IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.10.2020
PRONOUNCED ON : 02.12.2020

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.R.C.No.1050 of 2019

The Directorate of Revenue Intelligence,
(Represented by the Senior Intelligence Officer),
27, G.N.Chetty Road, T.Nagar,
Chennai-600 017.
... Petitioner

Vs.

1.Shri Abdullah @ R.Panchamoorthy
2.Shri Mujeebur Rahman. ... Respondents

PRAYER: Criminal Revision is filed under Section 397 r/w 401 of the Code of Criminal Procedure, to set aside order dated 30.07.2019 in Crl.M.P.No.349 of 2019 in R.R.No.11 of 2019 on the file of the learned Additional Chief Metropolitan Magistrate (E.O.1), Egmore, Chennai-8 and allow the same for the reason stated above.

For Petitioner : Mr.N.P.Kumar,
Special Public Prosecutor
For Respondents: Mr.B.Manoharan

ORDER

The petitioner/the Senior Intelligence Officer, Directorate of Revenue Intelligence has filed a petition under Sections 110(1A), 110(1B) and 110(1C) of the Customs Act, 1962, in Crl.M.P.No.349 of 2019 in R.R.No.11 of 2019 before the learned Additional Chief Metropolitan Magistrate (E.O.I), Egmore, Chennai. The learned Additional Chief Metropolitan Magistrate (E.O.I), Egmore, Chennai, by order, dated 30.07.2019, dismissed the petition, against which, the present revision.

2.The gist of the case is that based on specific intelligence, the officials of DRI, Chennai Zonal Unit, seized 3029 grams of gold of foreign valued at Rs.1,04,59,137/- and one Bajaj Pulsar Motor Cycle bearing registration number TN 22 CB 7733 valued at Rs.30,000/- vide mahazar dated 26.02.2019. The seized gold bars were verified and certified by the Government Approved Assessor under the said mahazar proceedings on 26.02.2019. The seized gold bars were deposited in the Airport Custom Warehouse, Chennai, vide a Deposit Memo-APWH Ref-V105/19, dated 27.02.2019 and the two wheeler was kept in the office of DRI, Chennai for safe custody. As per Section 126 of the Customs Act, any goods confiscated under the Act, will vest with the Central Government and the officer adjudging the confiscation shall take and hold possession of the confiscated goods and thereafter dispose the same as per the instructions issued by the Government of India, Ministry of Finance vide F.No.711/31/83-LC (AS), dated 22.05.1984. In Section 110(1A) of the Act, the procedure to dispose of notified goods are specified. As per Section 110(1B) of the Act, the Magistrate to certify the correctness of the inventory so prepared; the officer to take photographs of such goods and learned Magistrate to certify such photographs as true; draw representative samples of such goods in the presence of the Magistrate. As per Section 110(1C) of the Act, whenever an application is made under sub-section 110(1B) of the Act, the Magistrate shall, as soon as may be, allow the application. This application came to be dismissed by the learned Additional Chief Metropolitan Magistrate (E.O.1), Egmore, Chennai, against which the present revision. The respondents were arrested and remanded for offence under Section 135 of the Customs Act, 1962 and the same is pending before the Additional Chief Metropolitan Magistrate (E.O.I), Egmore, Chennai.

3.The learned Special Public Prosecutor appearing for the petitioner submitted that the gold bars and the motor cycle, which were seized are kept in safe custody. He further submitted that the Economic Offence Courts I & II were established under G.O.Ms.No.1293, Home Department, dated 24.05.1982 and G.O.Ms.No.446, Home (Courts-II) Department, dated 27.02.1984 exclusively to deal with the cases under Economic Offences of the Central Act, which includes the Customs Act, 1962. The order passed by the learned Magistrate is arbitrary and contrary to the law and facts and circumstances of the case and also contrary to the provisions of the Customs Act, 1962. A notification No.31/86, dated 05.02.1986, as amended from time to time has been issued, whereby Gold in all forms, all electronic goods, wrist watches etc., are notified goods under Section 110(1A) of the Act, 1962. As per Section 3 of Cr.P.C, any reference, without any qualifying words, to a Magistrate shall be construed, unless the context otherwise requires:-

(i) In relation to an area outside a metropolitan area, as a reference to a Judicial Magistrate;

(ii) In relation to a metropolitan area, as a reference to a Metropolitan Magistrate.

4.As per Section 4 of Cr.P.C., that “Trial of offences under the Indian Penal Code and other laws”

(1)All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be

investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner of place of investigating, inquiring into, trying or otherwise dealing with such offences.

5.The lower Court relied on the decisions of the Gujarat High Court and Delhi High Court, wherein the facts are different. The lower Court not considered the fact that the respondents/accused in this case were produced for remand along with mahazar and documents and after perusing the same, the learned Magistrate remanded the respondents/accused. Later, the bail petitions were dealt by him and failed to appreciate that the complaint will culminate from the remand report in R.R.No.11 of 2019. The facts of the decisions in the Gujarat High Court and Delhi High Court are not identical and relevant to the present case. The learned Magistrate arbitrarily held that the inspection under Section 110 of the Customs Act, 1962 for taking inventory of the properties are administrative in nature and only Executive Magistrate has to do the same. The judicial work of the Magistrates would be hampered for several days is not correct and proper. The Economic Offence Courts are constituted to deal the cases under the Economic Offences and Central Act. The learned Magistrate failed to follow the precedence and the order of the Hon'ble Supreme Court in the case of "DRI Versus State of NCT Delhi in SLP(Crl)No.2152 of 2014, dated 01.05.2017" and "Department of Customs Versus Siddharth Enterprises in SLP (Crl.)No.10280 of 2015, dated 27.10.2017" and also failed to consider and appreciate Section 110 of the Customs Act, 1962, in its right perceptive.

6.The learned Special Public Prosecutor further submitted that the mahazar recorded has to be marked as exhibits during trial to prove the seizure of materials which, were smuggled by the respondents/accused. The seized goods is being gold and the departmental adjudication proceedings is taken on the seized goods and to be dealt in accordance with the Customs Act, 1962. The learned Magistrate failed to consider that in the light of Section 3 of Cr.P.C., the inspection of goods, certifying the correctness of mahazar and issuing certificates are the functions of the Judicial Magistrate and not by the Executive Magistrate. The Customs Act is a special Act, which is a self contained act with procedure for investigating into offences committed under the Customs Act, 1962. Thus, the lower Court failed to consider Section 110 of the Customs Act, 1962 in proper perspective and mechanically dismissed the petition.

7.In support of his contention, the learned Special Public Prosecutor relied upon the following citations:-

- The Authorized officer, Indian bank Versus D.Visalakshi and another reported in 2019 AIR SC 4619, wherein, certain provisions of the SARFAESI Act were considered and dealt by the Magistrate.

- A.K.Kalifulla Versus M.Abdul Khader in Crl.O.P.(MD). No.2321 of 2009, in which, it is held that the First Class Magistrate referred under the Wakf Act is only a Judicial Magistrate as he has to enquire, sift evidence and to formulate a decision.
- Sunderbhai Ambalal Desai Versus State of Gujarat reported in (2002) 10 Supreme Court Cases 283, in which, guidelines were issued in the case of return of property.
- Directorate of Revenue Intelligence, N.D., Versus State of NCT of Delhi in SLP(Crl)No.2152 of 2014, wherein the Hon'ble Apex Court categorically held that the verification of the stock in question for the purpose of Section 110(1B) of the Customs Act, be made by the Judicial Magistrate or any person authorized by him for the purpose.
- Department of Customs Versus Parvinder Kaur reported in 2001 (73) ECC 66, in which, the Delhi High Court held that the Magistrate referred in the Customs Act means the Judicial Magistrate.

8.The learned Special Public Prosecutor filed typed set of papers, listing 11 cases, in which the inventory and representative samples of goods were taken in presence of Magistrate, who had certified the same. In view of the above, it is the regular practice and procedure followed by the Department to file such petition under Section 110 of the Customs Act. In this case, the learned Magistrate did not entertain the petition and dismissed the same. Hence, he prayed to set aside the order of the learned Magistrate, since the reason given by the lower Court are extraneous.

9.The learned counsel for the respondents submitted that the petitioner not made any averment to show how the representative of the petitioner is competent to file a petition and there are no material to show whether he is the proper officer or he got authority to file such petition. The learned counsel for the respondents placed reliance on the decision of the Gujurat High Court in the case of the "Assistant Collector of Customs Versus Surendra Praggar Gosai and another reported in (1988) 1 GLR 421", in which, it is held that the Executive Magistrate has power for taking inventory under Section 110 of the Customs Act, 1962 and not Judicial Magistrates. The Hon'ble Apex Court in the case of "Ramesh Chandra Mehta Versus State of West Bengal reported in AIR 1970 SC 940" held that a person arrested under the Customs Act, 1962 cannot be termed as an accused person. Despite the same, in the petition before the lower Court the respondents were shown as accused. Further, the petitioner had given no reason to invoke Section 110 of the Customs Act, 1962. The confession was extracted by way of threat, coercion and under influence by DRI and later, the respondents were arrested in the above case. The respondents are no way connected with the alleged seizure of golds and they have been falsely implicated in this case. Thus, the petitioner has filed the petition for extraneous reasons and the lower Court has rightly dismissed the same.

10.The aim of the petitioner is to dispose of the golds even before completion of the adjudication and prosecution. The reason stated by the petitioner for taking inventory is that the goods have to be confiscated absolutely by the adjudication authority. Once the seized goods are disposed, the adjudication authority would hesitate to pass orders against the version of show cause notice. Hence, it would amount to prejudging the issue.

11.In support of his contention, the learned counsel for the respondents relied upon the following decisions:-

- Assistant Collector of customs Versus Surendra Praggar Gosai and another reported in (1988) 1 GLR 421.
- Directorate of Revenue Intelligence Versus State in Crl.M.C.No.526 of 2013.
- Department of Customs Versus Ram Mohan Gulati and Ors., reported in MANU/DE/4915/2017.
- Janab Malang Nisar Ahmed and another Versus P.Hafeezan Rahman in Crl.O.P.No.13252 of 2009, dated 26.11.2014.

12.The sum and substance of the respondent contention is that the task of certifying the correctness of inventory in respect of seized goods under Section 110(1B) of the Customs Act is only executive function. As per the provisions of Section 3(4) of Cr.P.C., the function must be made by the Executive Magistrate not by Judicial Magistrate. Further, he relied upon the decision of this Court in the case of "Janab Malang Nisar Ahmed and another Versus P.Hafeezan Rahman in Crl.O.P.No.13252 of 2009, dated 26.11.2014" that as per the Wakf Act, 1995, the Magistrate referred therein is only a Judicial Magistrate is not correct. The Full Bench of this Court had clarified that the term Magistrate as employed in Section 68(4) of the Wakf Act, means only Executive Magistrate and not Judicial Magistrate. As per Wakf Amendment Act, 2013, dated 20.09.2013, Section 68 has been amended and after the amendment, the words Magistrate of First Class, Magistrate and Sub Divisional Magistrate have been deleted and the same have been substituted by the words District Magistrate, Additional Magistrate or their equivalent. This amendment has been made only to remove the ambiguity so as to declare once for all that the term Magistrate referred to in Section 68 of the Wakf Act means only an Executive Magistrate and not a Judicial Magistrate. In the Customs Act, 1962, the same analogy has to be adopted. Hence, he prayed to dismiss the revision, by confirming the order of the Court below.

13.This Court considered the submissions made on either side and perused the materials available on record.

14.In Chapter XIII of the Customs Act, 1962, searches, seizures and arrest provisions have been enlisted. Section 100 of the Customs Act, deals the power to search the suspected persons entering or leaving India. Section 101 of the Customs Act, deals with the power to search the suspected persons in certain other cases and the goods, which are liable to confiscate. As per Section 102 of the Customs Act, 1962, the persons to be searched may require to be taken before the gazetted officer of Customs or Magistrate. The Magistrate referred herein is a Judicial Magistrate and there is no dispute. Section 103 of the Customs Act, deals the power to screen or X-ray bodies of suspected persons for detecting secreted goods. Section 104 of the Customs Act, deals the power to arrest. Section 105 of the Customs Act, power to search premises. Section 110 of the Customs Act, states the seizure of goods, documents and things, in which, the sub-section (1A), (1B) and (1C) were inserted by the Customs (Amended) Act 80 of 1985. Thus, the Magistrate referred in Chapter XIII in Sections 102, 103, 104, 105 and 110 of the Customs Act, 1962, is the Judicial Magistrate and not Executive Magistrate. There is no dispute or ambiguity for the same and the duties and functions referred therein are only to be discharged by the Judicial Magistrate.

15.In Section 105 of the Customs Act, the power to search premises, the sub clause (2) referring to the sub-section (5) of 165 of Cr.P.C., that the word Magistrate has been substituted with Commissioner of Customs. This would only further qualify that in Chapter XIII of the Customs Act, 1962, the reference to Magistrate is only the Judicial Magistrate. In Section 3 of Cr.P.C., it is stated that any reference, without any qualifying words, to a Magistrate, shall be construed as Judicial Magistrate, in relation to area outside the metropolitan area and in relation to a metropolitan area, as a reference to a Metropolitan Magistrate. The word Magistrate found in Chapter XIII of the Customs Act, is without any qualified word. As per Section 4(2) of Cr.P.C., all offences under any other law shall be investigated, inquired into, tried and otherwise dealt. Thus, all offences under any other law includes the Customs Act shall be investigated, inquired into and tried and otherwise dealt with according to the same provisions would only confirm that the denotion of Magistrate in Chapter XIII of the Customs Act, 1962, is only a Judicial Magistrate and Metropolitan Magistrate and not otherwise. Further, the Chapter XIV of the Customs Act, 1962 deals with the Confiscation and Imposition of Penalties by the adjudication procedure, which is carried out by the customs officials, who are also quasi-judicial officials. The proceedings such as recording panchnama, taking photograph, certifying the same by the Magistrate becomes significant in view of the same being referred and relied in the adjudication proceedings.

16.In Section 123 of the Customs Act, 1962, the burden of proof is cast against the person who claims the seized articles. The description of articles found in Section 123(2) and Section 101(2) are similar. In Section 110 of the Customs

Act,1962, disposal of seized articles by the proper officer is mentioned and the procedure for the same is given in sub-section (1B). In Section 110(1B) of the Customs Act, the preparation of inventory by the proper officer, which to be authenticated by the Magistrate gains significance. From the scheme of the Act, it is seen that the procedure contemplated in Chapter XIII and XIV are significant, which cannot be dispensed with and diluted. Hence, this Court finds that the Magistrate referred in Chapter XIII is only Judicial Magistrate or Metropolitan Magistrate.

17.This Court on coming to the above conclusion, now looking at the decision of the Gujarat High Court in the case of "Assistant Collector of Customs Versus Surendra Praggar Gosai and anr.," (cited supra), which has been followed by the Delhi High Court in the case of "Directorate of Revenue Versus the State" (cited supra). On perusal of the said two decisions, it is seen that one of the reason given is that taking inventory in presence of Magistrate, certifying the correctness of inventory, taking photographs in the presence of Magistrate and certifying such photographs and allowing to draw representative samples in the presence of Magistrate are in the nature of other executive or administrative one, the Judicial Magistrate should not be entrusted with such work, because such work can be discharged by the Executive Magistrates or Sub Divisional Magistrates. It is also observed that there is no definition for the term 'Magistrate' given in the Customs Act, but in Section 3(4) of Cr.P.C., it is provided as under:-

> "(4) Where, under any law, other than this Code, the function exercisable by a Magistrate relate to matters,—
>
> (a) which involve the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or
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> (b) which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate."

18.Thus, it is held that the functions to be performed by the Magistrate under sub-section (1B) of Section 110 of the Customs Act would not involve any appreciations or sifting of evidence or other functions as contemplated above. It is also held that the functions cannot be said to be the functions to be discharged by the Judicial Magistrates. Functions described in sub-section (1B) of Section 110 of the Customs Act, are either executive or administrative nature and they are exercisable by the Executive Magistrates. Further taking into consideration that the Judicial Magistrates are overburdened with the pending criminal matters in Courts and it does not desirable to put any additional burden of executive work. The other factors considered is that the criminal complaints are filed for offence under Section 135 of the Customs Act and the complaints are filed before the Judicial Magistrates. If they are assigned such work, the Magistrates who have done work under Section 110(1B) cannot try such cases and hence, there will be embarrassment which would require transfer of such cases to other Magistrates. Considering all these facts, it had held that the petition under Section 110(1B) of the Customs Act, 1962 ought to be filed before the Executive Magistrate.

19.In the decisions referred above, Section 4(2) of Cr.P.C., have not been considered. As per Section 4(2) of Cr.P.C., all offences under any other law, in this case the Customs Law, shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions. The Customs Act is a self contained Act, wherein the procedures are contemplated. The function of the Magistrates under Section 110(1B) of the Customs Act, 1962 would amount to enquiry and otherwise dealt with according to law for the reason that the certificate is to be relied in the judicial proceedings, as well relied in the adjudication proceedings for proving seizure and confiscation. Hence, the primacy of the certificate and presumptiveness would be established.

20.The lower Court apprehension that the judicial work would get hampered, is unfound. From the typed set filed by the Special Public Prosecutor, it is seen that the learned Additional Chief Metropolitan Magistrate E.O.I and E.O.II are regularly visiting the customs warehouse and other places, inspecting the goods, in their presence mahazars are drawn, photographs are taken and they certified the same. Attending the proceedings under Section 110(1B) of the Customs Act, 1962 is part of their judicial work. The pendency of remand report for several years without launching prosecution or withdrawal from prosecution cannot be a reason to dismiss the petition. It is to be seen that two Special Courts namely Economic Offence I and Economic Offene II are exclusively formed to conduct cases under the Central Act.

21.The Hon'ble Apex Court in the case of the "Directorate of Revenue Intelligence, N.D., Versus State of NCT of Delhi in SLP(Crl.)Nos.2152 of 2014, dated 01.05.2017", held as follows:-

> "In the facts and circumstances of the case, the Special Leave Petition is dismissed leaving the question of law open. It is agreed that verification of the stocks in question, for the

purpose of Section 110 (1B) of the Customs Act, 1962, be made by the Judicial Magistrate or any person authorized by him for the purpose. No objection shall be raised in this regard by the parties concerned.”

22.The Hon'ble Apex Court had only endorsed that as per Section 110(1B) of the Customs Act, 1962, it is the Judicial Magistrate, who has to perform his duties and issue certificate. The lower Court dismissing the petition placing reliance on the decisions of the Gujarat High Court and Delhi High Court is not correct and proper. The decisions of the Gujarat High Court and Delhi High Court have only persuasive value, as rightly pointed out by the Special Public Prosecutor. The Hon'ble Apex Court in the above referred judgment held that the verification of stocks for the purpose of Section 110(1B) of the Customs Act, 1962 be made by the Judicial Magistrate. The lower Court following the decisions of the Gujarat High Court and Delhi High Court as binding precedents, is not proper. The view contrary to the Gujarat High Court and Delhi High Court is more acceptable. The language in the Section is unambiguous and not ambivalent. The plain language of the provision will prevail, endorsed by the Hon'ble Apex Court.

23.In view of the above, the order, dated 30.07.2019, in Crl.M.P.No.349 of 2019 in R.R.No.11 of 2019 passed by the learned Additional Chief Metropolitan Magistrate (E.O.1), Egmore, Chennai is hereby set-aside and the Criminal Revision is, accordingly, allowed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1.The Additional Chief Metropolitan Magistrate (E.O.1),
Egmore, Chennai.

2.The Public Prosecutor,
High Court, Madras.

PRE-DELIVERY ORDER IN
Crl.R.C.No.1050 of 2019

PA(CO)
GSP(17/12/2020)