IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 24.01.2018	Pronounced on: 30.01.2018

Coram:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Original Petition No. 2388 of 2018

Thirumurthy
S/o.Avanashi Gounder
Formerly Superintendent
Air Cargo Complex(ACC)
Coimbatore.
Presently Superintendent,
Coimbatore Commissionerate, ... Petitioner/Accused No.24 in Crl.OP.No.2388 of 2018

/versus/

Inspector of Police,
Central Bureau of Investigation,
Special Police Establishment,
Anti Corruption Branch,
Haddows Road,
Chennai-600 006. ... Respondent/Complainant

PRAYER: Criminal Appeals is filed under Section 482 of Criminal Procedure Code, to call for the records and quash C.C.No.10 of 2010 on the file of the Second Additional Sessions Court/Special Judge for CBI cases at Coimbatore.

For Petitioner : Mr. S.Senthil Nathan

For Respondent : Mr. K.Srinivasan,
Special Public Prosecutor (CBI)

O R D E R

The petitioner herein, who is arrayed as accused number 24 in C.C.No.10 of 2010 on the file of II Additional Sessions Judge/Special Judge for CBI cases has preferred the petition to quash the case since no material to constitute any offence is made out for proceeding with prosecution.

2. Based on source information, CBI has registered the complaint in RC MA 1 2007 (A) 0034 and 0035, which has culminated in filing final report on completion of investigation

alleging the petitioner serving as Superintendent in the Customs Department and 25 others during 2001 to 2006 entered into a criminal conspiracy in the matter of availing fraudulent duty drawback incentives, by exporting low priced goods but over invoicing its value many times in the invoices, shipping bills and other documents so as to claim excess duty draw back based on the inflated value.

3. In furtherance of the said criminal conspiracy of cheating the customs department, the petitioner and other officers of customs department had obtained illegal gratification of Re one per US dollar of the export consignment value for clearance and sanction of duty draw back incentives. In that way, from 10 firms which were mostly fictitious floated by private individuals, a total sum of Rs.5,77,59,493/- had been sanctioned as duty draw back causing wrongful loss to the Government the said sum. The investigation has revealed that the actual value of the goods exported and foreign remittance received from the foreign buyer being Rs.23,105,193/- by inflating the invoices and shipping bill duty draw back has been sanctioned as if good worth Rs.518,984,176/- has been exported.

4. The petitioner who is arrayed as one of the accused who was serving as Superintendent of customs in Coimbatore during the relevant point of time, claims that the case has been foisted against him based on wrong notion of the prosecution that petitioner is the proper officer for Valuation, Examination and sanction of draw back. While the custom manual holds the Assistant Commissioners, Superintendents, Examiners / Inspectors, LDC and Sepoys collectively responsible for documentation, physical verification, stuffing and assessment, selectively prosecuting few of them is discriminative in nature and liable to be quashed.

5. In addition to the above contention, the petitioner seeks quashing of the proceedings on the ground that section 155 of the Customs Act, gives immunity to action taken in good faith in the course of duty. No prosecution can be initiated under the act without previous notice in writing of the intended proceedings or after expiration of three months from the actual accrual of such cause of action. In this case no prior notice was served on him before proceeding against him and the period of 3 months expired long before initiation criminal prosecution against him.

6. In support of his above contention, the Learned Counsel

relies upon the judgments of Culcatta High Court and Punjab and Haryana High Court, Where the Judgment of Supreme Court in Public Prosecutor, Madras -vs- R.Raju and others reported in AIR 1972 SC 2504 cited.

7. The Learned Special Public Prosecutor would submit that, the present petitioner who is one among the 26 accused in the cases registered and taken on file as C.C.No.10 of 2010 along with other accused earlier filed a petitions to discharge and quash. Same was dismissed as devoid of merits. By couching his plea differently, the same relief is sought with intention to drag on the proceedings endlessly. The learned Special Public Prosecutor by circulating the orders passed by this court in the revision petitions filed by the co-accused for discharge, contented that the records collected during the investigation and relied by the prosecution reveals the criminal conduct of the petitioner who as Superintendent of Customs while serving at Coimbatore entered into conspiracy with the exporter and others, he has obtained illegal gratification to issue 'let export' order, thereby facilitated the exporters to get duty draw back and caused wrongful loss to the Government.

8. In support of his contention, the Learned Special Public Prosecutor point out the portion of the final report which alleges that, during 2002 to 2004, Shri.Appusamy and Shri Patrawal carried out over invoiced exports of garments in the companies named M/s. Petal Exports, M/s. Aar Kay Impex, M/s. R.R.Exports, M/s. Gowri Exports and M/s. Swathi Exports at Air Cargo Complex, Coimbatore to the consignee at Dubai. Thirumoorthy (the petitioner herein) Superintendent, Shri Gnanasambandam and Shri H.Narayanan, fixed the over invoiced value of the consignments, by seeing the same export consignment value for clearance and sanction of drawback incentives. Superintendents Shri A.Thirumoorthy (petitioner herein), Gnanasambandam and H.Narayanan knowingly cleared the low priced goods a the over invoiced value, by suitably instructing the inspectors working under them, by assessing, inspecting and issuing Let Export orders for the consignments of the said companies.

9. The learned Additional Public Prosecutor, while meeting out the judgments cited by the petitioner counsel submitted that, the said judgments are of no binding effect on this court. Further, the said judgments are misconceived on facts and law. The said judgments are resultant of wrong understanding of section 155 of the Customs Act. While on facts, prosecution has collected materials to prove the accused persons including the

petitioner had acted in malafide and criminal intention to cheat the Government and also obtained illegal gratification by misuse of their official capacity hence, nothing bonafide in their act could be inferred to draw the cover of immunity granted under section 155 of the Customs Act.

10. The Learned Special Public Prosecutor concluded that, the confession statements of the exporters who were taken as approvers, the documents of the custom department compared with the foreign inward remittance for the goods sold provides sufficient evidence to hold the petitioner and others guilty of the offence punishable under IPC and Prevention of Corruption Act. Hence there is no ground to entertain the petitions.

11. Heard the Learned counsel for the petitioner and the Special Public Prosecutor. Perused the records, judgments cited by either parties.

12. The scheme of duty draw back is an incentive extended by the Government to any exporter who gains foreign exchange through export of finished goods manufactured from excisable materials used as raw material for manufacturing the goods exported. To avail this incentive, the obligation on the part of the exporter is that he should bring back the sale proceeds of the goods exported in foreign exchange into India through his firm's bank account within 6 months.

13. As per the final report, fictitious firms in the name of M/s Petal Exports by C.Appusamy (A-6), M/s. Aar Kay Impex through Mr. R.Krishnamoorthy (approver), M/s R.R.Exports through Selvaraj (approver) M/s. Gee Gee Garments in the fictitious name Raghunathan through Viswanathan, M/s Dee Bee Garments through N.Karthikeyan (approver) M/s Emm Emm Exports through Chandrasekar (approver) M/s. Gowri Exports & M/s Sakthi Exports through Balasubramaniam (approver), M/s. Swathi Exports through P.Sathasivam (approver) and M/s Nandini Exports through Shanmugavelu (approver) were floated in Tirupur with false addresses. Current Accounts in Centurion Bank, Dhanalaksmi Bank and Indus Ind Bank were opened, PAN card and Import Export Code was obtained fraudulently.

14. By inflating the invoice value duty drawback were drawn by these exporters by bribing the customs officials. The petitioner who is arrayed as A-24 in this case was the Superintendent of Customs Department at Air Cargo Complex,

Coimbatore and he had privy to the crime. The confession statements of co accused implicate this petitioner in the scheme of conspiracy who has allowed low priced goods to be exported as high and inflate valued goods with intention to avail duty draw back incentives. This criminal act had been committed by the petitioner to get pecuniary advantage of obtaining illegal gratification at the rate of Re one per USD show as export value of the goods. It is the specific case of the prosecution that the petitioner during his tenure as Superintendent of customs at Air Cargo, Coimbatore between 2001 to 2003 had through his subordinates issued Let Export order with inflated invoice value and shipping bills. Therefore, contention of the petitioner that he has no role in said conspiracy is totally unsustainable.

15. In so far the immunity provided under section 155 of the Customs Act, it is to be read and understood by its text and context. The judgments cited by the learned counsel for the petitioner is not in consonance to the legislation or to the interpretation as given by the Supreme Court in Raju's cited supra.

Section 155 of the Customs Act reads as under:

> (1) No suit, prosecution or other legal proceeding shall lie against the Central Government or any officer of the Government or a local authority for anything which is done, or intended to be done in good faith, in pursuance of this Act or the rules or regulations. (2) No proceeding other than a suit shall be commenced against the Central Government or any officer of the Government or a local authority for anything purporting to be done in pursuance of this Act without giving the Central Government or such officer a month's previous notice in writing of the intended proceeding and of the cause thereof, or after the expiration of three months from the accrual of such cause.

16. In Para 11 in Sunil Kumar and Ors vs Central Bureau of Investigation judgements relied by the learned counsel for the petitioner, it is observed that,

> 11. The section consists of two sub-sections. The first sub- section speaks of bar of suits 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 the Act. The second sub-section speaks of limitation of suits, prosecution or other legal proceeding for anything done or ordered to be done under the 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. The two subsections operate indifferent fields. The first sub- section contemplates bar of suits against the Central Government or against the officers by protecting them in respect of orders passed in good faith or acts done in good faith. It is manifest that the second subsection does not have any words of restriction or limitation of class of persons unlike sub-section (1). Sub-section (2) does not have any words of qualification as to persons. Therefore, subsection(2) is applicable to any individual or person.

17. If one accept the fallacious interpretation given in this judgment and venture to bisect sub-sections (1) and (2) of Section 155 of the Customs Act and read sub-section (2) disjointly and independent of subsection (1) without its aid, then on the expiry of three months from the date of cause of action, it will be providing immunity from all proceedings except civil proceedings to a person who purport to act under the Customs Act. This interpretation is perse ignorable since it will have over riding effect on all other acts such as Indian Penal Code, All special Acts with penal consequences and Chapter XXXVI (Limitation of taking cognizance of certain offences) of Code of Criminal Procedure. Also, If this interpretation is accepted, then offenders will enjoy larger protection than the limited and restricted immunity provided to constitutional authorities such as President and governors under Article 361 of the Indian Constitution.

18. Therefore, sub-sections(1) and (2) of section 155 has to be read conjointly and not disjointly. “Good faith” and “anything done pursuance of this Act” (to be read as customs Act) which are twin pre-conditions mentioned in sub-section (1) to be satisfied primarily. For those who satisfy the said twin conditions, proceedings shall be initiated after expiry of one month notice and within 3 months from the date of cause of action as per sub-section (2) of Section 155 of the Act. If the pre-conditions mentioned in sub-section (1) is not attracted, the compliance of mandate mentioned in sub-section (2) does not arise.

19. The judgement of the Supreme Court in Raju's case cited supra and relied by the Calcatta High Court and Punjab and Haryana High court which in turn relied by the learned counsel for the petitioner is factually different from the case in hand. Raju's case arise out of private complaint under the Central Excise and Salt Act. When section 40 of the Central Excise and Salt Act was put to test in connection with prosecution for violation of rules 9,53,64,67,68,70,71,66 and 226 and punishable under section 9 (3) of Central Excise and Salt Act, and section 420 r/w 511 and section 109 IPC in a private complaint other than by police report, the Apex Court held that, Section 40 of the Central Excise and Salt Act is applicable.

20. If we go through the content of the final report which is under challenge, we could see it is a case taken cognizance by the criminal court based on final report filed under section 173 of the Code by the police after investigation. The offences alleged are cheating and misconduct of public servants obtaining pecuniary advantage abusing the official position. No offence under Customs Act is alleged against the accused persons. Neither cheating which is a offence defined in Penal Code nor misconduct of obtaining pecuniary advantage abusing office by a public servant which is an offence punishable under the Prevention of corruption Act are acts done in good faith or anything done in pursuance of Customs Act. When Cheating and obtaining illegal gratification are sui juris offences punishable under two different legislations of the parliament, sub-section (2) of section 155 of the Customs Act cannot be read in isolation and make other legislations otiose by mis-interpretation and misapplication of statute.

21. In addition, it is also appropriate to refer the judgment of the High Court of Rajasthan rendered in Ravinder kumar -vs- Union of India, when a similar plea was taken, the Hon'ble High Court has observed that;

> “The judgment of the Hon'ble Apex Court in Public Prosecutor, Madras Vs. R.Raju & Anr. (supra) was dealing with the unamended provisions, which existed prior to 1973. There has been a drastic change in the provision, as quoted above. Sub-section (2) of Section 40 of the Central Excise Act, 1944, as amended after 1973, is some what similar to Section 155(2) of the Customs Act, 1962. But sub-section (2) of Section 40 of the Central Excises and Salt Act, 1944, which existed prior to 1973 is not at all pari materia with

Section 155(2) of the Customs Act, 1962.

Sub-section (1) of Section 155 of the Customs Act gives a protection to the Central Government or any officer of the Government or a local authority for anything which is done or intended to be done in good faith in pursuance of the Act or the rules or regulations. There is a bar on filing a suit, prosecution or other legal proceeding, if the act is done in good faith.

Counsel for the petitioner is not claiming the protection as provided under sub-section (1) of Section 155 of the Customs Act, as it is contended by the learned counsel that the protection sought for under Section 155(1) of the Customs Act was rejected upto the High Court. Counsel for the petitioner is seeking protection under sub-section (2) of Section 155 of the Customs Act on the ground that the words "no proceeding" mentioned in sub-section (2) includes criminal prosecution, and therefore, the contention of counsel for the petitioner is that a month's previous notice in writing is mandatory.

The words "no proceeding" appearing in sub-section (2) of Section 155 of the Customs Act, in my humble opinion, do not include criminal prosecution, as for the protection pertaining to prosecution, there is specific provision under sub-section (1) of Section 155 of the Customs Act. Sub-section (2) of Section 40 of the Central Excises and Salt Act, which has been dealt with by the Hon'ble Apex Court in Public Prosecutor, Madras Vs. R.Raju & Anr. (supra) is not pari materia with sub-section (2) of Section 155 of the Customs Act, and therefore, the bar as provided under sub-section (2) of Section 40 of the Central Excises and Salt Act cannot be made applicable to Section 155(2) of the Customs Act.

The Punjab & Haryana High Court and the Calcutta High Court have based reliance on Public Prosecutor, Madras Vs. R.Raju & Anr. (supra) without taking note of the fact that the existing sub- section (2) of Section 40 of the Central Excise Act, 1944 and sub-section (2) of Section 155 of the Customs Act are different from sub-section (2) of Section 40 of the Central Excises and Salt Act, 1944, which fact went unnoticed both by the Punjab & Haryana High Court and the Calcutta High Court. Therefore, the judgment of the Hon'ble Apex Court being delivered on the provisions as were existing in the Central Excises and Salt Act, 1944 has no applicability with regard to sub-section (2) of Section 155of the Customs Act, 1962."

22. For the above said reasons, this court holds that the contentions raised by the petitioner both on facts as well as law is devoid of merit and hence, this Criminal Original Petition is dismissed. The case of the year 2010 being dragged so long, the trial court is directed to complete the trial by July, 2018 and report the same to the Registry of High Court.

Sd/-
Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

bsm

To

1. The Second Additional Sessions Court/Special Judge, CBI cases Coimbatore.

2. The Inspector of Police, CBI,
   Special Police Establishment,
   Anti correption Branch,
   Haddows Road, chennai 6.

3. The Special Public Prosecutor (CBI cases),
   High Court, Madras.

+1cc to Mr.S.SENTHILNATHAN, Advocate, S.R.No. 6820

judgment made in
Criminal Original Petition No.2388 of 2018

ssi(CO)
TR(15/02/2018)