BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Order	Date of Pronouncing the Order
06.09.2018	20.09.2018

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Crl.R.C(MD)Nos.437, 438, 439 and 440 of 2017
and
Crl.M.P.Nos.4553,4555,4557 and 4562 of 2017

1. P.Ramesh ... Petitioner in Crl.RC(MD) No.437 of 2017

2. K.N.R.Sugumaran ... Petitioner in Crl.RC(MD) No.438 of 2017

3. R.Sundar ... Petitioner in Crl.RC(MD) No.439 of 2017

4. Hanif K.Thara
5. Asif H.Thara ... Petitioners in Crl.RC(MD)No.440 of 2017

Vs.

State represented by
The Inspector of Police
CBI, ACB, Shastri Bhavan
Chennai- 600 006 .... Respondent in all Crl.Rc's

Prayer in Crl.RC(MD) No.437 of 2017: Criminal Revision Case is filed under Section 397 read with Section 401 of the Code of Criminal Procedure, to call for the records connected with Crl.M.P No.1017 of 2016 in C.C. No.7 of 2014 dated 07.04.2017 on the file of the II Additional District Judge for CBI cases, Madurai and revise the same under Section 397 and 401 of Cr.P,C by setting aside the said dismissal order and consequently discharge the petitioner from the Calendar Case No. 7 of 2014 on the file of the II Additional District Judge for CBI Cases, Madurai.

Prayer in Crl.RC(MD) No.438 of 2017: Criminal Revision Case is filed under Section 397 read with Section 401 of the Code of Criminal Procedure, to call for the records connected with Crl.M.P No.1618 of 2016 in C.C. No.7 of 2014 dated 07.04.2017 on the file of the II Additional District Judge for CBI cases, Madurai and revise the same under Section 397 and 401 of Cr.P,C by setting aside the said dismissal order and consequently discharge the petitioner from the Calendar Case No. 7 of 2014 on the file of the II Additional District Judge for CBI Cases, Madurai.

Prayer in Crl.RC(MD) No.439 of 2017: Criminal Revision Case is filed under Section 397 read with Section 401 of the Code of Criminal Procedure, to call for the records connected with Crl.M.P No.1392 of 2016 in C.C. No.7 of 2014 dated 07.04.2017 on the file of the II Additional District Judge for CBI cases, Madurai and revise the same under Section 397 and 401 of Cr.P,C by setting aside the said dismissal order and consequently discharge the petitioner from the Calendar Case No. 7 of 2014 on the file of the II Additional District Judge for CBI Cases, Madurai.

Prayer in Crl.RC(MD) No.440 of 2017: Criminal Revision Case is filed under Section 397 read with Section 401 of the Code of Criminal Procedure, to call for the records connected with Crl.M.P No.1026 of 2014 in C.C. No.7 of 2014 dated 07.04.2017 on the file of the II Additional District Judge for CBI cases, Madurai and set aside the same

For Petitioners (In Crl.Rc (MD)Nos. 437 to 439 of 2018)	: Mr.AR.L.Sundaresan, Senior Counsel for Mr.T.Sudhan Raj
(In Crl.RC(MD) No 440 of 2018)	: Mr.B.Kumar, Senior Counsel for Mr.B.Sathish Kumar
For Respondent in Crl.R.Cs.	: Mr.N.Nagendran Special Public Prosecutor for CBI Cases

COMMON ORDER

These four Criminal Revisions are preferred by the accused who are arrayed as A1 to A5 in C.C. No.7 of 2014. The petitions filed under Section 239 of Cr.P,C to discharge them from the case was dismissed by the trial court vide separate individual order dated 07.04.2017 filed by each of the petitioners.

2. The respondent police based on reliable information registered First Information Report on 22.04.2013 against the assessors, Superintendent and Deputy Commissioner of Customs who were part of the Assessment Group -I custom of Tuticorin during period 2008-2012 along with the proprietor of M/s. Unik Taders and Manager M/s.Sindhu Cargo Service Pvt Ltd the custom House Agent. According to the reliable information, pursuant to the conspiracy among these persons, Star Aniseed imported from

Vietnam and China were under valued and Special Additional Duty (SAD) was sanctioned causing loss to the Customs Department to the tune of Rs.2.78 crores and corresponding wrongful gain to the accused persons.

3.After investigation it was found that the customs officials of the Assessment Group- I which has cleared the Bills of Entry pertaining to M/s.Unik Traders were not criminally responsible for clearing under valued bills. The officers who were incharge of the intelligence (SIIB) office of the Commissioner of Customs, Customs House, Tuticorin, were actually responsible for clearing the under valued Bills of Entry for the import made by M/s. Unik Traders. Hence final report has been filed against them.

4. The revision petitioners herein are accused 1 to 5 before the II Additional District for CBI cases , Madurai in C.C.No. 7 of 2014. The final report filed by CBI alleges that P.Ramesh (A1), K.N.R.Sugumaran(A2) R.Sundar (A3) Superintendent of Customs, Special Intelligence and Investigation Branch (SIIB) Office of the Commissioner of Customs, Custom House Tuticorin entered into a criminal conspiracy with Shri.Hanif K.Thara (A4) and Shri.Asif H Thara (A5) of M/s Unit Traders, Bangaluru with an intention to cheat the Department of Customs in the matter of Assessment of Cargo imported by M/s. Unik Traders and in furtherance of the criminal conspiracy, by abusing their official position, knowing fully well, falsely issued U.O.Notes to the Assessment Officers, Customs House, Tuticorin to clear the imported cargo as per the under valuation declared by Shri. Hanif K.Thara (A4) and Shri. Asif H.Thara (A5) of M/s. Unik Traders, Bangaluru and thereby caused a wrongful loss of Rs.92,24,730/- to the Department of Customs, Tuticorin and corresponding wrongful gain to themselves and to Shri.Hanif.K.Thara (A4) Shri.Asif. H.Thara (A5) of M/s. Unik Traders Bangaluru. The aforesaid acts committed by them constitute the offences punishable U/s.120(b) r/w.420 IPC and Section 13(2) r/w.13(1)(d) of Prevention of Corruption Act.

5. The fulcrum of the final report is that when the customs officials at assessment level found that the value declared by the importer namely M/s. Unik Traders in respect of Star Aniseeds was found to be lesser than the guideline value found available with the Directorate of Valuation (DOV) and National Information Data Base (NIDB), the matter was referred to CIIB which is responsible for monitoring Import and Export. In case of any suspicion in import or export, with the approval of the Commissioner of Special Investigation, the Investigation Branch (SIIB) have to conduct investigation on the matter. The matter referred by the other departments like the assessment department to SIIB has to be scrutinized in the manner prescribed. After completion of the enquiry, the decision is to be communicated to the said department with the approval of AC/DC or Additional Commissioner, SIIB.

6. In this case concern, the assessing unit had referred Bills of Entry pertaining to M/s. Unik Traders, Bangaloru suspecting under valuation to CIIB. P.Ramesh(A1), K.N.R.Sugumaran (A2) and R.Sundaram (A3), All Superintendent of Customs at (SIIB), Office of the Commissioner of Customs House, Tuticorin have failed to report the matter to the respective controlling officers. They all dishonestly suppressed the information from the higher officials. They have created a Urgent Office Note (UO Note) stating falsehood that the Commissioner had persued the records of the Bills of Entry and allowed to clear the Bills of Entry accepting the declared value. Based on these U.O.letters which first eminated from A1(Ramesh) vide UO letter No.C.No.VIII/48/33/2009-SIIB dated 09.11.2010, all the suspected Bills of Entry presented by M/s.Unik Traders were cleared though they were with under valued. Thus caused wrongful loss to the Department of Customs to the tune of Rs.92,24,730/-.

7. The contentions raised before the trial court in their discharge petitions are that CBI is not proper officer to decide about under valuation. The Customs Act which is a composite Act provides for valuation as well as procedure to be adopted in case of under valuation. The Acts and Rules framed under the Customs Act empowers the proper officer to levy duty on import based on the transaction value. If there is any doubt in the transaction value Section 14 of the Customs Act provides guidelines how the valuation of the goods to be assessed.

8. In the present case, the officers have followed the procedure and guidelines as found in the statue. They have discharged their duty in accordance to law, therefore, under Section 155(2) of the customs act, they are protected from any proceedings including criminal action.

9.There is no material placed by the prosecution to prove there was meeting of mind between the officials A1 to A3 or with the importers A4 and A5. A1 to A3 were Superintendent of customs CIIB Department during different period. While so, the allegation of conspiracy between them is baseless. The valuations of the goods were determined based on DOV prevailing at the relevant point of time, taking into consideration the guidelines under Section 14 of the customs Act and Rules 3, 10 and 12. The materials relied by the prosecution does not disclose the goods were under valued. The DATA either NIDB or DOV produced after long delay, were not available for the customs official at Tuticorin, when the Bills of Entry were cleared, the custom department never found any under valuation in the goods imported, it is the CBI, which is investigating the case alleges under valuation which is their statutory responsibility. Therefore, proper officer as defined under the customs Act and not the CBI police could investigate the alleged under valuation, based on vague information.

10.The investigation made is not fair and proper when seven persons shown as accused in the F.I.R., 7 of them are not prosecuted. Their names are found in column (2) as not sent for trial. Whereas the names of the accused 1 to 3 which are not in the F.I.R as shown as Accused. The discrimination in selecting the accused with ulterior motive is obviously seen. The 161 (3) Cr.P.C statements of the witnesses and the documents relied by the prosecution does not disclose any material to infer either under valuation of goods cleared or by clearing the Bills of Entry, the accused persons obtained any pecuniary advantage to attract the provisions of Prevention and Corruption Act or an ingredient to attract the offence of cheating.

11. Further it is also contented that the final report as laid suffers misjoinder of persons and misjoinder of charges. The matter relates to different period and different Bills of Entry, they do not form part of same transaction, therefore, not substantiate in law.

12.The respondent defending every allegations had filed counter. The trial court considering the materials placed by the prosecution and the counter, declined to entertain the discharge petitions on the ground that whether offence of conspiracy or cheating made out is to be decided after appreciating the evidence and documents. For the present, to frame charge, the statement of witnesses and documents relied make out case for prosecution.

13. In respect of A4. Shri Hanif K.Thara, the importer and his son A5 Asif H.Thara who is looking after the day to day affairs of M/s. Unik Taders, 13 Bills of Entry checked and verified by A1 to A3. The Superintendents of custom department and cleared them during the period October 2010 and January 2011.

14. Discharge petition under Section 239 of Cr.P.C., filed by them on the ground that, the office of the Commissioner of customs has issued a show cause notice dated 28.03.2014 regarding under valuation of goods covered under 13 Bills of Entry and the same is matter of adjudication pending. When authority under the Act has seized of the matter whether really they under valued in the import of Star Aniseed is true or not, CBI cannot prosecute the petitioners based on the inference that there is under valuation in the import and loss to the revenue. The allegation of undervaluation is prematured to say, when the authorities competent to look into the matter whether any undervaluation in the import is adjudicating the matter and not yet arrived at a conclusion.

15.The duty as paid by the petitioner is on the value assessed by the assessors and confirmed by the Superintendents incharge of CIIB department. Who are the proper officers under the statue to levy duty and collect. The proposal to reject the declared value and revaluation will arise only if the department re apprise the transaction and establish the contemporaneous price of the goods import was higher than the declared price. When the prosecution has not filled any record to show the contemporaneous value of the goods was higher than the declared value, the charge sheet which is not supported by acceptable data, liable to fall. They never imported Star Aniseed from China. While so, reliance on a documents /Invoice of a company in China have no relevancy to allege the goods imported by the petitioner from Vietnam and Hongkong are under valued.

16. Heard the learned Senior Counsels appearing for the revision petitioners/accused and the learned Special Public Prosecutor appearing for CBI.

17. The counsels argued at length and relied upon several judgments and provisions of Customs act, Rules framed thereunder to emphasis that, it is the responsibility of the 'proper officer' as defined under Section 2 (3A) of the customs Act to assess the invoice value declared by the importers . At the first instance is the DC/AC of customs and Central Exercise Department. To exercise power under Section 28 AAA the proper officer are the Superintendent of customs and Central Exercise and Appraisers for exercising function under Section 28(1) of the Act. The 13 Bills of Entry under scanner, admittedly assessed and value fixed by the proper officers. The Bills of Entry suspected to be under valued were sent to CIIB and they have directed the Appraisers through UO letters to accept the declared value and clear the Bills of Entry. The contentions of A1 to A3 is that the UO letters were sent by them on the approval and instruction of the Commissioner, who is the controlling Officer, therefore, they cannot be prosecuted either for 120(B) I.P.C, conspiracy, 420 of IPC, cheating or misappropriation under Section 13(C) of Prevention and Corruption Act.

18. Whereas the specific case of the prosecution is that the 3 UO letters :

(1)UO letter No.CN VIII/48/33/2009-SIIB dated 09.11.2010 sent by P.Ramesh (A-1) to the assessing officer in respects of the following Bills of Entry.

i)B.O.E No.2247452 , dated 12.10.2010
i)B.O.E No.2247464 , dated 12.10.2010
i)B.O.E No.2247459 , dated 12.10.2010
i)B.O.E No.3873, dated 04.10.2010

(2) UO letter in C.No.VIII/48/2/2009-SIIB, dated 26.11.2010 sent by K.N.R.Sugumaran(A-2) to the assessing officer in respect of the following Bills of Entry.

i)B.O.E No.2355152 , dated 23.11.2010
i)B.O.E No.2355401 , dated 23.11.2010
i)B.O.E No.2355388 , dated 23.11.2010

(3)UO letter in C.No.VIII/48/2/2009-CIIB, dated 20.12.2010 sent by K.N.R.Sugumaran(A-2) to the assessing officer in respect of the following Bills of Entry.

i)B.O.E No.2430039 , dated 14.12.2010

(4) The UO letter No.C.No.VIII/48/33/2009-SIIB, dated 21.01.2011 sent by R.Sundar (A-3) to the assessing officer in respect of the Bills of Entry.

i)B.O.E.No.2577295, dated 13.01.2011 and
ii)B.O.E.No.2577296, dated 13.01.2011

were dishonestly sent by the above 3 accused persons without obtaining the approval of the controlling officers. Falsely and dishonestly they have mislead in their UO letters that the Commissioner has allowed to clear the Bills accepting the declared value and to follow the same in past/ future imports. Thus abused their position to obtain pecuniary advantage.

19. It is also submitted by the learned Special Public Prosecutor that the adjudication for undervaluation by the custom officers and making pecuniary advantage of themselves or for others by a public servant by abusing their official position or by corrupt or illegal means are two distinct offences. For the rather conduct, CBI has authority to investigate. The plea of the revision petitioners by prosecuting than the CBI is discharging the function of a proper officer is baseless contention.

20.In this case, loss of Rs.92,24,730/- is deducted in the investigation. Corresponding wrongful gain to the importer, pursuant to the alleged conspiracy between the importer and the officers of customs in the CIIB wing is made out. The prosecution is therefore sustainable.

21.The disputed fact whether the respective UO letters referred above sent by the accused A1 to A3 were issued with the knowledge of the Commissioner or can be decided only after trial.

22.From the statements of LW-1 Francis Xavier Raja, the NIDB Data used to compare the prevailing value of the goods imported and the declared value found in the invoice were handed over to the Investigating Officer. He has explained the DOV value at the relevant dates were higher than the declared value, but the importer has paid duty only as per the declared value. Thereby caused revenue loss to the tune of Rs.80 lakhs. LW-5 Alagarsamy, Superintendent of Customs and C.E, had stated that when he found the declared value of the Bills of Entry No.2577295 and 2577296, dated 13.01.2011 were under valued by around 70/kg compared to DOV value of around 130/kg, he told the CHA of M/s.UNIK Traders to enhance the value but the importer refused, so he sent note to CIIB seeking clarification whether to assess the goods (Star Aniseeds) as per the value mentioned in the B.E's. R.Sundar(A3) has issued letter of approval, so he cleared the B.E's based on declared value. The other witnesses for the prosecution have also stated in the same line, which indicates the officers in the assessing group have noticedunder valuation in the B.E's presented by the CHA of the importer M/s.Unik traders. Though it was brought to the notice of CIIB wing, the accused A1 to A3 had suppressed the communication from the knowledge of the Commissioner. They have issued the UO letters with misleading facts. The statement of Thiru.S.Santhana Muhu(LW-16) discloses the culpability of the accused persons and the violation of procedure and law in allowing M/s.Unik traders, Bangaloru to clear goods with under valuation. The comparative chart regarding prevailing price of Aniseed throughout the world as imported in various_ports of India is furnished by Ranjith Kumar (LW-15). The Superintendents who have verified the B.O.E's and have stated that the declared value as found in the invoice was in variably found very low compared to Directorate of Valuation (DOV) but the communication sent by the accused 1 to 3 from CIIB wing permitted to clear the Bills as per the declared value.

23.The judgments cited by the counsels regarding the comparative value/NIDB data which form base for DOV data it is held that though it may not be a conclusive proof but it is definitely a source to determine the value of the goods as per Section 14 of the Customs Act.

24.Further, the prosecution against importer A4 and A5 is for under valuing the goods imported and for evading duty. As against A1 to A3 is for suppressing the reference made by the assessing group about undervaluation, to the controlling officer. Issuing UO letters on their own without the knowledge of the Commissioner thereby to facilitate the importer to clear the goods showing lesser value than the prevailing market value caused unlawful pecuniary advantage.

25.The three UO letters issued by A1 to A3 respectively are not issued as per the procedures. UO letters are not to be issued in respect of the matters relating to policy or revenue. The statement of LW-16 Santhanamarimuthu, Superintendent of Customs CIIB wing in his statement has stated that without the approval of the AC/DC, the Superintendents cannot send UO letter to other sections of the customs department or other departments. UO notes can be sent only on routine matters.

26.LW-18 Ajay Dikshit, Commissioner of Customs in his statement has said that UO letters, dated 09.11.2010, by A1 or the other 2 UO letters by A2 and A3 were sent without his approval. The matter relating to undervaluing B.E's of M/s.Unik traders were not brought to his notice by A1 to A3.

27.LW-19, Chandra Mohan Additional Commissioner has perused the files relating to the UO letters had pointed out that they were issued without his approval or knowledge.

28. The above stated incriminating materials indicates that the UO letters issued by A1 to A3 were not part of their duty but created falsely to cheat the exchequer. No element of duty is found in issuing a misleading, false document under the capture UO letter. Hence, Section 155 (2) of the Customs Act have no relevance. The said Section 155 of Customs Act places embargo for mitigating proceedings against the customs official only in respect of the act done in the course of their duty in consonance with the act, not for the acts done dishonestly and contrary to law. The Section 155 of the customs act refers to act done in good faith, in pursuance of this Act or the rules or regulations are protected from legal proceedings. The sub Section (2) of Section 155 puts embargo to initiate any proceedings, without a months notice, for anything purporting to be done in pursuance of this Act.

29. These two sub Sections of Section 155, gives protection not only to the officers of the custom department, but it extends the protection to all the Government servants or any officers of the Government or local authorities for acts done in good faith, in pursuant to this act. If at all any proceedings to be initiated against them, one month prior notice or expiry of three months from the accrual of cause of action is prescribed.

30.As pointed out, issuing UO letters contrary to Act, rules and Regulations containing falsehood does not attract Section 155 of the Act, to claim protection. Hence, the orders of the trial court dismissing the discharge petitions are liable to be confirmed.

31.In the result, these Criminal Revision Petitions are dismissed confirming the orders dated 07.04.2017 passed in Crl.M.P Nos.1017 of 2016, 1618 of 2016, 1392 of 2016 and 1026 of 2014 in C.C. No.7 of 2014 by the learned Second Additional District Judge for CBI cases, Madurai. Consequently connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CO)

/True Copy/

Sub Assistant Registrar (CS-IV)

To

1. The II Additional District Judge for CBI cases,
   Madurai.

2. The Inspector of Police
   CBI, ACB, Shastri Bhavan
   Chennai- 600 006

3. The Special Public Prosecutor,
   Madurai Bench of Madras High Court,
   Madurai.

4. The Record Keeper
   Vernacular Section
   Madurai Bench of Madras High Court,
   Madurai. (2 Copies)

+ 10 CC TO Mr.M.RAMASAMY, ADVOCATE IN SR No. 85795

AAV
TE/SV/SAR-4 : 10/10/2018 : 10P/16C

ORDER MADE IN
Crl.RC(MD) Nos.437, 438,
439 and 440 of 2017
20.09.2018