

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL REVISIONAL JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRR 2326 of 2001

SMT. KUSUM HIMATSINGKA & ANR.
VS.
SRI SAMIR KUMAR MUKHERJEE

For the Petitioners : Mr. Debasish Roy, Sr. Adv.
Mr. Apalak Basu, Adv.
Mr. Dipak Dey, Adv.
Mr. Dipanjan Dey, Adv.
Ms. Shreyashi Manna, Adv.

For the Opposite Party : Mr. Vipul Kundalia, Adv.
Mr. Anirban Mitra, Adv.
Mr. Anurag Ray, Adv.

Hearing concluded on : 4th November, 2022

Judgement on : 14th November, 2022

Siddhartha Roy Chowdhury, J.:

1. Challenge in this revisional application is to the legality and maintainability of the proceeding being Complaint Case No. C/888/91 pending before the learned 12th Court of Metropolitan Magistrate, Calcutta under Section 120B/420/467/468/471 of the Indian Penal Code.
2. Depicting themselves as the proprietress of the M/s P.K. Himatsingka & Company and the Chief Executive Officer of the said Company respectively, the petitioners contended that Project &

Equipment Corporation issued a letter of authority in favour of M/s P.K. Himatsingka & Company for importation of goods on the price approved by Project & Equipment Corporation as per list attached to the license issued by Chief Controller of Imports and Exports for the period 1985-86. Such license was delivered by the Project & Equipment Corporation to M/s P.K. Himatsingka & Company on 5th January, 1987 to be utilized within July, 1988. P.K. Himatsingka & Company duly discharged such obligation.

3. Sri Samir Kumar Mukherjee, Deputy Chief Controller of Imports and Exports lodged a complaint against the petitioners before the learned Chief Metropolitan Magistrate, Calcutta on 27th December, 1989 which was registered as G.R. Case No. 62 of 90 and the said case was subsequently converted to a Complaint case and renumbered as Complaint Case No. C/888/91 under Section 120B/420/467/468/471 of the Indian Penal Code, read with Section 5 of the Import and Export (Control) Act and Section 132/135 of the Customs Act.
4. Learned Chief Metropolitan Magistrate was pleased to take cognizance on 5th January, 1990 and transferred the case to the learned 10th Court of Metropolitan Magistrate for disposal on 5th January, 1990. The case was subsequently transferred to the learned 12th Court of Metropolitan Magistrate and after examination of 24 witnesses, learned Trial Court was pleased to frame charge on 22nd February, 1995 against the petitioners for committing offence punishable under Section 120B, read with Section 420/467/468/471 of the Indian Penal Code and Section 5 of the Import and Export (Control) Act and Section 132/135 of the Customs Act. The petitioners

pleaded their innocence to the charges framed against them and claimed to be tried.

5. It is adverted that the Project & Equipment Corporation obtained Import license for importing spare parts of Road Rollers from Rumania for a sum of Rs. 10,00,000/- from the Chief Controller of Imports and Exports, New Delhi. M/s P.K. Himatsingka & Company submitted a list of spare parts to be imported and the same was cleared by DGTD and duly attested by CCT & E. The Power & Equipment Corporation of India (hereinafter referred to as "PEC") in turn forwarded the attested list to M/s P.K. Himatsingka & Company, who opened current account and letter of credit for a sum of Rs. 15,00,000/- with Dena Bank. Indent was placed to M/s Impex International Calcutta for importation of certain types of Rumanian ball bearings which were restricted items. Those items were shipped from Rumania. The goods were cleared from Customs Control, Calcutta by M/s M. Dutta Agency, clearing agent appointed by M/s P.K. Himatsingka & Company on the basis of required documents and goods were dispatched to New Delhi and delivered by agents of M/s P.K. Himatsingka & Company on payment of transportation charge. However, it was alleged in the petition of complaint that the goods imported were not as per attested list of the goods appended to the Import license to P.E.C. Importation of goods beyond the attested list was made on the basis of forged and fabricated documents under the forged signature of K.A.S. Tomar, Deputy Marketing Manager, P.E.C. and E.C. Nambudiri, Controller of Imports and Exports. Goods were imported without valid license in violation of the terms and conditions of the license which is punishable under

Section 5 of the Imports and Exports (Control) Act and also for violation of Section 132/135 of the Customs Act. It is alleged that the accused persons cheated the customs authority. Necessary sanction of the Collector of Customs for prosecution of the accused persons have been obtained and filed with the petition of complaint. Subsequently at the behest of the complainant the proper procedure for disposal of the complaint was adopted.

6. Challenging the legality and maintainability of the aforesaid proceeding the petitioners preferred a criminal revision before this Hon'ble Court being C.R. No. 1482 of 1995. However it was dismissed ex-parte on 15th July, 1998. Charges in the said case were framed on 22nd February, 1995 but recording of evidence could not be completed even after lapse of two years. Under such circumstances in consonance with the direction given by Hon'ble Supreme Court in the case of Rajdeo Sharma vs. State reported in JT 1998 (7) SC application was taken out for closure of the prosecution. But the said application was dismissed by the learned Trial Court vide order dated 9th January, 2001.
7. Being aggrieved by and dissatisfied with the said order another application was taken out under Section 482 of the Criminal Procedure Code being C.R. No. 278 of 2001 which was disposed of by the Co-ordinate Bench of this Hon'ble Court on 10th February, 2001 with liberty given to the petitioners to agitate the points raised in the revisional application before the learned Trial Court at the appropriate stage. Pursuant to such order the petitioners took out an application seeking order of discharge on the grounds stated therein and upon

hearing the parties the learned Trial Court was pleased to dismiss the application on 13th August, 2001 on the ground that having taken cognizance it would not be proper to discharge the accused persons. However, the issue was kept open to be raised during argument. Challenging that order the present application under consideration has been filed.

8. During pendency of this application supplementary affidavit is filed by the petitioners to bring a copy of the petition of complaint on record.
9. Mr. Debasish Roy, learned Senior Counsel representing the petitioners strenuously argued that the proceeding before the learned Trial Court is out and out bad in law inasmuch as the Complainant being Deputy Chief Controller of Imports and Exports has no authority to file any complaint under Section 132 and 135 of the Customs Act. He further argued that Section 137 of the Customs Act prohibits taking of cognizance of the offence by a Court when the sanction is accorded by the Collector of Customs, for the purpose of institution of the prosecution, which has got nothing to do with taking of cognizance of the offence by the Court. Sanction for prosecution is quite different from sanction for taking cognizance. Sanction accorded by the Collector of Customs for the prosecution of the petitioner, cannot be regarded as sanction for taking cognizance by the Court under Section 197 of the Cr.P.C. To buttress his argument Mr. Roy relied upon the decision of Hon'ble Supreme Court pronounced in the case of **S.N. BHOWMIK VS. THE STATE** reported in **1988 (II) CHN 455** wherein it was held by the Co-ordinate Bench:-

“The learned Advocate for the petitioner further argues that there is a good deal of difference between a sanction for taking cognizance and a sanction for prosecution as pointed out by the Supreme Court in the case of [Ram Kumar v. State of Haryana](#) AIR 1987 SC 735. Their Lordships have held in unmistakable terms that sanction for prosecution is quite different from sanction for taking cognizance and the one cannot be a substitute for the other. In view of this legal position it must be held that the sanction accorded by the Collector of Customs for the prosecution of the petitioner cannot be regarded as a sanction for taking cognizance by the Court. It is no doubt true that in the sanction, Ext. 1, the sanctioning authority has stated that he was the competent authority to accord sanction for taking cognizance of the offence but while actually according the sanction he did it for the prosecution as found in the last paragraph and not for taking cognizance. In the circumstances, taking cognizance of the alleged offence under [Section 5\(2\)](#) of the Prevention of Corruption Act and the [Customs Act](#) must be held to be bad for lack of proper sanction and the charge on these two counts are liable to be quashed.”

In the judgement as quoted above, decision of Hon’ble Supreme Court pronounced in the case of **RAM KUMAR VS. STATE OF HARYANA** reported in **AIR 1987 SC 735** has been relied upon. Mr. Roy, learned Senior Counsel also placed the judgement pronounced in the case of Ram Kumar (supra).

10. It is further adverted by Mr. Roy that a joint complaint alleging commission of offence under the Import and Export (Control) Act and Customs Act is not maintainable. The offence laid down under different acts are different in nature. It is an error committed by learned Trial

Court resulting into abuse of process. Taking cognizance of this case and framing of charges by the learned Trial Court both are bad in law. According to Mr. Debasish Roy, learned Senior Counsel, learned Trial Court ought to have addressed the issues raised by the petitioners in their petition seeking discharge at the preliminary stage without keeping the same pending till the conclusion of trial. Relying upon the decision of Hon'ble Supreme Court in **ABDUL WAHAB ANSARI VS. STATE OF BIHAR & ANR.** reported in **(2000) 8 SC 500** and **DEVINDER SINGH & ORS. VS. STATE OF PUNJAB THROUGH CBI** reported in **(2016) 12 SCC 87**, Mr. Roy, learned Senior Counsel argued vehemently that objection on the question of sanction can be taken at any stage of the proceeding.

11. Question of sanction according to Mr. Roy may arise at any stage of proceedings even it may arise at the inception of the proceeding as well. There is nothing to suggest that the accused must wait till the charges are framed. According to Mr. Roy the order passed by the learned Trial Court suffers from illegality and should not be allowed to remain in force.
12. Refuting such contention Mr. Vipul Kundalia, learned Counsel representing the Opposite Party submits that points raised by Mr. Roy are no longer res-integra. According to Mr. Kundalia the members of the Arm Forces or of the Forces charged with maintenance of the public order are provided with two safeguards when such member is sought to be prosecuted for use of excessive force in the discharge or purported discharge of their duty. They cannot be prosecuted without obtaining a sanction to prosecute from the appropriate government in

terms of Section 132 of the Code of Criminal Procedure and no Court can take cognizance of offence against such official in absence of the previous sanction of the appropriate government under Section 197 of the Criminal Procedure Code. But the said safeguard is not available to the petitioners. Mr. Kundalia further contended that the judgement pronounced in the case of **S.N. BHOWMIK VS. THE STATE** reported in **1988 (II) CHN 455** was based on the judgement pronounced by the Hon'ble Supreme Court in the case of **RAM KUMAR VS. STATE OF HARYANA** reported in **1987 SC 735** wherein the Hon'ble Apex Court held:-

“2. Two safeguards are provided in regard to prosecution of members of the Armed Forces or of the forces charged with the maintenance of public order sought to be prosecuted for use of excessive force in the discharge of purported discharge of their duty:

(1) They cannot be "prosecuted" without obtaining a sanction to prosecute from the appropriate Government ([Section 132](#)¹ of the Code of Criminal Procedure) (Cr.P.C.)

(2) No Court can take "cognizance" of an offence against such an official in the absence of the previous sanction of the appropriate Government (see [Section 197](#)² of Cr. P.C.)

3. In the present case the Trial Court has taken cognizance without the previous sanction (of the State Government) as envisioned by [Section 197\(2\)](#) read with [Section 197\(3\)](#) of the Code of Criminal Procedure in respect of a charge that the appellant had in the purported discharge of his duties used force in excess of what was necessary and thereby committed on offence. Admittedly, there is no such previous sanction

authorising any court to take 'cognizance' of the offence against the appellant. The High Court has, however, taken the view that inasmuch as the State Government itself had accorded sanction to 'prosecute' the appellant in exercise of powers under [Section 132](#) of the Cr.P.C. there was no need for sanction under [Section 197](#) of Cr.P.C. The reasoning runs along these lines: Both sanctions are (1) to be given by the State Government, (2) in respect of the same person, and (3) on the same allegations. Therefore, the sanction under one provision (Sec. 132) can be treated as a sanction under the other provision (Sec. 197(3) as well). We are afraid, the High Court has overlooked the scope, purpose and character of sanction under [Section 132](#) of Cr.P.C. on the one hand and [Section 197](#) Cr.P.C. on the other. Six significant points of difference need to be highlighted:-

(1) The two sanctions are addressed to altogether different persons. While sanction under Sec. 132 is addressed to the intending complainant, sanction 197 is addressed to the Magistrate presiding over a Court

(2) The two sanctions serve two altogether different purposes. While the sanction under [Section 132](#) clothes the intending complainant with authority to institute a complaint and set the machinery of the criminal court in motion, the sanction under [Section 197](#) clothes the court with the jurisdiction to take cognizance of the offence. Without the former, the intending complainant cannot trigger the proceedings, without the latter the Magistrate cannot have seisin over the matter or act in the matter.

(3) The absence of sanction in each case visits different persons with different consequences. Absence of the former disables the intending complainant whereas absence of the latter disables the Court.

(4) The disability operates in two different spheres. Want of sanction under Sec. 132 renders the complaint invalid. Want of sanction under Sec. 197 vitiates all the proceedings in the Court. For want of the former, the complainant cannot complain, for want of the latter the court cannot try the case.

(5) The sanctioning authority has to address itself to different questions. In regard to a sanction under Sec. 132 Cr.P.C. the question to be answered is whether the intending complainant is a suitable person to be authorized for prosecuting the matter in good faith. In regard to the sanction under Sec. 197 the question to be answered is which particular court should be empowered to try the case'. So also in granting sanction under Sec. 197 the sanctioning authority has to consider whether or not to exercise the powers under [Section 197\(4\)](#) to specify "the person by whom, the manner in which, and the offence or offences for which" the concerned public servant should be tried and "the court before which the trial is to be held". The authority seized of the matter in the context of sanction under Sec. 132 does not have to address himself to these questions and in fact has no competence in this behalf.

(6) One is an authority to an individual to 'prosecute' the alleged offender, the other is an authority to 'try' the alleged offender."

13. Placing his reliance upon the said judgement of Hon'ble Supreme Court Mr. Kundalia adverted that the petitioners not being the member of Arm Forces or Forces charged with maintenance of public order are not entitled to two safeguards under Section 132 of the Criminal Procedure Code and Section 197 of the Criminal Procedure Code. According to Mr. Kundalia, learned Counsel, the sanction under Sub-Section 1 of Section 137 of the Customs Act paves the avenue for the

learned Magistrate to take cognizance and it is good enough to maintain the proceeding. To buttress his point Mr. Kundalia relied upon decision of a Division Bench of this Hon'ble Court pronounced in **SAYED MOHAMMAD HASAN VS. K.C. DAS** reported in **1991 SCC Online Cal 512** wherein Their Lordships held:-

“28. Regard being had to the principle laid down in the Supreme Court decision of AIR 1954 SC 359 we are of the view that what is necessary for the Court to decide as to whether a proper sanction is given or not as required under the law, is to see as to whether either from the order of sanction or from any other materials produced the facts in respect of which it is given have been set out or not. It is not necessary that the sanction will be in a particular form. It is only necessary that there should be a sanction stating the facts in respect of which it is given and the Court on the basis of the said sanction has to take cognizance. The particular language used in the order of sanction is not material. The only material thing to show is as to whether there is a previous sanction for the Court to take cognizance. It is not necessary that a sanction order under Section 137(1) shall have to be issued by the Collector to accord sanction for the Court to take cognizance, Under the Code of Criminal Procedure ordinarily the Criminal Courts on the basis of petition of complaint or police report or otherwise may take cognizance and initiate a criminal proceeding. No sanction of the executive authority is necessary for a Criminal Court to take cognizance. What 197, Criminal Procedure Code or 137(1) of the Customs Act provides is that for the offences contemplated under the said provisions there must be a previous sanction of the concerned authority for the Court to take cognizance. The language in which such sanction is worded is not in the least material when the Supreme Court

has clearly held that there is no particular form of sanction. When the Customs Act has not specified the particular form of sanction under Section 137(1) of the Customs Act, then we are of the view that even if the Collector of Customs accords sanction for filing complaint for offences punishable under Section 132 and 135 of the Customs Act, 1962 before a competent Court of Law and when that sanction has been accorded in exercise of the powers under Section 137(i) of the Customs Act and when the sanction order clearly set out the facts in respect of which the said sanction has been accorded, then only because the expression used in the sanction order that the sanction is accorded for filing complaint, we are unable to hold that such sanction which has been issued under Section 137(1) is invalid. We are unable to hold that the Collector of Customs has to accord a sanction to the competent Magistrate to take cognizance. We have already indicated that it is not the contemplation of the law that the Collector shall accord sanction to take cognizance. It is the contemplation of the law that there must be a previous sanction of the competent Authority for the Court to take cognizance.

29. We have unable to approve the decision of the Learned Single Judge reported in (1989) 19 ECC 173 (Cal) : (1988) 2 CHN 455 in which the learned Single Judge even though he found that only the sanction under Section 137(i) of the Customs Act was necessary he quashed the proceeding on the ground that the sanction was accorded for prosecution of the accused and that it was not a sanction for taking cognizance. In the result we are unable to hold that the sanction order issued by the Collector of Customs in this case under Section 137(1) Criminal Procedure Code [Customs Act] is in any way invalid. Therefore, the taking cognizance by the Learned Magistrate on the basis of such sanction order is not in our opinion invalid. As none of the contentions raised by

the petitioner is acceptable, we find no merit in this petition. The petition is rejected. Let the Lower Court record be sent down to the Learned Magistrate for disposal of this case as expeditiously as possible.”

14. The said judgement of the Hon’ble Division Bench virtually has taken sting out of the case pleaded by the petitioners.

The decision of Hon’ble Supreme Court pronounced in the case of Ram Kumar (supra) is of no help to the petitioners because of difference in factual matrix.

15. Under such circumstances, I do not find any reason to interfere with the order impugned. In my humble opinion the petition under consideration is devoid of merit and is dismissed, however, without cost. Application, if any, is thus disposed of, interim order if there is any, stands vacated.

16. Parties are directed to act upon the server copy of this judgement duly downloaded.

17. Let a copy of this judgement be sent to learned Trial Court for information and taking necessary action.

18. Urgent Photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)