is governed by customs manual which fix specific duty and responsible to the Officers based on their cadre. In this case, the prosecution has collected evidence to prove that the importer had fabricated invoice and presented Bill of Entry as if he is importing parts of Air Conditioner. The Assistant Commissioner and the Appraiser who are at customs house, responsible for the scrutiny the documents such as Bill of lading and delivery order with that of Bill of Entry. In the present case, while the bill of lading and delivery order issued by the M/s. Samudera Shipping Line Private Limited indicates that the imported consignment as "full Air Conditioner". The Bill of entry has been filed dishonestly with description as parts of Air Conditioner. A1 [Kathirvel] Assistant Commissioner of Customs who had scrutinized the documents ought to have found out the inconsistency in these documents and should have assessed the duty after physical examination of goods imported. Though the examination of the goods by A-4 [Mani] (the petitioner in Crl.R.C.No. 1557 of 2017) had revealed the container is full Air Conditioner and not part, in pursuant to the conspiracy between them and the importer, the goods was not re-assigned or impounded for mis-declaration. Instead they have cleared the goods causing pecuniary loss to a tune of Rs.42,05,597/- to the Government.

17. In support, of his submission, the learned counsel for the respondent would refer the statement of witnesses recorded by the investigating Officer during the course of investigation.

18. From the reading of the statements more particularly the statements of Lakshmikanthan, Assistant Commissioner of Customs [LW.6], statement of LalithaKumari, Appraiser [LW.5], statement of Jayashrirajan, Examiner Central Intelligence Unit [LW.4], this Court finds that a primafacie case of conspiracy for allowing full Air Conditioner by mis-declaration code as parts of Air Conditioner and also assigning wrong custom tariff "8415 1090" which is meant for other items but not for part of

Air Conditioner or full Air Conditioner the petitioners herein had deliberately allowed the goods cleared both at customs house as well as at the Shed. In spite of physical verification and even after patent mis-declaration in the documents such as bill of entry and the custom tariff code, they have allowed the importer to clear the goods based on forged invoice and Bills of Entry.

19. Quashing of complaint on technical reason for want of sanction will not enure any benefit to the Co-accused. It is now well settled by catena of the judgments that when the prosecution has placed before the trial Court primafacie material for the trial, the Court cannot probe into the records summarily and discharge the accused persons. In this case, the material placed by the prosecution, if proved to be true it will lead to conviction.

20. The material relied by the prosecution indicates that forgery of invoice, mis-declaration of goods, wrong tariff code for the goods imported and loss of Revenue to the State. The observation of the commissioner in the adjudicating proceedings that there was no loss to the state cannot be considered at this juncture, because on going through his report, though he has discussed at length about various proposition of law, he has not addressed the core issue of mis-declaration of goods and wrong reference of Tariff code. In the disputed transaction he has not stated how the state has not incurred any Revenue loss when the different rate of tariffs are prescribed for full Air Conditioner and for part of Air Conditioner.

21. At this juncture, this court recollects the following passage in the Judgment of Hon'ble Supreme Court in Amit Kapoor vs Ramesh Chander and another reportrd in (2012) 9SCC 460 rendered after considering catena of judgments including off quoted Bhajan Lal case,

> 17. Framing of a charge is an exercise of jurisdiction by the trial court in terms ofSection 228of the Code, unless the accused is discharged underSection 227of the Code. Under both these provisions, the court is required to consider the ‘record of the case’ and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts

leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a primafacie case. There is a fine distinction between the language ofSections 227and228of the Code.Section 227is expression of a definite opinion and judgment of the Court whileSection 228is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms ofSection 228of the Code.

22. For the above said reason, this court holds that order of the Trial Court is legally sustainable and need no interference. Therefore, the Criminal Revision Petitions are dismissed, with direction to the Trial Court to frame charge immediately and take up the Trail at the earliest and complete it within a period of six months from the date of receipt of this order.Consequently, connected Miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VII)

//True copy//

Sub Assistant Registrar

bsm

To

1. The learned Principal Special Judge for CBI Cases,
VIII Additional City Civil Court,
Chennai

2. The Special Public Prosecutor, CBI
Chennai.

+1cc to Mr.R.Jaya Prakash, Advocate SR.No.12077
+1cc to Mr.G.P.Bhargavi, Advocate SR.No.11474

Crl R.C.Nos.1557 of 2017
& 47 of 2018

GP(CO)
GN(01/03/2018)