

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.08.2018

Pronounced on : 28.09.2018

CORAM

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

Crl.O.P.No.2559 of 2013

and

M.P.Nos.1 and 2 of 2013

Stephen Stanislaus Rosario,
S/o.Late S/Stanislaus, Aged 18 years,
Proprietor, M/s. Zandra Trading Company,
D-43, 2nd Main Road,
Vel Murugan Nagar,
Kosapalayam,
Pondicherry - 605 013.
Residential Address
No.9, V.V.P.Nagar
Lane B.Pondicherry - 605 008. ... Petitioner/Accused-1

Vs.

The Assistant Commissioner of Customs
Prosecution (Seaport, imports)
Customs House,
Chennai. ...Respondent/Complainant

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records in C.C.No.11 of 2012 from the file of the learned Additional Chief Metropolitan Magistrate, EOI, Egmore, Chennai - 8 and quash the proceedings against the petitioner.

For Petitioner : Mr.R.Tyagarajan,
Senior counsel
for Mr.A.Ganesh

For Respondent : Mr.N.P.Kumar
Spl.Public Prosecutor for Customs

O R D E R

This petition has been filed by the Accused No.1 u/s.482 Cr.P.C., to quash the proceedings against him in C.C.No.11 of 2012 on the file of the Additional Chief Metropolitan Magistrate, EOI, Egmore, Chennai-8.

2. The facts are, in brief, as follows:

The respondent herein has filed a complaint against the petitioner herein and two others to punish them for the offences punishable under Sections 132 and 135 of the Customs Act, 1962 (hereinafter referred to as 'the Act').

3. According to the respondent, Muriate of Potash (MOP), a restricted item for export is being smuggled out of India under the guise of 'Industrial Salt'. Hence, the officers of the Docks Intelligence Unit (DIU), Customs House, Chennai, detained the export consignment of 125 Metric Tonnes of cargo declared as 'Industrial Salt' on 24.07.2009 lying at M/s. A.S.Shipping Container Freight Station, Numbal Village, Maduravoyal, Chennai 600 077, brought for export by M/s.Zandra Trading Company, Pondicherry. The said consignment was seized under a mahazar on 04.08.2009. At the time of detention of the above mentioned consignment, it was ascertained that another consignment of 50 MTS of cargo, declared as 'Industrial Salt' covered under shipping bill No.3429962 dated 14.07.2009 filed by the same exporter, M/s.Zandra Trading Company, Puducherry was lying at M/s.Viking container Warehousing Container Freight Station, No.5, GNT Road, Moolakadai, Chennai - 600 110. It was found that the petitioner herein is the Proprietor of M/s.Zandra Trading Company, Puducherry and he gave authorization to one R.Gopinath (A-3) to sign invoices on all shipping related documents at Bangalore on behalf of M/s.Zandra Trading Company.

4. The premises of M/s. Sri Lakshmi Packagings, Tirupur was searched on 03.09.2009 by the Tiruppur Customs Officers and a restraint order was issued on the 200 bags of salt approximately weighing 10 MTS. The second accused viz., R. Sampath is the Proprietor of M/s.Sri Lakshmi Packagings, Tiruppur and he gave a voluntary statement stating that he was doing the business of supplying HDPE/Woven sacks; that his customer M/s. Zandra Trading Company asked him to supply the goods by raising the invoices with the description as 'industrial salt'; that he has raised the invoices for 'industrial salt' as per the instruction of M/s Zandra Trading Company, Puducherry and that he has received a commission of 2% of the bill value from M/s.Zandra Trading Company Ltd., In the course of investigation, it was found that 200 MTS of 'MOP' available in the eight recalled container lying at in the CFS was seized on 25.11.2009 under a mahazar as it was smuggled out of India by way of mis-declaration violating the provisions of the Customs Act, 1962 r/w. Fertilizer Control Order, 1985 under the Essential Commodity Act, 1955. Thus in all the 375 MTS of 'MOP', with an FOB value of Rs.82,83,633/- (as per the concerned shipping bills) and market value of Rs.1,34,40,000/- were attempted to be smuggled out of India by the exporter by way of mis-declaration and hence the accused persons are liable to be punished under Sections 132 and 135 of the Customs Act, 1962

r/w. Fertilizers Control Order, 1985 under the Essential Commodity Act, 1955.

5. Heard Mr.R.Tyagarajan, learned senior counsel for Mr.A.Ganesh appearing for the petitioner and Mr.N.P.Kumar, learned Special Public Prosecutor for Customs/respondent.

6. The learned senior counsel for the petitioner has submitted that the respondent herein has filed a complaint based on the sanction order issued by the Commissioner of Customs dated 07.06.2011 and the said sanction order itself was issued based on the order passed by the adjudicating authority dated 29.03.2011 confiscating the goods. He further submitted that as against the order passed by the adjudicating authority, the petitioner herein has filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) and the said Appellate Tribunal by the order dated 02.05.2012 has allowed the said appeal and set aside the order passed by the adjudicating authority and hence, the prosecution cannot be allowed to continue. In support of the abovesaid contentions, the learned senior counsel has relied upon the following decisions:

1) G.L. Didwania and another Vs. Income Tax Officer and another, 1995, supp. (2) SCC 724

(2) K.C.Builders and another Vs. Assistant Commissioner of Income Tax (2004) 2 SCC 731.

7. The learned Special Public Prosecutor, on the contrary, has contended that it is true that the order which was passed by the adjudicating authority dated 29.03.2011 has been set aside by the CESTAT by the order dated 02.05.2012, but after setting aside the order of the adjudicating authority CESTAT has remanded the matter for fresh disposal. He further submitted that after remand, the adjudicating authority by the order dated 01.04.2014, has confirmed the earlier order and ordered for confiscation of the 375 MTS of Muriate of Potash and also imposed a penalty of Rs.20,00,000/- u/s. 114 (i) and Rs. 2,00,000/- u/s.114 (AA) of the Customs Act, 1962. He further submitted that as against the said order, the petitioner herein has filed an appeal before the CESTAT and at the time of admitting the said appeal, Appellate Tribunal has passed an order on 30.03.2015 directing the petitioner herein to pre-deposit a sum of Rs.10,00,000/-. He further submitted that as against the said order, the petitioner herein has filed an appeal in CMA.No.925 of 2015 before this court, wherein this court by the order dated 21.04.2015 has modified the Appellate Tribunal's order by reducing the amount from Rs.10,00,000/- to Rs.5,00,000/- to comply within a period of eight weeks. He further submitted that the petitioner has not complied with the said order and hence the appeal was dismissed by the Appellate Tribunal on 01.07.2015 and therefore, the complaint is maintainable against the petitioner. He further relying upon the

decision of the Hon'ble Supreme Court in AIR Customs Officer IGI New Delhi Vs. Pramod Kumar Damija (Criminal Appeal No.123 of 2016 dated 15.02.2016) submitted that the adjudicating proceedings and criminal prosecution can be launched simultaneously as they are independent in nature.

8. The learned senior counsel for the petitioner relying upon the decision of this court in M/s.Together Textile Mills represented by its partners viz., Shivananda B. Shetty and Others Vs. The Deputy Commissioner of Central Excise (Crl.OP.No35264 of 2005 dated 13.12.2006) has submitted that even if the matter is remanded back to the Commissioner by the Appellate Tribunal, the prosecution cannot be allowed to continue. In that case, the original order of adjudication was set aside by the Appellate Tribunal and the matter was remanded back to the Commissioner and at that stage, this court has quashed the criminal proceedings by observing that in the event of the Commissioner coming to a positive conclusion, thereafter a fresh criminal proceedings can be initiated. But in this case, as already pointed out that after remand, the Commissioner of Customs has passed Denovo Adjudication Order on 01.04.2014, wherein, he has confirmed the earlier order. As against the same, an appeal was filed and the said appeal was dismissed and therefore, at this stage, the petitioner cannot rely upon the aforesaid decision.

9. In the case of G.L. Didwania and another Vs. Income Tax Officer and another (supra), the prosecution was launched against the assessee for making false statement. The assessing authority held that the assessee had intentionally concealed his income tax derived from 'Y' Company which belonged to him, initiating prosecution against him. The appellant filed an appeal against the assessment order and the Tribunal set aside the assessment order holding that there was no material to hold that 'Y' Company belonged to the assessee. The assessee thereupon filed a petition before the High Court u/s.482 of Cr.P.C., to quash the criminal proceedings and the same was dismissed. On appeal, the Hon'ble Supreme Court has held that the whole question was whether the appellant made a false statement regarding the income which according to the assessing authority escaped assessment and so far as the said issue was concerned, the findings of the Appellate Tribunal was conclusive and hence the prosecution cannot be sustained. Accordingly, the Hon'ble Supreme Court quashed the criminal proceedings and allowed the appeal filed by the assessee.

10. Following the aforesaid decision in K.C.Builders and another Vs. Assistant Commissioner of Income Tax (supra), the Hon'ble Supreme Court has held that the findings of the Appellate Tribunal was conclusive and the prosecution cannot be sustained since the penalty having been cancelled by the

complainant following the Appellate Tribunal's order, no offence survives under the Income Tax Act and thus quashing of prosecution is automatic.

11. In the case on hand, the original order passed by the Adjudicating Authority dated 29.03.2011 was set aside by the Appellate Tribunal by the order dated 02.05.2012. However, the Appellate Tribunal has remanded the matter to the Adjudicating Authority for fresh disposal. Thereafter, the Adjudicating Authority has passed Denovo adjudication order dated 01.04.2014, wherein, the Adjudicating Authority has again passed an order of confiscation of the goods and also imposed a penalty of Rs.20,00,000/- u/s.114 (i) and Rs.2,00,000/- u/s. 114 (AA) of the Customs Act, 1962. As against the said order, the petitioner herein has filed an appeal before the Appellate Tribunal and the Appellate Tribunal by the order dated 30.03.2015 has directed the petitioner herein to pre-deposit a sum of Rs.10,00,000/- within a period of eight weeks and to report compliance on 01.06.2015. As against the said order, the petitioner herein has filed CMA.No.925 of 2015, wherein this court by the order dated 21.04.2015 has modified the Appellate Tribunal's order by reducing the amount from Rs.10,00,000/- to Rs.5,00,000/- to comply within a period of eight weeks. The petitioner herein has not complied with the said order and hence, the Appellate Tribunal has dismissed the appeal by the order dated 01.07.2015. So, it is clear that the original confiscation order passed by the Adjudicating Authority has been restored and therefore, there is no bar for continuation of prosecution.

12. The Hon'ble Supreme Court in AIR Customs Officer IGI New Delhi Vs. Pramod Kumar Damija (supra) has observed in paragraph No.7 as follows:

7. The exoneration in related adjudication proceedings and the effect thereof on criminal proceedings again came up for consideration before a three-Judge Bench of this Court in Radheshyam Kejriwal v. State of West Bengal and Another [3]. In his dissenting opinion P. Sathasivam, J. (as the learned Chief Justice then was) concluded that there was nothing in Foreign Exchange Regulation Act, 1973 to indicate that a finding in adjudication is binding on a court in prosecution under Section 56 of Act or that the prosecution under Section 56 depended upon the result of the adjudication under the Act. C.K.Prasad J., speaking for the majority summed up as under:-

"38. The ratio which can be culled out from these decisions can broadly be stated as follows:-

(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;

(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding: If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue the underlying principle being the higher standard of proof in criminal cases. "

From the aforesaid decision, it is clear that adjudication proceedings and criminal prosecution can be launched simultaneously and the decision in adjudicating proceeding is not necessary before initiating criminal prosecution and that the adjudication proceeding and criminal proceeding are independent in nature to each other. Therefore, even without any decision in adjudication proceeding, criminal prosecution can be launched.

13. It is also to be pointed out that the petitioner herein has filed a petition u/s.245 (ii) Cr.P.C before the trial court in CrI.M.P.No.1375 of 2012 and the said petition was dismissed by the trial court on 11.01.2013. The said order is not an interlocutory order and as such, the same is a revisable order, but the petitioner has not filed any revision against the dismissal of his discharge petition. On the contrary, he has filed the present petition u/s.482 of Cr.P.C., Even in this petition, he has not challenged the order passed by the trial court in the discharge petition. On the contrary, in this petition, he has challenged the very launching of the prosecution.

14. The learned senior counsel for the petitioner has

submitted that the petitioner need not file revision against the dismissal of the discharge petition and he can straight away file petition u/s.482 of Cr.P.C., to quash the criminal proceedings. In support of the said contention, he relied upon the following decisions:

1) Krishnan and another Vs. Krishnaveni and another (1997) 4 SCC 241

2) Pepsi Foods Ltd., and another Vs. Special Judicial Magistrate and others (1998) 5 SCC 749.

3) G. Sagar suri and another vs. State of U.P. And Others (2000) 2 SCC 636

15. Learned Special Public prosecutor, on the contrary, has submitted that since the dismissal of the discharge petition is not an interlocutory order, certainly the said order is a revisable one and as such, the petitioner ought to have filed a revision and when an alternative remedy is available, this court cannot exercise the powers u/s.482 Cr.PC.

16. In Krishnan and another Vs. Krishnaveni and another (supra), the appellants filed an application to discharge them. The Magistrate on the said application, discharged the accused by the order dated 22.02.1990. The respondents, feeling aggrieved thereby, filed a revision petition before the Sessions Judge and the Sessions Judge has dismissed the revision petition. On a further revision filed by the first respondent, the High Court has allowed the said revision and set aside the order of the Magistrate and directed him to consider the facts on merits in the trial. Feeling aggrieved, the appellants have filed an appeal before the Hon'ble Supreme Court by special leave. It was argued before the Hon'ble Supreme Court that in view of bar u/s.397, (3) Cr.P.C, the High court should not have entertained second revision, but the Hon'ble Supreme Court has held that though further revision before the High Court under Sub Section (1) of Section 397 is prohibited by sub-section (3) thereof, inherent power of the High Court is still available u/s.482 Cr.P.C., and that the High Court is justified in interfering with the order leading to miscarriage of justice and in setting aside the order of the courts below. But in this case, admittedly no revision was filed against the order passed by the trial court in the discharge petition. So, the aforesaid decision will not be applicable to the facts of this case.

17. In Pepsi Foods Ltd., and another Vs. Special Judicial Magistrate and others (supra), after receipt of the summons, the accused filed a writ petition under Articles 226 and 227 of the Constitution of India before the High Court. The High Court refused to entertain the writ petition on the ground that the accused should approach the trial court for their discharge u/s.245 of the Cr.P.C. Aggrieved by the same, the accused filed an appeal before the Hon'ble Supreme Court wherein the Hon'ble

Supreme Court has held that no doubt that the Magistrate can discharge the accused at any stage of the trial, if he considered the charge to be groundless, but that does not mean that the accused cannot approach the High Court u/s.482 of Cr.P.C or Articles under 226 and 227 of the Constitution to quash the proceedings against him, when the complaint does not make out any case against him and still he must undergo the agony of criminal trial. But in this case, as already pointed out that the discharge petition filed by the petitioner was dismissed by the trial court and challenging the same, he has not filed any criminal revision. Therefore, the aforesaid decision also will not apply to the facts of this case.

18. It is no doubt true that the dismissal order passed by the trial court in the discharge petition filed by the petitioner is not an interlocutory order and as such, it is a revisable order but, the petitioner has not filed any revision. At this juncture, it would be relevant to refer the decision in Mohit alias Sonu and Another Vs. State of U.P and Another (Crl.A.814 of 2013) dated 01.07.2013 wherein the Hon'ble Supreme Court in paragraph Nos.23 to 27 has observed as follows:

"23. So far as the inherent power of the High Court as contained in Section 482 of Code of Criminal Procedure is concerned, the law in this regard is set at rest by this Court in a catena of decisions. However, we would like to reiterate that when an order, not interlocutory in nature, can be assailed in the High Court in revisional jurisdiction, then there should be a bar in invoking the inherent jurisdiction of the High Court. In other words, inherent power of the Court can be exercised when there is no remedy provided in the Code of Criminal Procedure for redressal of the grievance. It is well settled that inherent power of the court can ordinarily be exercised when there is no express provision in the Code under which order impugned can be challenged.

24. Courts possess inherent power in other statute also like the Code of Civil Procedure (Code of Civil Procedure) Section 151 whereof deals with such power. Section 151 of Code of Civil Procedure reads:

Nothing in this Code shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.

25. This Court in the case of Padam Sen and Anr. v. State of Uttar Pradesh AIR 1961 SC 218 regarding inherent power of the Court under Section 151 Code of Civil Procedure observed:

The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore, it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict what has been expressly provided in the Code or against the intentions of the Legislation. It is also well recognised that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code.

26. In a Constitution Bench decision rendered in the case of Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal AIR 1962 SC 527, this Court held that:

The inherent jurisdiction of the Court to make orders *ex debito justitiae* is undoubtedly affirmed by Section 151 of the Code but inherent jurisdiction cannot be exercised so as to nullify the provision of the Code of Civil Procedure. Where the Code of Civil Procedure deals expressly with a particular matter, the provision should normally be regarded as exhaustive.

27. The intention of the Legislature enacting the Code of Criminal Procedure and the Code of Civil Procedure vis-a-vis the law laid down by this Court it can safely be concluded that when there is a specific remedy provided by way of appeal or revision the inherent power under Section 482 Code of Criminal Procedure or Section 151 Code of Civil Procedure cannot and should not be resorted to."

19. From the aforesaid decision, it is clear that when there is a specific remedy provided by way of appeal or revision, the inherent power u/s. 482 Cr.P.C or Section 151 Cr.P.C cannot be resorted to.

20. Looking from any angle, this petition is not maintainable and hence, the same is liable to be dismissed. Accordingly, this petition is dismissed. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

gv

To

1.The Additional Chief Metropolitan Magistrate,
EOI, Egmore, Chennai -8.

2.The Assistant Commissioner of Customs
Prosecution (Seaport, imports)
Customs House,
Chennai.

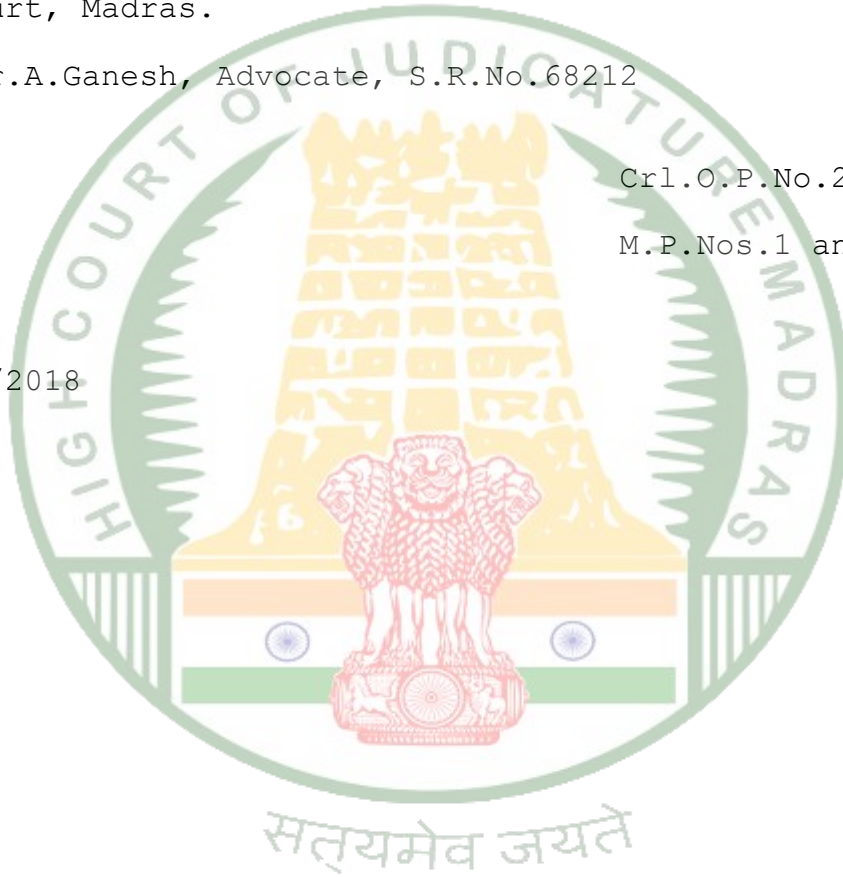
3.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.A.Ganesh, Advocate, S.R.No.68212

Cr1.O.P.No.2559 of 2013
and
M.P.Nos.1 and 2 of 2013

GJ II(CO)

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