HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

Criminal Revision Case No.2326 of 2017

ORDER:

This Criminal Revision Case is directed at the instance of petitioner/A.1 against the order dated 05.07.2017 in Crl.M.P.No.2240/2016 in C.C.No.7/2010 on the file of II Additional Special Judge for CBI Cases, Visakhapatnam, whereunder learned Judge dismissed the application filed by the petitioner under Section 239 Cr.P.C to discharge him from main case.

2) The factual matrix of the case is thus:

a) A.1 to A.3 are Assistant Commissioner and Superintendents in the office of Commissioner of Customs and Central Excise, at Vadodra and Visakhapatnam respectively. A.5—M/s. Sri Balaji General Trading Co. (SBGTC) which is a partnership firm floated by its Partners P.Kesava Rao (A.4) and K.Surya Rao, both are fictitious persons. The firm was registered with the District Registrar, Srikakulam. K.Surya Rao, appointed A.4 as Attorney of the Firm to execute the partnership works. The prosecution case is that A.1 to A.3 being officials of customs and central excise in abuse of their official position, allowed A.5 firm for deemed export of materials like Polyester Gray Fabric (PGF), Nylon Gray Fabric (NGF) etc, without payment of duty to three non-existing firms in violations of the provisions of EXIM policy, 1997-2002 as per which a 100% trading export oriented Unit could make *physical exports only* but not deemed export. A.1 to A.3, abusing their official position, allowed clearance of numerous consignments to the three non-existing companies against the advance release orders and thereby caused wrongful loss of Rs.32.28 crores to the Government of India. A.1 to A.3 accommodated fabricated and fake bank guarantees submitted by A.4 for issuance of private bonded warehousing licence.

b) Initially, Inspector of Police, CBI filed charge sheet against A.1 to A.5 for the offences punishable under Sections 120B, 420, 468, 471 IPC and Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988 (for short "PC Act"). A.4 was shown as absconded and hence, cognizance was taken accordingly. Later, the I.O filed the additional charge sheet against two persons namely Polaki Janaki Ram (who impersonated as A.4—P.Kesava Rao) and Shabbir Haji Issak Noorani (A.6).

3a) While so, the petitioner/A1 filed Crl.M.P.No.2240 of 2016 under Section 239 Cr.P.C. to discharge him from the offence. Denying the charge sheet allegations it is contended that A1 functioned as Superintendent of Customs and Central Excise, Srikakulam Range from 05.07.2002 to 07.11.2002; a Central Excise Officer is required to function as Customs Officer to attend the work in respect of 100% Export Oriented Unit (EOU). Since the present case relates to a fraud allegedly committed relating to 100% EOU, his duties fall under Customs Act, 1962. Hence, the instant criminal proceedings are barred by Section 155 (2) of Customs of Act, 1962. As per the prosecution, the alleged fraud was commenced from January, 2002 which can be treated as cause of action for launching prosecution, whereas CBI registered FIR in 2008 for alleged fraud. However, petitioner was not served with notice in terms of Section 155(2) of Customs Act, 1962 prior to launching of criminal proceedings or before lapse of three months of the accrual of cause of action. Hence, the continuation of criminal proceedings against the petitioner which were launched six years after the date of accrual of cause of action is illegal and abuse of process of Court.

b) The respondent/complainant filed counter and opposed the petition contending that the petitioner along with other accused was charged for the offences under Sections 120B, 420, 467, 468 IPC and Section 13(2) r/w 13(1)(b) of PC Act, 1988 and therefore Section 155(2) of Customs Act, 1962 has no application in the instant case. The respondent contended that the protection given to the officers under Section 155 of Customs Act, 1962 will be applicable in respect of those acts that were done in good faith under the provisions of Customs Act, 1962 but such protection will not extend to the offences committed by the Officers of Customs and Central Excise Department. To extend the protection the act must be purported to be done in pursuance of the Customs Act, 1962. In other words, Section 155 of the Customs Act, 1962 extends protection to those Officers who act in good faith while implementing the provisions of the Act under Chapter—III relating to Searches, Seizures and Arrest etc. However, the said Section does not come in the way of charging an Officer who under the guise of his office commits offences.

c) The trial Court having accepted the contention of the respondent dismissed the petition in view of the *prima facie* case against the petitioner but of course with the observation that whether the petitioner is entitled for protection under Section 155 of Customs Act, 1962 could be determined only after a detailed trial and thus preserved the right of the petitioner to raise relevant and appropriate contentions in the course of trial.

Hence, the Criminal Revision Case.

4) Heard Sri N.Vijay, learned Counsel for petitioner and learned Special Public Prosecutor for CBI.

5) Fulminating the impugned order, the main plank of argument of learned counsel for petitioner is in terms of Section 155(2) of Customs Act, 1962. Referring the phrase "*no proceeding other than a suit*" appearing in Section 155(2), he would vehemently argue that no proceedings including the criminal proceedings shall be launched against the Central Government or any officer of the Government or local authority without giving a month's previous notice in writing of the intended proceedings and of the cause thereof and after the expiration of three months from the accrual of such cause. In this case, learned counsel would argue, according to the prosecution, the cause of action had arisen in January, 2002 but the prosecution was launched in 2008. No notice was issued to the petitioner ever. Therefore, the prosecution has not complied with either of the conditions mentioned in Section 155(2) i.e. mandatory issuance of notice one month prior to the launching of prosecution or launching of prosecution within three months from the accrual of cause of action. Hence, the Criminal Proceedings in C.C.No.7 of 2010 are not legally maintainable as they are hit by Section 155(2) of Customs Act, 1962. He placed reliance on the decisions in ***Public Prosecutor, Madras vs. R.Raju***[1]

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[1] (1972) 2 SCC 410

and ***Ashok Kumar Singh vs. State of West Bengal***[2] and ***Sunil Kumar vs. CBI***[3].

6) In oppugnation, learned Special Public Prosecutor for CBI vehemently argued that Section 155(2) has no application to criminal prosecution as the term "*no proceedings*" employed in Section 155(2) does not comprehend in it in criminal proceedings. Therefore, the question of following the mandatory procedure under Section 155(2) Customs Act, 1962 does not arise. He placed reliance on the unreported judgments of the Rajasthan High Court in ***Ravindra Kumar vs. UOI***[4] and Delhi High Court in ***Atul Dikshit vs. CBI***[5].

6) The point for determination is:

"Whether there are merits in the Crl.R.C. to allow?"

7) **<u>POINT</u>**: In view of the respective contentions, it has to be seen whether Section 155(2) of Customs Act, 1962 has application to criminal proceedings. Section 155 of Customs Act, 1962 is as follows:

> *<u>"Sec.155: Protection of action taken under the Act.—</u>*
> *(1) No suit, prosecution or other legal proceedings 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*

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[2] CDJ 2016 Calcutta HC 234 = MANU/WB/0394/2016
[3] CDJ 2016 PHC 048 = MANU/PH/0193/2016
[4] S.B.Crl.R.P.No.1282/2016 dt. 08.11.2016
[5] 2017 (1) JCC 746 = MANU/DE/0210/2017

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."

8) Sofaras Section 155(1) is concerned, no suit or prosecution or other legal proceedings shall lie against Central Government or any officer of the Government or local authority for anything done or intended to be done in good faith in pursuance of this Act or the rules or regulations. So the acts done in good faith in pursuance of the provisions of the Act or the Rules or Regulations will give protection to concerned officers. In such an instance no suit, prosecution or other legal proceedings shall lie against them. In the instant case the allegation is that, A1 to A3 being officials of Customs and Central Excise, in conspiracy with A4 and abusing their official status allowed SBGTC for deemed export of materials without payment of duty to the three non-existing firms in violation of provisions of EXIM policy. As per which, 100% trading EOU can be made by physical export and not by deemed export but A1 to A3, abusing their official capacity allowed clearance of numerous consignments to the three non-existing companies against advanced release orders and thereby caused wrongful loss of Rs.32.28 crores to GOI. In the backdrop of aforesaid allegations whether A1 to A3 acted in good faith in pursuance of the provisions of the Customs Act, 1962 and Rules and Regulations thereof or whether they acted with mala fide intention is a matter of fact which can be determined only after full-fledged trial. Therefore, as rightly observed by the trial Court, Section 155(1) cannot be pressed into service at this stage.

9) What is remained for consideration is whether Section 155(2) is violated. The argument of learned Special Public Prosecutor for CBI is that Section 155(2) has no application to criminal proceedings.

10) In similar circumstances, the High Court of Rajasthan happened to discuss about the applicability of Section 155(2) of Customs Act, 1962. It was argued on behalf of revision petitioner that the protection under Section 155(2) was available to him on the ground that the words "*no proceeding*" mentioned in sub-section (2) include criminal prosecution. Rejecting the said argument, the High Court of Rajasthan held thus:

> *"16. 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 9 / 11 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.*
> *17. The Punjab & Haryana High Court in **Sunil Kumar vs. CBI (MANU/PH/0193/2016)** and the Calcutta High Court in **Ashok Kumar Singh vs. State of West Bengal (MANU/WB/0394/2016)** have based reliance on **Public Prosecutor, Madras vs. R.Raju & Anr. ((1972) 2 SCC 410)** without taking note of the fact that the existing subsection (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 155 of the Customs Act, 1962."*

11) Later, High Court of Delhi in the case of ***Atul Dikshit*** (5 supra) also expressed the same view and agreed with the judgment of High Court of Rajasthan mentioned supra.

12) I am in full agreement with the judgments of High Courts of Rajasthan and Delhi. They discussed and distinguished the judgments now relied on by the petitioner. So, it is obvious that the protection under Section 155(2) of Customs Act is not available in criminal prosecution. Hence, the Crl.R.C. fails.

13) In the result, the Crl.R.C. is dismissed.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 14.06.2018
Scs/Murthy