HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

<u>Criminal Revision Case No.2869 of 2017</u>

<u>ORDER</u>:

This Criminal Revision Case is directed at the instance of petitioner/A.6 against the order dated 19.09.2017 in Crl.M.P.No.1251/2017 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 Wadodra 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, showing A.4 as absconded and it was taken cognizance. 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 (petitioner—A.6). The brief details of additional charge sheet are that A.4—Palla Kesava Rao, was a non-existing person and Polaki Janaki Ram of Pondur by impersonating P. Kesava Rao and in conspiracy with some other persons floated A.5 firm and committed fraud in conspiracy with public servants. Sofaras petitioner/A.6 is concerned, he is a native of Doraji of Rajkot in Gujarat and settled in Mumbai. He is engaged in import and export business, his forefathers are having business interest in Orissa. They are having one Oil Mill in the name of Jamal Oil Mill at Pondur. The investigation revealed that in 2001, the petitioner/A.6 came into contact with P.Janaki Ram at which time, the Government of India made amendments to the EXIM policy 1997-2001 as per which even trading units were entitled for the exemption of excise duty and custom duty on indigenously procured and imported materials if they are physically exported in toto. However, such benefit is not available in case of making deemed exports. It is alleged, petitioner/A.6 in conspiracy with P.Janaki Ram, hatched a plan to take undue advantage of Government scheme. Pursuant to thereof, P.Janaki Ram started a fictitious partnership with non-existing partners i.e, K.Surya Rao, and Kesava Rao and both petitioner/A.6 and P.Janaki Ram approached Ch.Eswar Mohan Rao, a chartered Accountant and got prepared one project report in the name of SBGTC to set up as 100% EOU and they also obtained PAN cards in the fictitious name of P.Kesava Rao. For obtaining the same, petitioner/A.6 and P.Janaki Ram, used photo of one A. Laxmi Naidu, who is an illiterate Kalasi in Jamal Oil Mill of petitioner/A.6. Later, P.Janaki Ram, in pursuance of conspiracy with petitioner/A.6 opened a current A/c.No.309 in Indian Bank, Srikakulam Branch. Later, both of them obtained a Trading Licence to establish 100% EOU at the leased premises at Srikakulam. They got declared their premises at Industrial Estate, Kusalapuram as warehousing Station under Customs Act, 1962. P.Janaki Ram, in the fictitious name of P.Kesava Rao, obtained C.TC certificates from Central Excise, Srikakulam, for procurement of indigenous goods, without payment of Central Excise duty. He obtained duty free indigenous goods from three firms namely M/s. Sunrise Textiles Ltd., M/s. Blue moon Textiles Ltd. and M/s. Jash Overseas, Malegaon, Nasik. They also imported Polyester Fabric, Artificial leather, beetle nuts and brass scrap in the name of A.5 without payment of customs duty. They were required to physically export all the material procured on behalf of M/s. SBGTC, however, petitioner/A.6 and Janaki Ram pursuant to their conspiracy with A.1 to A.3, fraudulently cleared the above materials as deemed export to the three 100% EOUs namely 1) M/s.T.Chandrakala Super Auto, Mumbai, 2)M/s. Shivam Corporation, Mumbai and 3) M/s.Chinta Subramanyam, Mumbai. In the process, they caused loss of Rs.32.28 crores to the Government of India.

3) Heard Sri Vedula Venkata Ramana, learned Senior Counsel appearing for Sri N.Naveen Kumar, learned counsel for petitioner and learned Special Public Prosecutor for the State (A.P).

4) Fulminating the impugned order, learned Senior Counsel Sri Vedula Venkata Ramana, would argue that even if the charge sheet allegations are taken to be true on its face value, no offence could be made out against petitioner/A.6 for conspiring with A.1 to A.3 and making undue use of EXIM policy to make deemed export and thereby causing loss of Rs.32.28 crores to GOI. The record will not show the complicity of petitioner/A.6 in misusing the EXIM policy. At the worst, the record may show the petitioner/A.6 conspiring with A.4 to create a fictitious partnership. He would argue that there is no material to establish the alleged conspiracy of A.6 and A.4 on one hand and their conspiracy with A.1 to A.3. Except mere suspicion against the petitioner/A.6, there is no other reliable material to frame charges against A.6. He would submit that creation of a fictitious partnership firm has nothing to do with evasion of customs duty. There is nothing on record to hold that petitioner/A.6 is a Kingpin. He thus prayed to set aside the impugned order and discharge the petitioner/A.6. He placed reliance on the decision in ***Sunil Bharti Mittal v. Central Bureau of Investigation***[1].

---

[1] (2015) 4 SCC 609

5) In oppugnation, learned Special Public Prosecutor for CBI vehemently argued that petitioner/A.6 is the mastermind behind starting a fictitious partnership under the name and style of M/s.SBGTC. Its main objective is to get undue benefit of EXIM policy. Though the petitioner/A.6 cleverly and cunningly did not execute any document nor signed any record, however, his role is writ large, which is evident from the oral evidence of Sri Ch.Eswar Mohan Rao, the Chartered account, K.Chandra Sekhar, J.Kantha Rao, former employees of M/s. SBGTC and V.S.Prasad Rao, the-then Chief Manager of Indian Bank, Srikakulam Branch, etc. He would further argue that since conspiracy will be hatched in secrecy, it is difficult to get any direct evidence for that purpose and the same can be established only inferentially. The role of petitioner/A.6 can be well delineated only after a full-fledged trial. He thus prayed to dismiss the Crl.R.C.

6) The point for determination is:

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

7) **POINT**: It is seen that the Trial Court having regard to the statements of certain witnesses such as LW.25—Sri A.Laxmi Naidu, LW.23—Sri Ch. Eswar Mohan Rao, LWs.36 to 38 namely N.Raghuram, Ch.Subramanyam and Kelothu @ Tejavathu Chandra Kala, held that there is a *prima facie* material against the petitioner/A.6.

8) The statement of Sri A.Laxmi Naidu, would show, he is an illiterate and worked as Kalasi (coolie) for 20 years in M/s. Jamal Oil Mill, owned by petitioner/A.6 and after he met with accident, he stopped working. He stated

that in the account opening form, relating to Current A/c.No.309 of Indian Bank, Srikakulam Branch, standing in the name of SBGTC, there were 2 photographs, one such photograph under the name of K.Surya Rao, belonged to him. He does not know the said Surya Rao. He was not a partner of the said firm. He does not know P.Kesava Rao, the other partner. After he met with accident, petitioner/A.6 took him to Srikakulam to obtain handicap certificate and at that time he took his photographs and one of such photographs might have been used in the Account opening form.

9) The statement of Ch.Eswar Mohan Rao, Chartered Accountant would reveal that he knows petitioner/A.6 and once he came to this witness along with one P.Kesava Rao and introduced the said Kesava Rao, as the Managing Partner of SBGTC. The petitioner/A.6 requested him to prepare a project report for applying warehousing licence to central excise as 100% EOU and to apply for e-code to VEPZ, Visakhapatnam. He also requested this witness to help obtaining PAN card, in the name of P.Kesava Rao and his partner K.Surya Rao and he accordingly helped them in obtaining PAN card. This witness stated that he can identify the photograph of P.Kesava Rao on PAN card, the other partner K.Surya Rao, did not come to his office. He prepared project report and furnished. Thus as can be seen, the statements of aforesaid witnesses and others would project *prima facie* material about the complicity of the petitioner in the offence. As rightly argued by learned Spl.P.P, the role of the petitioner in the conspiracy can be divulged completely only after full-fledged trial. Therefore, the Trial Court was right in framing charges against

the petitioner/A.6. The decision cited by the petitioner will have no application to the facts of the present case.

10) In the result, this Criminal Revision Case is dismissed.

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

U. DURGA PRASAD RAO, J

Date: 11.06.2018

scs