IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.4035 OF 2019

ATCO INDUSTRIES LIMITED AND OTHERS)...PETITIONERS

V/s.

THE UNION TERRITORY OF DAMAN AND)
DIU AND ANOTHER)...RESPONDENTS

Mr.Siddhesh Bhole i/b. Haresh Jagtiani and Associates, Advocate for the Petitioner.
Mr.R.M.Pethe, APP for the Respondent – State.
Mrs.Purnima Kantharia, Special Public Prosecutor, for Respondent No.2.

CORAM : A. M. BADAR, J.

DATE : 13th FEBRUARY 2020

<u>P.C.</u> :

1 Leave to amend, as prayed, is granted. Amendment be effected forthwith. Re-verification dispensed with.

2 By this petition, petitioners/accused in Regular Criminal Complaint No.41 of 2007 filed under Rule 9(1), 52A, 53, 173F, 173G(4), 173H and 226 of the Central Excise Rules 1944 are praying for quashing and setting aside the summoning order of 4th August 2007.

3 Relying on judgment of the Hon'ble Apex Court in the matter of **Radheshyam Kejriwal vs. State of West Bengal and Another**[1] the learned counsel for petitioners/accused urged that exemption from excise duty was granted for the products which used to be manufactured by petitioners/accused for the period from 1st March 1997 to 1st June 1998. However, ignoring this exemption, show cause notice came to be issued and the Adjudicating Authority by upholding the contravention was pleased to impose penalty vide order dated 31st August 2004 passed by the Commissioner, Central Excise. It is further pointed out that Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as CESTAT for the sake of brevity) vide order dated 11th September 2007 was pleased to set aside the

1 (2011) 3 Supreme Court Cases 581

order of the Adjudicating Authority and the matter was remanded for fresh consideration to the Adjudicating Authority. The learned counsel further argued that again the Adjudicating Authority has passed similar order, and therefore, the appeal came to be filed before the CESTAT. By drawing my attention to the order dated 16th September 2011 and more particularly to paragraphs 17 and 21 of the said order, it is argued that exemption from excise duty in respect of manufacture of 80,000 bottles came to be upheld. However, for adjudication regarding refurbishion of remaining bottles, the matter was again remanded to the Adjudicating Authority. Challenge to this order was not found favourable by the Division Bench of this court, and ultimately, appeals filed by the Customs Department came to be dismissed on 22nd January 2018. The learned counsel for petitioners/accused further argued that ultimately, on 18th December 2018, the Adjudicating Authority held that there is contravention of Central Excise Rules and penalty was imposed on petitioners/accused and this order is now again the subject matter of the appeal before the CESTAT.

4 The learned counsel further argued that the complaint pending before the Chief Judicial Magistrate, Daman, is based on first order of the Adjudicating Authority which is now no more in existence, and therefore, summons issued in that proceedings need to be quashed and set aside.

5 As against this, the learned counsel appearing for respondents submitted that the first order dated 31st August 2004 of the Adjudicating Authority has ultimately merged in the order dated 18th December 2018 and by this order, which is said to be the subject matter of challenge in an appeal before the CESTAT, petitioners herein are not exonerated and therefore, the petition deserves to be dismissed.

6 I have considered the submissions so advanced and also perused the judgment of the Hon'ble Apex Court in the matter of **Radheshyam Kejriwal (supra)**. Paragraphs 38 and 39 of the said judgment need reproduction and those read thus :

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

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

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

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

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

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

(vii) In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal

> prosecution on the same set of facts and circumstances can not be allowed to continue underlying principle being the higher standard of proof in criminal cases."

> 39 In our opinion, therefore, the yardstick would be to judge as to whether allegation in the adjudication proceeding as well as proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceeding is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceeding, the trial of the person concerned shall be an abuse of the process of the court."

7 It is, thus, clear that only after exoneration in the adjudicating proceedings and that too on merit, the criminal prosecution can be quashed. Such is not the case in hand. In this view of the matter, the petition is devoid of merits and the same is dismissed.

(A. M. BADAR, J.)