IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.04.2018

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Crl.O.P. No.10507 of 2018 & Crl.M.P. No.5386 of 2018

The Assistant Commissioner of Customs
Prosecution Unit (Sea)
Customs House
Chennai 600 001 ... Petitioner

vs.

1 Harren Choksey
Proprietor, Jai Matha Enterpreses
Krishna Vila
Linking Road
Santa Cruz (W)
Mumbai 400 054

2 Vasu Pandri Thamala ... Respondents

Criminal Original Petition filed under Section 482, Cr.P.C. seeking to set aside the order dated 14.03.2018 in Crl.M.P. No.717 of 2018 in E.O.C.C. No.118 of 2011 on the file of the Additional Chief Metropolitan Magistrate (E.O.-I), Egmore, Chennai-8 and permit the petitioner/complainant to examine Asha Panicker, S.I.O., "E" Cell, Directorate of Revenue Intelligence, Mumbai Zonal Unit, Mumbai, as prosecution witness and mark certain documents.

For petitioner Mr. N.P. Kumar,
Special Public Prosecutor

For R1 Mr. Diwakar Singh
for Mr. B. Manoharan

ORDER

This Criminal Original Petition has been preferred seeking to set aside the order dated 14.03.2018 in Crl.M.P. No.717 of 2018 in E.O.C.C. No.118 of 2011 on the file of the Additional Chief Metropolitan Magistrate (E.O.I), Egmore, Chennai - 8 and permit the petitioner/complainant to examine Asha Panicker, Senior Intelligence Officer, "E" Cell, Directorate of Revenue

Intelligence, (D.R.I.) Mumbai Zonal Unit, Mumbai, as prosecution witness and mark certain documents.

2 To appreciate the dispute at hand, it may be necessary to recapitulate the facts obtaining in this case.

3 It is the case of the prosecution that a Toyota Land Cruiser car was imported by A.2/second respondent herein from Dubai under Transfer of Residence Scheme sometime in the year 2006; that A.1/first respondent herein acted as a broker to sell the said car to Sushmita Sen (P.W.7), a Bollywood celebrity; that investigation conducted by the D.R.I. revealed that the said car was not an used car and that it was a new car that was imported, as if it was being brought into India under the Transfer of Residence Scheme; that, in this regard, adjudication proceedings were initiated against A.1 and A.2 and Sushmita Sen (P.W.7) for the illegal import of the car; that differential duty of Rs.20 lakhs was paid by Sushmita Sen (P.W.7) before the Settlement Commissioner, pursuant to which, Sushmita Sen (P.W.7) was given immunity from prosecution; however, the D.R.I. has launched the present prosecution in E.O.C.C. No.118 of 2011 before the Additional Chief Metropolitan Magistrate, (E.O.-I), Egmore, Chennai, against A.1 and A.2 for the offences under Section 132 read with 135 (1) of the Customs Act, 1962.

4 The allegation in the complaint is that A.2 had illegally imported Toyoto Land Cruiser car from Dubai and A.1 had brokered the sale of the said car to Sushmita Sen (P.W.7). Since A.2 was in abscondence, non-bailable warrant was issued against him and the case was split up as against A.2 on 19.12.2013 and the prosecution proceeded against A.1. However, it came to light that A.2 is a non-existent person. At this juncture, we are not concerned about it.

5 The prosecution examined witnesses under Section 244 Cr.P.C. and charges were framed against A.1 under Section 245 Cr.P.C. After the charges were framed, further witnesses were examined by the prosecution on 18.01.2017, which included Sushmita Sen (P.W.7), who was cross-examined by the accused on 18.09.2017. The prosecution examined nine witnesses and closed their side. A.1 was questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against him and his answers were recorded by the Trial Court. Thereafter, Mansiha Choksey, wife of A.1 was examined as D.W.1. With that, the defence closed their case. Arguments were advanced by both sides.

6 At that juncture, the prosecution filed a petition in Crl.M.P. No.717 of 2018 in E.O.C.C. No.118 of 2011 under Section 311 Cr.P.C. for examining Asha Panicker, S.I.O, "E" Cell,

D.R.I., Mumbai and to mark certain documents.

7 After hearing either side, the Trial Court, by a detailed order dated 14.03.2018, has dismissed the petition in Crl.M.P. No.717 of 2018, aggrieved by which, the prosecution is before this Court.

8 Heard Mr. N.P. Kumar, learned Special Public Prosecutor, appearing for the petitioner/prosecution and Mr. Diwakar Singh for A.1/first respondent.

9 It is a trite law that the power under Section 311 Cr.P.C. can be invoked at any time before the judgment is delivered by the Trial Court. In Rajendra Prasad vs. Narcotic Cell [(1999) 6 SCC 110], it has been held that if a piece of evidence is relevant for deciding the issue at hand, mere fact that the request has been made after the evidence has been closed, will not be a reason to deny the opportunity. In this case, while Sushmita Sen (P.W.7) was in the witness box, she has been asked a specific question by the defence as to who had paid the differential duty for the car, for which, Sushmita Sen (P.W.7) replied that it was she who had paid the differential duty from her pocket. This has been recorded in the deposition. However, the defence has suggested that the differential duty was paid by A.1 from his pocket in the name of Sushmita Sen (P.W.7) since he was pressurised by the D.R.I. and Sushmita Sen (P.W.7) to make the payment. Sushmita Sen (P.W.7) has denied this suggestion. After giving evidence, Sushmita Sen (P.W.7) went back to Mumbai and contemplated over the evidence that was given by her. She addressed a letter dated 18.10.2017 to the D.R.I., Mumbai, stating that the amount for the differential duty was partly paid by A.1 and that it was not fully paid from her pocket, as stated by her in her evidence. She has further stated in the communication that she had inadvertently given a wrong answer in her evidence on account of lapse of memory since the transaction had taken place a decade ago. After receiving the said communication, Asha Panicker, S.I.O, "E" Cell, D.R.I, sent a letter dated 11.01.2018 to Sushmita Sen (P.W.7), calling upon her to forward the documents such as copies of bank statements, etc., to show that A.1 had transferred a part of the differential duty to her. In response to the said letter, Sushmita Sen (P.W.7) has sent a letter dated 31.01.2018 addressed to Asha Panicker, S.I.O, "E" Cell, D.R.I. enclosing certain documents, including a letter dated 03.03.2006 that is said to have been written by A.1 to her (Sushmita Sen). Therefore, the prosecution thought it fit to file an application under Section 311 Cr.P.C. to examine Asha Panicker for the purpose of marking the documents that were received by her from Sushmita Sen (P.W.7).

10 In the opinion of this Court, the said documents, even if marked through Asha Panicker, will not have any evidentiary value, because, Asha Panicker had merely received those documents and is not the author of the same. That apart, the fact in issue in this case is, as to whether the car in question was an used car in Dubai or was it a brand new one that was imported in violation of Transfer of Residence Scheme. The issue is not payment of differential duty. The fact that differential duty has been paid has been accepted by both sides and that is the reason why immunity from prosecution was given to Sushmita Sen (P.W.7) and she was not made an accused in the case.

11 Thus, the documents, which, the prosecution was seeking to mark through Asha Panicker are neither relevant nor can they be admitted in evidence via Asha Panicker. Further, A.1 has admitted in his Section 313 Cr.P.C. examination itself that it was he who had paid the differential duty. In such view of the matter, this Court does not find any infirmity in the order passed by the Trial Court warranting interference.

Resultantly, this Criminal Original Petition fails and is dismissed as being devoid of merits. Connected Crl.M.P. is closed.

Sd/-
Deputy Registrar(CS)

//True Copy//

Sub Assistant Registrar

cad

To

1 The Additional Chief Metropolitan Magistrate (E.O.I)
Egmore, Chennai - 8

+1cc to The Special Public Prosecutor SR. No. 27496

Crl.O.P. No.10507 of 2018

TR(20/04/2018)