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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 23/12/2021

C O R A M

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

Crl. O.P. No.18335 of 2017

a n d

Crl.M.P.No.11198 of 2017

R. Selvaraj ... Petitioner /Accused No.3

Vs

1. The Deputy Commissioner of Customs  
Prosecution Unit (Air)  
Custom House  
Chennai 600 001.

2. M/s. India Sales Corporation  
rep. By its Partners  
Shri Tayeb Haroon  
Having Office at  
A 19-20, MEPZ  
Phase II, Tambaram  
Chennai 600 045.

3. Tayeb Haroon ... Respondents/Complainant/Accused 1 & 2

PRAYER : Criminal Original Petition filed under Section 482 Cr.P.C., to set aside the order passed by the learned Additional Chief Metropolitan Magistrate, EOI, Allikullam at Egmore in Crl.M.P.No.1811 of 2017 in E.O.C.C.No.23 of 2014.

For Petitioner ... Mr.V.K.Sathiamurthy

For Respondent ... Mr.N.P.Kumar  
Spl.P.P for R.1

O R D E R

This Criminal Original Petition has been filed to set aside the order passed by the learned Additional Chief Metropolitan Magistrate, EOI, Allikullam at Egmore, in Crl.M.P.No.1811 of 2017 in E.O.C.C.No.23 of 2014.

2. Heard Mr.V.K.Sathiamurthy, learned counsel for the petitioner and Mr.N.P.Kumar, learned Special Public Prosecutor for the first respondent.



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3. The main contention of the learned counsel appearing for the petitioner is that prosecution has been launched on the basis of the private complaint filed by the first respondent/complainant, for the offence punishable under Sections 132 and 135 of the Customs Act, 1962.

4. It is his further submission that on 24/2/2017, prosecution has filed a petition in Crl.M.P.No.466 of 2017, under Section 311 of the Code of Criminal Procedure, to examine the witnesses. Despite P.W.2 was recalled and examined, now an application has been filed to file an additional document, which is not permissible in law. The petitioner would have exercised the power of discharge from the criminal prosecution whereas the application has been filed to prevent such action. This application has been filed to show as if there is prima facie materials to proceed against the accused. Hence it is his contention that this application is nothing but to fill up the lacuna.

5. The learned counsel further submitted that the reasons assigned for recalling, filing additional documents is also not convincing, except contending that due to inadvertence, the document could not be filed. It is also his submission that no provision has been mentioned. The application is just to receive the document which is not maintainable under the eye of law. In support of his submissions, he has relied upon the judgment of this Court in GAYES Vs. STATE, rep. BY ITS INSPECTOR OF POLICE, KULASEKARANPATTINAM POLICE STATION, THOOTHUKUDI DISTRICT (CDJ 2018 MHC 7020).

6. The learned counsel appearing for the petitioner submitted that though P.W.2 was recalled in Crl.M.P.No.466 of 2017, he was not reexamined, as per the orders of this Court, whereas the complaint itself clearly indicate the nature of the document relied upon by the Customs Department. Bill of Entry is already filed and marked as exhibit. The said bill itself is generated on the basis of the invoice and packing list. At the time of earlier application filed for recalling some witnesses, the invoices and packaging list of the accused Company omitted to be filed, due to inadvertence. Therefore, this document is absolutely necessary to prove the charges against the accused. Hence submitted that the trial Court has allowed the application, taking note of the nature of the document.

7. Normally, it is well settled that the prosecution cannot be allowed to fill up the lacuna, after examination of the witnesses. Similarly for the sake of recalling and marking documents, the Courts cannot act mechanically and pass such an order. It is not disputed by both sides that the application filed under Section 311 of Cr.P.C., has already been filed, to



recall P.W.2. But however, the order was passed and he was not re-examined. While examining P.W.2, the document now sought to be marked this invoice-cum-packing list was omitted to be marked by the Customs Department. Whereas, on perusal of the complaint, there is a mention about this document and other bills have been marked. Though the trial of the case is governed by Sections 244 and 245 of the Code of Criminal Procedure, the fact remains that the ultimate object of the Courts to find out whether the fact in issue is proved and all the relevant documents are available on record.

8. On the basis of the evidence produced by the complainant, if the Magistrate of the Court finds that no case against the accused has been made out, the Court shall discharge such accused. If the Court finds that evidence on record does not disclose the case against the accused if rebutted to warrant conviction, the accused would be discharged. Therefore, merely because the document is sought to be filed which was omitted and it was relevant to connect other facts, accused cannot claim right of discharge automatically. Therefore, the contention of the learned counsel for the petitioner that right of discharge is lost by way of filing additional document, cannot be countenanced.

9. It is not that the new document is sought to be introduced, only an invoice-cum-packing list said to have been issued by the accused Company. Therefore, mere omission to bring on certain document due to inadvertence at the time of examining the witnesses at an earlier time by the Public Prosecutor is concerned, the same cannot be taken advantage to contend that such document has been filed only to fill up the lacuna.

10. At the same time, this Court records its displeasure over which the prosecution conducted by the Department, particularly, the Special Public Prosecutor appearing on behalf of the first respondent. The learned Special Public Prosecutor should make an endeavor to bring all the relevant and connected document, through the proper witnesses and there cannot be mechanical filing of the applications every time for bringing some documents which were omitted by them. On a perusal of the entire order of the trial Court and order passed under Section 311 of Cr.P.C., the same would indicate that such lapses is only due to Special Public Prosecutor and not by the Department nor by the accused.

11. In view of the above observation, this Court is of the view that role of the Special Public Prosecutor appearing for the Customs is to inform the Department to hand over all the documents, at the time of filing the complaint itself, to avoid



such instance in the Court of law particularly, when the prosecution has launched by the Customs Department. Of course in the judgment of GAYES Vs. STATE, rep. BY ITS INSPECTOR OF POLICE, KULASEKARANPATTINAM POLICE STATION, THOTHUKUDI DISTRICT (CDJ 2018 MHC 7020) has held that any exercise of discretionary power when done arbitrarily can be interfered by this Court under Section 482 of the Code of Criminal Procedure.

12. In the above cited case, prosecution has sought to be reexamined all the sixteen witnesses at the stage of final argument. In that context, this Court rejected 311 petition, whereas, the facts in the present case, is entirely different and the above judgment cannot be applied. As far as the contention of the learned counsel that no provision has been quoted for filing to receive the additional document. Mere non quoting any provision will not make any dent or prejudice to the accused. After all, the document sought to be filed is the invoice issued by the accused. Further, the accused will also be given an opportunity to cross examine the witnesses in this regard. In such a view of the matter, there is no infirmity in the order passed by the Court below.

13. In the result, this Criminal Original Petition is dismissed. Consequently connected Criminal Miscellaneous Petition is closed.

Sd/-  
Assistant Registrar (CS-IX)

//True copy//

Sub Assistant Registrar

mvs

To

1. The Additional Chief Metropolitan Magistrate,  
EOI, Allikullam at Egmore
2. The Deputy Commissioner of Customs  
Prosecution Unit (Air)  
Custom House, Chennai 600 001.
3. The Public Prosecutor,  
High Court, Madras.

+2ccs to Mr.C.Rajan, Advocate SR.No.69680

CrI. O.P. No.18335 of 2017

UM(CO)  
GMY(25/01/2022)