IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.3724 OF 2013

NARAYAN TIBREWAL ..PETITIONER
VS.
DEPUTY SUPERINTENDENT OF POLICE
CBI, ACB MUMBAI AND ANR. ..RESPONDENTS

WITH
CRIMINAL REVISION APPLICATION NO.76 OF 2013

VIRENDRAKUMAR AGARWAL ..APPLICANT
VS.
THE STATE OF MAHARASHTRA AND ANR. ..RESPONDENTS

WITH
WRIT PETITION NO.3841 OF 2013

AMIT TIBREWAL ..PETITIONER
VS.
DEPUTY SUPERINTENDENT OF POLICE
CBI, ACB MUMBAIAND ANR. ..RESPONDENTS

Mr. Shirish Gupte, Senior Advocate i/b. Adv. N. D. George for the petitioner in WP/3724/2013.

Adv. H. G. Dharmadhikari a/w Ms.Lalita S. Phadke, for the applicant in REVN/76/2013.

Adv. N. D. George for the petitioner in WP/3841/2013.

Mr.Kuldeep Patil a/w Mr.Nagesh Khedkar, Mr.Nikhil Hire and Ms.Saili Dhuru, for the respondent – CBI.

Mr. S. A. Karmakar, APP for the respondent-State.

CORAM : M. S. KARNIK, J.

DATE : APRIL 26, 2024

JUDGMENT :

1. Since common issues are involved, these matters are being disposed of by a common order with the consent of the parties.

2. Heard learned senior advocate Shri Shrish Gupte appearing for the petitioner in WP/3724/2013, Mr. Dharmadhikari, learned counsel appearing for the applicant in REVN/76/2013, Mr.N.D.George for the petitioner in WP/3841/2013 and learned counsel Shri Kuldeep Patil, for CBI.

3. The challenge in these matters is to an order dated 19/01/2013 passed by learned Special Judge, CBI, ACB, Mumbai below Exhibit 23 in Special Case No. 73 of 2008 arising out of RC No. BAI/2007/A0030 registered with the respondent no.1 for the offence punishable under sections 120B, 420 of the Indian Penal Code, 1860 and under sections 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 ('PC Act', for short). The application Exhibit 23 was filed by the petitioner-accused for discharge from the aforementioned offences.

The facts of the case in brief are as under:

The Manager of M/s. Radhika Exports while filing shipping bill declared and submitted invoices with higher weight so as to claim the benefit under Duty Free Import Authorization Scheme ("DFIA Scheme", for short). The said invoice bill was investigated by the office of Special Intelligence and Investigation of Branch (Export) ("SIIB", for short), Nhava Sheva, District- Raigad. Thereafter Radhika Exports was allowed to file revised invoice as the discrepancies in the gross weight in the earlier invoice was a typographical mistake and the Gram Per Square Meter ("GSM", for short) was not amended due to oversight. The said goods were allowed to be exported after due permission from the customs department and shipping bill was assessed finally.

5. It was later noticed that the petitioner-Virendrakumar Agarwal and other accused- officers of the Customs department while allowing the provisional release of the consignment, instead of following the procedure of confiscation for the breach, allowed the provisional release for monetary consideration and thereby shown undue favour to the accused nos. 3 and 4 i.e. the applicants Narayan and Amit Tibrewal. At the relevant time, the

applicant- Virendrakumar Agarwal was working as the Additional Collector of Customs, Jawaharlal Nehru Customs House, Sp. Intelligence & Investigation Branch (Export). The complaint was investigated. Charge-sheet was filed against the accused. The applicants filed the aforesaid application for discharge.

6. The trial Court rejected the application for discharge for the following reasons.

> "14 Perused the documents filed by the prosecution, also perused statements of various witnesses recorded during investigation and the provisions contained in Customs Act. It is to be noted that as regards role of the accused and procedure for work of the accused has elaborately come in the version of PW3 Dandapai Behera and PW4 Harish Dharnia. It is also clear that section 18 of Customs Act definitely confer absolute power as regards the calculation of duty and assessment of duty. It is also clear that section 113 of Customs Act provides for confiscation of goods attempted to be improperly exported and specifically when there is mis-matching of particulars as relation to goods to be exported and documents in connection with it.
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> 15 As has been pointed out earlier the allegations against the accused though prima facie show of passing order of inquiry; provisional assessment and after following the provisions of Customs Act is made on the part of the accused. It is to be noted that as per statements of objections reasons of the Customs Act and preamble of the Customs Act it is clear that Customs Act was passed to consolidate law relating to Customs Act. Thus when there is allegation of ulterior motive in evaluation and compliances of provisions of Customs Act as has been alleged in the present case it cannot be inferred plainly in favour of the accused and when some intrinsic screening to each step, document and alleged conduct of the accused in the

> present case it cannot be said that there is no material against the accused to frame charge for the alleged offences. Therefore the submissions of the ld. Counsel for the accused cannot be accepted. Hence Point Nos. 1 & 2 are answered accordingly."

7. Learned senior advocate submitted that the order passed by the trial Court is not in consonance with the law laid down by the Supreme Court in [1]**Yogesh Alias Sachin Jagdish Joshi Vs. State of Maharashtra.** It is submitted that the trial Court failed to apply the broad test whether the materials on record, if unrebutted, make a conviction reasonably possible. It is submitted that the trial Court has not at all considered the materials on record which overwhelmingly led to the only conclusion that a conviction in the present case was just not possible. Learned senior advocate submitted that the goods to be exported were not prohibited goods. It is contended that the proper officer has passed an order provisionally releasing the goods. It is submitted that in fact there was no loss caused to the government as a result of such export. Learned senior advocate urged that the order passed by the proper officer is a quasi judicial order which has attained finality as the Revenue did not file any appeal before the Appellate

1 (2008) 10 Supreme Court Cases 394

authority under the Customs Act. It is urged that there cannot be any criminal liability fastened on the petitioner/applicant much less a charge under the PC Act. It is submitted that there is no material to indicate that the applicant–Virendrakumar was paid any monetary consideration by the exporter to get a favourable order.

8. Learned counsel for the applicant Virendrakumar Agarwal was at pains to point out that the only material against the applicant is the statement of the prosecution witness- Ashok Mahadeo Vange recorded under section 164 of the Code of Criminal Procedure ("CrPC", for short) about the applicant-Virendrakumar Agarwal having demanded a bribe from the accused no.3 – Narayan Tibrewal, the Manager of M/s. Radhika Exports on 15/10/2006 in order to avoid his arrest and settle the issue. It is further submitted that in the earlier statement of Shri Ashok Vange, there is no mention of demand of bribe. It is then submitted without prejudice to the aforesaid submissions that as the order passed by the trial Court is not in consonance with the test propounded by the Supreme Court in **Yogesh alias Sachin Jagdish Joshi,** the application for discharge be remitted to

the trial Court upon setting aside the impugned order.

9. Learned counsel for the respondent -CBI invited my attention to the affidavit-in-reply filed by the respondent no.2. It is submitted that the impugned order does not warrant any interference.

10. I have heard learned counsel for the parties. The Supreme Court in **Yogesh alias Sachin Jagdish Joshi** while stipulating the broad test to be applied in considering an application under section 227 of the CrPC has held thus:

> "15. Chapter XVIII of the Code lays down the procedure for trial before the Court of Session, pursuant to an order of commitment under Section 209 of the Code. Section 227 contemplates the circumstances whereunder there could be a discharge of an accused at a stage anterior in point of time to framing of charge under Section 228. It provides that upon consideration of the record of the case, the documents submitted with the police report and after hearing the accused and the prosecution, the court is expected, nay bound to decide whether there is "sufficient ground" to proceed against the accused and as a consequence thereof either discharge the accused or proceed to frame charge against him.
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> 16. It is trite that the words "not sufficient ground for proceeding against the accused" appearing in the section postulate exercise of judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine a prima facie case depends upon the facts of each case and in this regard it is neither feasible nor desirable to lay down a rule of universal

> application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, make a conviction reasonably possible."

11. Learned senior advocate submitted that the order passed by the trial Court has not considered whether the materials on record if unrebutted make a conviction reasonably possible. The trial Court undoubtedly has a power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. At the relevant time, the applicant/ accused no.1 -Virendrakumar Agarwal was the Additional Collector of Customs at Jawaharlal Nehru Customs House, Sp. Intelligence & Investigation Branch (Export). It is the allegation that he misused his official position and allowed the export of a consignment of fabric by M/s.Radhika Exports under shipping bill no. 43615819 dated 21/09/2006 by permitting provisional export of the consignment though GSM which is one of the technical characteristics/specifications of the quality of fabric was mis-declared by Shri Narayan Tibrewal, Manager (A-3) and

Shri Amit Tibrewal, Partner (A-4) both of M/s. Radhika Exports, Mumbai in the packing list/shipping bill. The allegation is that the applicant neither directed the confiscation of the consignment nor did he direct the exporter to execute a bond, which could have been asked for, as per rules, while permitting the provisional release of the consignment. The specific allegation is that the same was done by him for monetary consideration received from the accused no.3.

12. The case in brief of the respondents is thus that while allowing the provisional release of the consignment, instead of following the procedure of confiscation, consignment is provisionally released for monetary consideration and thereby shown undue favour to the accused nos. 3 and 4.

13. No doubt, earlier statements of Ashok Wange does not make mention of demand of bribe. However, those statements were recorded by one of the accused prior to the lodging of the complaint. It is after the complaint was registered that the statement of Ashok Vange recorded under sections 164 of CrPC which revealed that the applicant -Virendrakumar Agarwal demanded a bribe of Rs.

6,00,000/- from the accused no.3 – Narayan Tibrewal-Manager of M/s. Radhika Exports on 15/10/2006 in order to avoid his arrest and settle the issue. On 18/10/2006, the applicant -Virendrakumar Agarwal released the consignment provisionally and did not direct the exporter to execute a bond nor did he confiscate the consignment. The accusation is that by abusing his position as a public servant, applicant -Virendrakumar Agarwal obtained pecuniary gain in order to release the consignment and thereby he benefited by illegal means and caused wrongful loss to the government by not confiscating the goods. The respondents are relying upon the statements of the witnesses and the documents on record to establish the conspiracy between the various accused.

14. The contention of learned senior advocate that the order of the provisional release having attained finality under the Customs Act has an effect of absolving the petitioners accused of any criminal liability is without any merit. The accusations against the petitioner-Virendrakumar Agarwal is that he obtained pecuniary gain from the co-accused for release of the consignment and

thereby he benefited by illegal means and caused wrongful loss to the government by not confiscating the goods. There are thus, prima facie, materials and statements on record which in my opinion, sufficient to proceed against the petitioners.

15. I therefore see no reason to interfere with the order passed by the trial Court.

16. The petitions and revision application stand rejected.

17. The trial Court to proceed with the trial on its own merits uninfluenced by the observations made in this order.

(M. S. KARNIK, J.)