BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Order	Date of Pronouncing the Order
31.01.2018	16.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE P.N.PRAKASH

Crl.R.C.(MD)No.245 of 2015
and
Crl.O.P.(MD)No.9397 of 2016

K.S.Subramanian ... Petitioner / Petitioner / A5 in Crl.R.C.(MD)No.245 of 2015

R.Vijayan ... Petitioner / A3 in Crl.O.P.(MD)No.9397 of 2016

-vs-

State, represented by
The Deputy Superintendent of Police
CBI, ACB, Chennai.
(R.C.No.MA1 2012 /A0006) ... Respondent / Respondent / Complainant in both cases

PRAYER (in Crl.R.C.(MD)No.245 of 2015): Petition filed under Section 397 r/w 401 Cr.P.C., to call for the records from the lower Court and to duly set aside the order passed by the learned II Additional District Judge for CBI Cases, Madurai, Madurai District, in his Crl.M.P.No.339 of 2013, dated 07.04.2015, in C.C.No.3/2013.

PRAYER (in Crl.O.P.(MD)No.9397 of 2016:) Petition filed under Section 482 of the Code of Criminal Procedure, to call for the records relating to the criminal proceedings in C.C.No.03/2013 in R.C.No.6(A)/2012, on the file of the Principal Special Judge for CBI Cases, Madurai and quash the same in so far as the petitioner is concerned.

For Petitioner : Mr.R.Vijayan, Party-in-Person
(in Crl.O.P.(MD) No.9397/2016)

For Petitioner : Mr.Niranjan S.Kumar
(in Crl.R.C.(MD) No.245/2015)

For Respondent : Mr.N.Ashok Kumar Gowtham
(in both cases) Spl. Public Prosecutor for CBI Cases

C O M M O N   O R D E R

Based on source information, the Central Bureau of Investigation, Chennai, registered a case in RC MA1 2012 A 0006, against one Sanjay H Shah, Proprietor of M/s.Edge, Mumbai and others and after completion of investigation, has filed seven charge sheets, namely, C.C.Nos.3 to 9 of 2013, for the offences under Sections 120-B r/w 420 I.P.C. and Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988, before the learned II Additional District Judge for C.B.I.Cases, Madurai. In all the charge sheets, Sanjay H Shah, Proprietor of M/s.Edge, Mumbai and K.S.Murugan, partner of M/s.Green Port Shipping Agency, have been shown as A1 and A2. However, the other accused in each of the cases are customs officials and they differ.

2. The crux of the allegation in all the charge sheets is that, Sanjay H Shah (A1) imported steel measuring tapes from China via Tuticorin Port under different bills of entry on different dates and in collusion with the customs officers on duty, he had cleared all his consignments without payment of anti-dumping duty.

3. The present case pertains to C.C.No.3 of 2013, in which, apart from Sanjay H Shah (A1) and K.S.Murugan (A2), the other accused are R.Vijayan (A3) - Superintendent of Customs, S.Sridhar (A4) - Superintendent of Customs and Central Excise, K.S.Subramanian (A5) – Deputy Commissioner (Retd), Central Excise, Tuticorin.

4. K.S.Subramanian (A5) filed Cr.M.P.339 of 2013 in C.C.No.3 of 2013, under Section 239 Cr.P.C., before the learned II Additional District Judge for C.B.I.Cases, Madurai, for discharging him from the prosecution, which has been dismissed by the Trial Court by order dated 07.04.2015. Challenging the same, he has filed Crl.R.C.(MD) No.245 of 2015. R.Vijayan (A3) has filed Crl.O.P.(MD) No.9397 of 2016, under Section 482 Cr.P.C., seeking to quash the proceedings initiated against him in C.C.No.3 of 2013. Both the cases were taken up together, heard together and are being disposed of by this common order.

5. During the course of hearing, Mr.P.Saravanan, learned counsel on record for R.Vijayan (A3) withdrew his appearance and R.Vijayan (A3) argued the case as party-in-person.

6. Heard both sides and perused the materials filed in the form of typed set.

7. To appreciate the contentions of the petitioners, it may be necessary to state the nature of the allegations made against them in the final report in C.C.No.3 of 2013. To put it in simple words, steel measuring tapes are manufactured in abundance by China and therefore, they are liable to anti-dumping duty in terms of the Government of India's Notification No.147 of 2003 dated 07.10.2003. According to the said notification, steel measuring tapes, its parts and components imported from China costing less than 4.106 US$ per Kilogram would attract anti-dumping duty. In this case, Sanjay H Shah (A1) imported 4,32,000 pieces of steel measuring tapes from M/s.Shanghai Huiyi Measuring Instruments Company Limited, Shanghai,

China, vide bill of lading dated 08.06.2006. The said consignment reached Tuticorin Port on 17.07.2006 and it was transported to M/s.Concor, CFS, Tuticorin, for customs clearance formalities. Sanjay H Shah (A1) appointed M/s.Green Port Shipping Agency run by K.S.Murugan (A2) as his Custom House Agent for clearing the consignment. K.S.Murugan (A2) filed the bill of entry on 17.07.2006 and it was checked by Vijayan (A3), Superintendent of Customs, who was functioning as Appraiser in Import Assessment Section, Custom House, Tuticorin. Vijayan (A3) passed an order directing that there should be 100% examination of the cargo, which was approved by K.S.Subramanian (A5), who was working as the Assistant Commissioner then. This order was passed at 05.30 p.m., on 17.07.2006 and it was transmitted via local area network (LAN) to Thirugnanam, Superintendent and R.Venugopal, Inspector, who were working at M/s.Concor, CFS, Tuticorin, as Shed Examination Officers. Thirugnanam and Venugopal inspected the consignment thoroughly and sent a report stating that the cargo attracts anti -dumping duty and it was transmitted to Vijayan (A3).

8. It is the specific case of the prosecution that Vijayan (A3) instead of imposing anti-dumping duty of Rs.12,41,602.77 beside the import duty on the consignment based on the landed cost declared by the importer, he preferred to enhance the unit price of the measuring tape from 0.11 US$ per piece (declared invoice value) to 0.163 US$ per piece. In other words, the invoice value as shown by the seller at China was 47,520 US$ and this was enhanced to 79, 890 US$ without any basis. As a result, the landed cost per kilogram rose to 4.99 US$ per kilogram, which is just higher than the reference value i.e., 4.106 US$ per kilogram. In other words, had Vijayan (A3) taken the declared invoice value as 47,520 US$, the price for per kilogram of the consignment would have been less than 4.106 US$ and thereby, Sanjay H Shah (A1) would have been asked to pay anti-dumping duty. Since the invoice declared value was increased to 79,890 US$, the cost for per kilogram became 4.99 US$, which is just higher than the reference value i.e.4.106 US$, thereby, Sanjay H Shah (A1) avoided payment of anti-dumping duty. This calculation by Vijayan(A3) has been cleared by Sridhar (A4) and K.S.Subramanian (A5).

9. Apart from the above said occurrence, the accused are also facing prosecution in the same charge sheet for a similar occurrence, in which Sanjay H Shah (A1) imported 2,18,000 pieces of steel measuring tapes by bill of lading dated 04.07.2006, for which also, M/s.Green Port Shipping Agency was appointed as a Custom House Agent. In this occurrence also, Vijayan (A3) had directed one T.M.Ramalingam, Superintendent and R.Venugopal, Inspector to conduct 100% examination of the consignment. Accordingly, they conducted 100% examination and reported that the total weight of the consignment was 17,790 Kilograms and it attracts anti-dumping duty. Despite the recommendations of T.M.Ramalingam and Venugopal, Vijayan (A3) enhanced the unit price of the steel measuring tapes and as a result of which, the landed cost for per kilogram has been made to

4.99 US$ per kilogram, which is higher than the reference value of 4.106 US$ and thereby, facilitated Sanjay H Shah (A1) to evade anti-dumping duty to the tune of Rs.14,45,059/-.

10. Mr.Niranjan S.Kumar, learned counsel appearing for K.S.Subramanian (A5) submitted that the accused had not done any illegal act inasmuch as their action was intended to secure customs duty for the State. The learned counsel took this Court through the provisions of the Customs Act and the Customs Tariff Act to show that the customs officer need not have to accept the value of the consignment at its face value as declared in the invoice.

11. Mr.Niranjan S.Kumar, learned counsel, further submitted that the Shed Examination Officers namely, Thirugnanam and Venugopal did not raise any objection when the orders passed by Vijayan (A3) and K.S.Subramanian (A5) were transmitted to them for clearance of the goods without payment of anti-dumping duty and therefore, they are equally liable. The learned counsel further contended that the accused had strictly followed the Notification dated 07.10.2003 in letter and spirit by following the same procedure that was adopted for certain other consignments also.

12. Per contra, Mr.N.Ashok Kumar Gowtham, learned Special Public Prosecutor for C.B.I.Cases refuted the contentions of Mr.Niranjan S.Kumar, learned counsel for the petitioner / A5.

13. This Court gave its anxious consideration to the rival submissions.

14. It may be relevant to state here that though only two transactions are listed in C.C.No.3 of 2013, one cannot loose sight of the fact that Sanjay H Shah (A1) has cleared more than ten consignments during the said period without payment of anti-dumping duty and that is why, the C.B.I. has filed six charge sheets apart from this case. It may be apposite to refer to the Police statement of one A.Thalavai, an employee of M/s.Green Port Shipping Agency. Thalavai, in his statement, has stated that he was working under K.S.Murugan (A2) as Manager in M/s.Green Port Shipping Agency; that Sanjay H Shah (A1) had engaged M/s.Green Port Shipping Agency for clearance of his consignments through Tuticorin Port; that when the Shed Examining Officers recorded that the consignment is liable for anti-dumping duty, the same was informed to Sanjay H Shah (A1), who told him that he has already spoken to the customs officers, namely, Vijayan (A3), Sridhar (A4) and K.S.Subramanian (A5) and they would take care of everything. This is an indeed incriminating piece of material against the accused, which cannot be lightly ignored.

15. As regards the ground taken based on the Judgment of the Apex Court in Public Prosecutor, Madras Vs. R.Raju and others, [AIR 1972 SC 2504] relating to Section 155 of the Customs Act, 1962, the issue is no longer *res-integra*, in the light of the recent Judgment [unreported] of this Court in Thirumurthy Vs. Inspector of Police,

[Crl.OP.No.2388 of 2018, dated 30.01.2018] and I am in agreement with the law laid down therein.

16. In *State of T.N. v. N.Suresh Rajan*, reported in *(2014) 11 SCC 709*, the Honourable Supreme Court, after discussing the entire law governing discharge under Sections 227 and 239 Cr.P.C., has held as follows.

> *"29. We have bestowed our consideration to the rival submissions and the submissions made by Mr. Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the Court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the Court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the Court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage."*

17. In such view of the matter, this Court is of the view that this is not a case, in which the accused can be discharged from the prosecution or the prosecution initiated against them can be quashed.

18. In the result, both the criminal revision and the criminal original petition are dismissed.

19. At this juncture, the learned counsel appearing for the petitioners sought leave of this Court to dispense with the personal appearance of the petitioners before the Trial Court.

20. Accepting the submissions of the learned counsel for the petitioners and also taking into consideration the facts and circumstances of the case, the petitioners are directed to surrender before the Trial Court within a period of two weeks from the date of receipt of a copy of this order and if they are already on bail, they shall furnish a bond for Rs.10,000/- (Rupees ten thousand only) without sureties, under Section 88 Cr.P.C., to the satisfaction of the Trial Court.

21. Further, this Court directs the petitioners to appear before the Trial Court for collecting the final report and other papers under Section 207 Cr.P.C., at the time of framing charges, for questioning under Section 313 Cr.P.C. and on the day of judgment. On all other dates, if the petitioners file an application under Section 317 Cr.P.C., undertaking that they will not dispute their identity and that their counsel will cross-examine the prosecution witnesses on the day they are examined in chief, as held by the Hon'ble Supreme Court in *Vinod Kumar vs. State of Punjab*, reported in *2015 (1) Scale 542*, in their absence without adopting dilatory tactics, the Trial Court may liberally consider and entertain the same. If they abscond, a fresh First Information Report can be registered against them under Section 229-A of the Indian Penal Code. If they adopt any dilatory tactics, it is open to the Trial Court to insist upon their presence.

Sd/-
Assistant Registrar(Crl.Side)

/True Copy/

Sub-Assistant Registrar

To:

1.The Principal Special Judge for CBI Cases,
Madurai.
2.The II Additional District Judge for CBI Cases,
Madurai, Madurai District
3.The Deputy Superintendent of Police,
CBI, ACB, Chennai.
4.The Special Public Prosecutor for CBI Cases,
Madurai Bench of Madras High Court, Madurai.
+One cc to Mr.Niranjan S.Kumar, Advocate, SR.No.49269
sm/ta/krk
RL/6C/6P/SKN/RSK/SAR4/27/2/2018

COMMON ORDER
in
Crl.R.C.(MD)No.245 of 2015
and
Crl.O.P.(MD)No.9397 of 2016
16.02.2018