

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 49 OF 2014

STATE

CBI/ACB/Goa

GMC Bungalow No.F-1, Type VI

NH-17 Road, Bambolim Goa

Applicant.

V e r s u s

1. Shri Alex Piedade Sales,
The Then Supdt. of Central Excise, Vasco Range,
Goa, R/o 1st Floor, Prema Apts. CRE Quaraters,
Maimollem, Mangor Hill, Vasco, Goa.

2. Shri Vasudev Anant Naik,
Inspector of Central Excise, Vasco Range, Goa,
R/o H. No. E-128, Fondvedvem, Ribandar, Goa.
Permanent Address: H. No. 158, Nr. Shri Viaragi
Temple, Ladewado, Madkai, Goa.

3. Shri Vijay Kumar Poddar,
Proprietor of M/s. Globe Fashion (Exim) India,
Plot No. 50, Shed D-3/4, Sancoale Indl. Estate,
Zuari Bagar, Vasco, Goa.

4. Shri Kamal Deendayal Mundra,
Proprietor of M/s. Welspin & Branded Impex,
Plot No. 50, Shed D-3/4, Sancoale Indl. Estate,
Zuari Nagar, Vasco da Gama, Goa, R/a A-401,
Vasant Vihar, Altan, Surat (Gujarat).

5. Shri Raj Kumar Dhadech, Manager of M/s
Welspin & Branded Impex, Plot No. 50, Shed D-

3/4, Sancoale Indl. Estate, Zuari Nagar, Vasco da Gama, Goa, R/A: Flat No. T-1, 3rd Fl., Tita Maria Chamber, Mangur Hill, Vasco da Gama, Goa, Permanent Address: Village: Basau Dist. Churu (Rajasthan).

6. Shri Dwarka Prasad Sharma,
Then Prop. M/s K. D. Impex, Surat, R/o 502,
Karuna Apartments, Raviskul Society, Bhatar
Char Rasta, Surat.

... Respondents/
Accused

Mr. S. R. Rivankar, Senior Advocate with Mr. R. G. Rivonkar and Ms. N. Rivonkar, Advocates for the Applicant.

Mr. G. Vijaychandran, Advocate for the Respondent No.1.

Mr. G. K. Sardessai, Advocate for the Respondent No.2.

Mr. N. Fernandes, Advocate for the Respondent No. 3.

CORAM: NITIN W. SAMBRE, J.

Reserved on: 17th March, 2021

Pronounced on: 6th May, 2021.

JUDGMENT

The Central Bureau of Investigations has invoked the revisional jurisdiction of this Court questioning the order passed by the Special Judge, CBI Court, at Mapusa, Goa in Special Case No. 29/2013/D passed on 28.03.2014, thereby discharging the Accused nos.1 and 2 for offence punishable under Section 13(1)(d) read with Section 15 of the Prevention

of Corruption Act, 1988.

2. The case of the Applicant against the Accused persons in the final report presented under Section 173 of Cr.P.C. is as under :

The Accused no.1 was at the relevant time working as Superintendent of Central Excise, Vasco Range, Goa and Accused no.2 was working as Inspector of Central Excise, Vasco Range, under the Accused no.1. The Accused no. 3 is the proprietor of M/s. Globle Fashion, the Accused no.4 is the proprietor of M/s. Welspin & Branded Impex, the Accused no.5 is the Manager of Welspin and Branded Impex and Accused no.6, the proprietor of M/s. K. D. Impex.

3. The Accused nos. 4 and 5 are having factory at Sancoale Industrial Estate, Goa and are claimed to be manufacturers of the garments whereas the Accused no.3 is having factory at plot no. 50, Sancoale Industrial Estate, Goa, and is involved in the manufacture and export of garments.

4. The Accused no.3 obtained nine DEPB (Duty Entitlement Pass Book) licenses against eight exports from the office of Directorate General of Foreign Trade, Goa. Eight exports were carried out to the firms in Zambia

and Dubai.

5. The ninth consignment meant for export packed in a container was intercepted and examined by Superintendent of Customs, Hyderabad on 27th March, 2004. In the said ninth consignment, it was found to contain pieces of cloth; except for, in four cartoons which were verified by the Accused nos. 1 and 2. As such, it is noticed that the pieces described by the exporter i.e. Accused no.3 onwards in the declaration as “ladies nightwear”, were in fact pieces of cloths irregular in shape and in any case cannot be described as “ladies nightwear” and, as such, were not qualifying the eligibility of the DEPB benefits referred above.

6. As such, an investigation was carried out in the matter in which it was revealed that the manufacturer and the exporter i.e. Accused no.4 onwards, made an attempt to export under four shipping bill nos.2952 to 2955 dated 17.03.2004. The Accused nos. 1 and 2 abused their official position in the capacity of public servant by conniving with Accused nos. 3 to 6 and has signed ARE-2 forms and other documents for Accused nos. 4 and 5.

As such, the allegations are, an attempt was made to export sub-

standard material without issuance of CT- 1 form and without issuance of Modal Examination order by the Jurisdictional Assistant/Deputy Commissioner.

7. In the aforesaid background, the Commissioner of Customs, Hyderabad, in adjudication proceedings arising out of the aforesaid export under Section 144 (1) of the Customs Act, 1962, has made an observation that there was dereliction of duty on the part of Accused nos. 1 and 2. It further observed that it was not proved that there are some extraneous considerations for their actions. In exercise of powers under Section 114 of the Customs Act, the Accused nos.1 and 2 were saddled with penalty of ₹25,000/- and ₹15,000/- respectively. The Commissioner of Customs, in the said adjudication order dated 04.07.2005, had declared that the goods under the above referred four shipping bills, were made from 100% polyester filament yarn, are substandard junk cloth pieces i.e. rags. He further rejected the declared value of the goods by the exporter, re-determining the value of the goods under the export under Section 14 of the Customs Act. A Further order of disallowing the Central Excise rebate and DEPB credit was also passed. An Order of confiscation of the goods under

Section 113(d) and 118(b) of the Customs Act was also made.

8. It appears that Accused nos. 1 and 2, feeling aggrieved, preferred an Appeal No. C-377/2005 and C-376/2005 respectively before the Customs Excise and Service Tax Appellate Tribunal, Bangalore. The Tribunal set aside the penalty under Section 114 of the Customs Act against the Accused nos. 1 and 2.

9. Forming said to be the basis, the Respondent nos.1 and 2 appears to have invoked the provisions for discharge vide exhibit B-309, which application came to be allowed vide order impugned dated 28.03.2014. As such, this revision.

10. The learned Senior Counsel, Mr. S. R. Rivankar, appearing for the applicant while inviting the attention of this Court to the observations made in the impugned order, would urge that the Accused nos.1 and 2 have abused their official position being public servant by conniving with Accused nos. 3 to 6 thereby permitting the export by overlooking the quality of goods during physical verification and by giving false certification. According to him, Accused nos. 3 and 4 have not furnished all the declarations, the one required to be made with jurisdictional

Assistant/Deputy Commissioner containing details of finished goods, rate of duty leviable, manufacturing formulae with details of proportion of each raw material used, quantity, the input and output, ARE-2 Forms, still rebate was availed. The Accused nos. 4 and 5 only have executed B1 bond and the exporter i.e. Accused no.3 has not furnished any such bond. No permission was obtained from the jurisdictional Assistant/Commissioner for stuffing the container.

11. As such, the submissions are, the prescribed legal procedures for exporting the goods and certification thereof, by the Accused nos. 1 and 2 was not adhered to. It is further claimed that the Accused nos. 1 and 2, did not check the 5% of the export consignment, as a consequence intentional latitude was shown to the exporter so as to facilitate export of rags, instead of the materials for which the license was obtained.

12. In the aforesaid background, it is claimed that by ordering discharge of the Accused nos.1 and 2 for an offence punishable under the provisions of Prevention of Corruption Act, miscarriage of justice is caused. It is further claimed that the exoneration of Accused nos. 1 and 2 by the Appellate Tribunal is overlooking the aforesaid serious default on the part of

the Accused nos.1 and 2 and, as such, the said order of exoneration is contrary to the settled provisions of law. As such, it is alleged that said order ought not to have been relied upon by the Courts below. According to the learned Senior Counsel appearing for the Applicant, the Court below exceeded its jurisdiction in ordering discharge of the Accused nos. 1 and 2 in spite of the findings of dereliction of duty recorded by the Commissioner Customs and Central Excise in order dated 24.07.2005. The further submissions are, the proceedings under the Prevention of Corruption Act, and an adjudication under Section 114 of the Customs Act, are independent to each other. As such, adjudication proceedings would not in any way affect the criminal proceedings particularly the prosecution under the Prevention of Corruption Act.

13. As such, it is claimed that the impugned order, is liable to be quashed and set aside.

14. While countering the aforesaid submissions, the learned Counsel for the Respondents would oppose the claim as, according to them, no case of exercise of excessive jurisdiction or failure to exercise jurisdiction is demonstrated and, that being so, the revision is liable to be rejected.

According to the learned Counsel for the Respondent nos. 1 and 2, the law laid down by the Apex Court in the matter of *Radheshyam Kejriwal vs. State of West Bengal & anr.* reported in *(2011) 3 SCC 581* affirmed in the subsequent judgments of Apex Court in the matter of *Videocon Industries Limited & anr. vs. State of Maharashtra & Ors.* reported in *(2016) 12 SCC 315* and in the matter of *Ashoo Surendranath Tewari vs. The Deputy Superintendent of Police, EOW, CBI & anr.* decided on 08.09.2020 in Criminal Appeal no.575/2020, has concurred that in the adjudication proceedings, the material relied on is similar to that of in the proceedings for prosecution and in the adjudication proceedings, there is exoneration of the concerned persons. Then, in such an eventuality, the continuation of the prosecution is an abuse of the process of the Court. As such, the submissions are that the revision is without any merit and is liable to be rejected.

15. I have perused the pleadings in the petition wherein the challenge raised by the Petitioner is only to the extent of the discharge of the Accused nos.1 and 2 who are public servants vide order dated 28.03.2014 passed by Special Judge, CBI Court, Goa at Mapusa in Special Case No.

29/2013/D.

16. The Respondents-Accused nos.1 and 2 are chargesheeted for an offence punishable under Section 13(1)(d) of the Prevention of Corruption Act, 1988 read with Section 15 hereinafter shall be referred to as the punishing Section. Section 13(1)(d) provides for an offence by a public servant of criminal misconduct, i.e. if such public servant by corrupt or by illegal means, obtains for himself or for other person any valuable thing or pecuniary advantage or by abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage or while holding office as a public servant, obtains for any person any valuable thing or a pecuniary advantage without any public interest. Section 15 of the said Act provides for a punishment or attempt to commit an offence under Section 13(1)(d) of the Act.

17. As such, it is incumbent on the part of the Applicant to demonstrate that the Accused no.1 had obtained for themselves or for any other person any valuable thing or pecuniary advantage by misusing the official position and such misuse should be demonstrated to be by corrupt or illegal means.

18. The factual aspect as to the adjudication order passed by the Commissioner of Customs and Central Excise on 04.07.2005 with a specific finding on the role of the departmental officers in allowing the export of misdeclared goods, the Commissioner in categorical terms has observed in the order that the Accused nos. 1 and 2 had not followed the procedure strictly and correctly in the matter of verification of various disclosures to be made by the exporter, approval from the jurisdictional Assistant/Deputy Commissioner and the discreet approach of the Officers in their examination of goods. The Commissioner, as such, proceeded to record the findings against Accused nos. 1 and 2 of dereliction of duty. It is important to observe here that the Commissioner has in categorical terms noted that it was not proved that there are extraneous considerations for their actions.

19. As the Accused nos. 1 and 2 were aggrieved, preferred their respective appeals before the Appellate Tribunal. The Appellate Tribunal while dealing with the aspect of the fraudulent export in para 5 of its judgment, observed thus :

“5. On a careful considerations, it is seen that appellants were acting as Superintendent and Inspector in the O/O The

Commission of Central Excise, Goa. There were charged to have involved themselves in the fraudulent exports made by the Globe Fashion (Exim) India Goa. The Commissioner has absolved them from this charge by holding that the Revenue has not proved that there are some extraneous consideration for their action. He has clearly noted that there is dereliction of duty. For the purpose of imposing penalty under Section 114(i), the revenue has to prove that the appellants have abetted in the offence or have colluded with the exporters and CHA. This charge has not been made in the show cause notice. The charge is not explicit and the only ground made out is that the appellants ought to have examined the containers fully and discovered discrepancies in the documents vis-a-vis the contents in the containers. Ld. Commissioner has clearly held that there is only dereliction of duty. In the circumstances, the charge of the revenue under Section 114 and consequence imposition of the penalties are required to be set aside. Further more on this very issue the citations relied by the appellants clearly apply to the facts of the case. In the case of CC New Delhi vs Hargovind Export (2003 (158) ELT 496), the Tribunal has clearly held that penalty cannot be imposed under Section 114 of the Customs Act on the mere charge of dereliction of duty and the benefit has to be given to

the officers.”

The Appellate Tribunal, as such, has proceeded to observe that the penalty ordered against the Accused nos.1 and 2 is not sustainable with an observation that the Accused nos. 1 and 2 have not done or have omitted to do any act, which act or omission would render such goods liable to confiscation nor they have abetted in doing or any omission of such act which shall attract provisions of imposing penalty on them.

20. As such, this Court is required to be sensitive to the observations of the Commissioner of Customs in the order of adjudication that the act of the Accused nos. 1 and 2 as has been looked into in the adjudication proceedings, was not proved to be, for some extraneous considerations. Apart from above, while setting aside the order of penalty to be paid by the Accused nos. 1 and 2, the Appellate Tribunal has in categorical terms made an observation that the act of the Accused nos.1 and 2 cannot be said to be an act of omission or otherwise, which would render such goods for confiscation. It is also observed that the Accused nos. 1 and 2 have not abetted in doing or any omission of such act.

21. It can be inferred from the available material on record (even though the complete investigation papers are not produced by the Accused on record) that the material available in the adjudication proceedings before the Commissioner of Customs and that of the Appellate Tribunal was the same as that of in the criminal trial i.e. in the report filed under Section 173 of Cr.P.C

22. The Apex Court in the matter of *Radheshyam Kejriwal* (supra) has elaborately considered the aspect of the impact of exoneration in related adjudication proceedings on the criminal proceedings against the Accused person in the very same case.

23. The Apex Court has held that the adjudication proceedings are decided on the principle of preponderance of evidence of little higher degree, whereas, in criminal case, the burden of proof beyond all reasonable doubts, lies on the Applicant/Prosecution. As such, in a criminal case, the standard of proof required is much higher than that of the one required in the adjudication proceedings.

24. In the case in hand, in the adjudication proceedings, it is not proved that the Accused were in any way guilty of the act of

omission/derelection of duty or acting in an illegal manner. Consequently, the Accused nos. 1 and 2 were exonerated on the same set of allegations as has been made in the present case in the adjudication proceedings that too by an order of Appellate Tribunal. In that view of the matter, the determination in the adjudication proceedings are very much relevant and germane in the matter of prosecution of the Accused nos.1 and 2 on the same set of material in the criminal trial. What can be noticed from the observations made by the Commissioner and thereafter the Appellate Tribunal is the Accused nos. 1 and 2 were exonerated in the adjudication proceedings on merits as the allegations against them of dereliction of duty or acting in an illegal manner were not established. The observations of the Apex Court in the judgment of ***Videocon Industries Limited*** (supra) particularly para 17, are worth referring to :

“17. Clarifying the position, the majority observed that the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the

provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court. On the basis of the aforesaid principles, the majority proceeded to analyse the factual matrix and analysed the finding recorded by the adjudicating authority and opined when there is a finding by the Enforcement Directorate in the adjudication proceeding that there is no contravention of any of the provisions of the Act, it would be unjust and an abuse of the process of the court to permit the Enforcement Directorate to continue with the criminal prosecution.”

25. Applying the aforesaid principles to the case in hand, it could be noticed that once the contravention of the provisions of the act by the Accused nos. 1 and 2 in the adjudication proceedings was not established, it has to be inferred that the prosecution of the Accused nos.1 and 2 under the provisions of the Prevention of Corruption Act particularly having regard to the non-satisfaction of necessary ingredients of Section 13(1)(d) of the Act cannot be held to be satisfied.

26. The observations of the Apex Court in the matter of ***Radheshyam Kejriwal*** (supra) as are endorsed in the matter of ***Ashoo***

Surendranath Tewari (supra) are also required to be relied on so as to infer that the impugned order is very much justified.

27. As far as the observations made in the order impugned as regards the discharge of the Accused nos. 1 and 2 to the extent of offence punishable under the Prevention of Corruption Act is concerned, the Special Judge had complete regard to the material placed on record in the form of the final report under Section 173 of Cr.P.C. and the observations made by the Commissioner Customs and the Appellate Tribunal. The judgment of the Apex Court in the matter ***Radheshyam Kejriwal*** (supra) has been rightly taken into account by the Special Judge for ordering discharge of the Accused nos. 1 and 2 in the impugned order. The Special Judge was sensitive to the fact that the Appellate Tribunal has allowed the appeal of the Accused nos. 1 and 2 thereby exonerating them of the serious charge against them in the adjudication proceedings. The fact that the adjudication and the chargesheet in this case against Accused nos. 1 and 2 is based on the same set of facts and identical material i.e. the inspection of the ninth consignment, the non-disclosure and the failure to make the declaration by the Accused persons as warranted in the legal procedure of forms and bonds

etc., the failure of the accused persons to physically inspect and verify the goods, etc., has rightly prompted for ordering discharge.

28. In the light of above, the claim of the Applicant that there is a miscarriage of justice and as the offence under the Prevention of Corruption Act and the adjudication by the competent authority are parallel and cannot go hand in hand, is liable to be rejected particularly in the light of the observations of the Apex Court in all the aforesaid three referred judgments.

29. Once the order passed in the adjudication proceedings is not questioned by the Applicants, the Applicants are bound by the same and, that being so, it is not open for the Applicants to open the question for illegality of the orders passed in the adjudication proceedings.

30. In the aforesaid background, in my opinion, no case of exercise of excessive jurisdiction could be made out. The application as such lacks merits. Hence, rejected.

NITIN W. SAMBRE, J.