IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 31.07.2024	Pronounced on: 07 .08.2024

Coram:

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

Crl.O.P.No.14756 of 2024
& Crl.M.P.Nos.9011 & 9012 of 2024

V.Girinath. .... Petitioner

/versus/

The Asst. Commissioner of Customs,
Customs Preventive Unit,
21B, Raagavis Centre, 1st Floor, Netaji Nagar,
Nanjundapuram Main Road, Ramanathapuram,
Coimbatore – 641 036. .... Respondent

Prayer: Criminal Original Petition has been filed under Section 482 of Cr.P.C., to call for the records relating to C.C.No.446 of 2023 on the file of the Learned Chief Judicial Magistrate, Coimbatore and quash the same.

For Petitioner : Mr.C.V.Shyam Sunder

For Respondent : Mr.N.P.Kumar,
Special Public Prosecutor (NCB)

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O R D E R

On 29/04/2022, based on intelligence developed by Directorate of Revenue Intelligence, Regional Unit of Coimbatore, 4 passengers from Singapore to Coimbatore were intercepted at Coimbatore International Airport on their arrival. From the baggages of two of the passengers namely, Shri.Tangkesvaran and Smt.Nandhini found 4 heavy object wrapped in off-white coloured adhesive tape in the shoulder bag of Tangkesvaran and one heavy object wrapped with off-white coloured adhesive tape from the hand bag of Smt.Nandhini been recovered. On opening the wrapped parcels in the presence of witnesses, six yellow coloured metal bars with marking and description mentioned below was found and recovered.

Shri.M.Tangkesvaran

(i) Argor Heraeus SA Switzerland 1 kilo fine gold 999.9 (Melter Assayer) AH8T398- 1Kilogra.

(ii) Metalor 1 kilo gold 999.9 MSG Assayer Melter Y31685-1Kilogram

(iii) Argor Heraeus SA Switzerland 100g fine gold 999.9 (Melter Assayer) CN 6132-100 Grams

Smt.T.Nandhini

(1) ABC 1 kilo fine gold 999.9 Australia D 0114160--1 kilogram

(ii) ABC 1 kilo fine gold 999.9 Australia D 0113369-1 Kilogram

(iii) Argor Heraeus SA Switzerland 100 g fine gold 999.9(Melter Assayer) CN61444-100 Grams

2. On examination of the objects by the gold appraiser, it was ascertained that the yellow coloured metal bar were 24 carat pure gold bars of foreign origin. Since these two passengers had no valid documents to carry gold to India, they were detained for enquiry and the other two passengers were let off since nothing incriminating were recovered from them.

3. The interrogation of Shri.Tangkesvaran and Smt.Nandini both Malasiyan nationals, disclosed the fact that they were carrying the gold on the instruction of one V.Girinath who arranged for their travel and shared dummy invoices through whatsapp to show as if the gold attempted to be smuggled were procured by four of them.

4. The digital analysis of the mobile used by Shri.Tangkesvaran disclosed further information about V.Girinath, hence the residential premises of V.Girinath was searched on 19/06/2022. Following the search, V.Girinath obtained anticipatory bail and in compliance of the bail condition appeared before the DRI Office, Regional Unit, Coimbatore. His statement under Section 108 of Customs Act was recorded on 19/07/0222. V.Girinath voluntarily admitted that he booked travel tickets for the 4 passengers on the request of Shri.Mageshwari and Shri.Tangkesvaran, whom he know for several years. He was asked to arrange for their transport, stay and visit to religious places. However, he denied the allegation that he instructed Tangkeswaran to collect the parcels from one Murugan and keep the one gold bar parcel with him and another gold bar parcel in the hand bag of Nandhini.

5. The conversation between Tangkesvaran and V.Girinath retrieved from the mobile of Tangkeswaran was played to V.Girinath during interrogation. He admitted his voice but feign ignorance why Tangkeswaran had incriminated him as the owner of the gold bars.

6. The conversation retrieved through mobile data disclose the active participation of V.Girinath in transporting gold bar illegally. As per instruction of V.Girinath, Tangkeswaran had waited in the Airport at a specific seat for one Murugan to deliver the parcels. As per instruction of V.Girinath, on receiving the parcel from Murugan, one parcel been kept by Tangkeswaran and another parcel been kept in the handbag of Nandhini. That apart, V.Girinath waiting at Coimbatore Airport for the arrival of the 4 passengers, also lend support to the prosecution case that he was the mastermind behind the crime of smuggling gold bar and he is not a mere facilitator arranging their travel.

7. Show Cause Notice under Section 124 of Customs Act was issued to Tangkeswaran, Nandhini and V.Girinath in connection with seizure of 4200 grams of foreign marked gold of 24 carat at Coimbatore Airport on 29/04/2022. After getting their explanations, Order-in-Original No.TCP-CUS-PRV-JTC-31/2023 dated 06/03/2023 passed by the Additional Commissioner of Customs, Trichy imposing penalty against each of them as below:-

i) Rs.1,10,00,000/- under Section 112(i) r/w 112(a) and (b) of Customs Act on M.Tangkeswaran.

ii) Rs.1,10,00,000/- under section 112 (i) r/w 112(a) and (b) of Customs Act on Ms.Nandhini.

iii) Rs.2,20,00,000/- under section 112 (i) r/w 112(a) and (b) of Customs Act. on Mr.V.Girinath.

8. Challenging the Order-in-Original dated 06/03/2023, V.Girinath has preferred Writ Petition (MD) No.13814/2023 before the Madurai Bench of Madras High Court and on 21/06/2023 interim stay granted in W.M.P(MD).No.11641 of 2023. The stay been extended until further orders *vide* order dated 26/07/2023.

9. In the meanwhile, the Assistant Commissioner of Customs, Customs Preventive Unit, Coimbatore has filed complaint before the Chief Judicial Magistrate, Coimbatore under Section 135 (1)(a) & (1)(b) of Customs Act r/w Section 200 (A) of Cr.P.C against V.Girinath and same taken on file by the Learned Chief Judicial Magistrate on being satisfied that *prima facie* cognizable offence made out to proceed against the accused. The said complaint taken on file and numbered as C.C.No.446/2023. It is posted for examining witnesses for pre-charge evidence.

10. Shri.V.Girinath, in his petition to quash C.C.No.446 of 2023, pleads innocence. The learned counsel for the petitioner contends that the genesis to proceed against him is the alleged statements of Tangkesvaran and Nandhini. The said statements already been retracted by the makers. The final Order-in-Original passed against the petitioner based on the retracted statement of these two persons is under challenge in the W.P.(MD) No.13814/2023 and stay been granted. The criminal prosecution under Section 135 of the Customs Act, primarily pegged on the facts which are identical to the facts which is subject matter in the Writ Petition. Further, the complaint filed under Section 200(A) of Cr.P.C is a warrant case on complaint otherwise than the police report. However, the Chief Judicial Magistrate who took cognizance of the offence had not followed the procedure contemplated in Section 244 of Cr.P.C. The sanction to prosecute the petitioner issued without application of mind and lack discussion on the sufficiency of evidence.

11. Mr.N.P.Kumar, Learned Special Public Prosecutor for Customs submitted that, there are overwhelming evidence to proceed against the petitioner for offence under Section 135 of the Customs Act. The proceedings under Section 112 of the Customs Act will no way preclude the Customs Department from prosecuting the violators and independent of the outcome of the proceedings under Section 112 of the Customs Act. It is a well settled principle of law, that prosecution under Section 135 of the Customs Act can proceed simultaneously and independent of the adjudication proceedings.

12. In the counter affidavit filed on behalf of the Department, the facts incriminating the petitioner are listed in detail, which includes the voluntary statement of the petitioner and the voice recording of the conversation between the petitioner and the other accused. The complaint contains wealth of details which requires examination through judicial process.

13. Particularly, the defence taken by the petitioner that he is an Advocate by Profession and earlier he was running a Travel Agency, through which he got acquaintance with Tangkesvaran and one Maheswari. On their request, he arranged tickets for four persons and advised them that they can carry only upto one kg of gold each. He came to Coimbatore Airport to receive them and take them to religious places were all found to be only a ruse to cover up his active involvement in the act of smuggling gold into India in contravention to the Act and Rules.

14. The prosecution had arrived at the above conclusion since the conversations between the petitioner and Tankesvaran not confined to arranging tickets for the passengers and accommodations, but it also about the gold bar parcels carried by them. Further, there is evidence to show two different set of invoices for the contraband been arranged by the petitioner.

15. It is also contended by Mr.N.P.Kumar, Learned Special Public Prosecutor for Customs that, the petitioner without resorting to the appeal remedy provided under the statute challenging the Order-in-Original, obtained *exparte* stay by way of Writ Petition. The writ petition is not maintainable in view of the judgment of the Hon'ble Supreme Court in ***C.A.Ibrahim -vs- ITO, H.B.Gandhi*** reported in ***1992 (Suppl) 2 SCC 312***.

16. Heard the Learned counsel for the petitioner, the Learned Special Public Prosecutor for the respondent and records perused.

17. The records placed before the Chief Judicial Magistrate, Coimbatore in C.C.No.446/2023 disclosed commission of offence under Section 135(1)(a) & (1)(b) of the Customs Act. The complaint as well the counter clearly makes out a case for taking cognizance of the offence against the petitioner. It is not the exculpatory statement of others but the voluntary statement had provided wealth of information which on further investigation confirms the active role of this petitioner in the clandestine transport of 4200 grams of pure foreign mark gold through two Malaysian passengers. The admissibility of the digital evidence is to be tested during the trial.

18. In so far the procedural error regarding taking cognizance without examining the witnesses in the complaint filed otherwise than the police report, the Lower Court record indicates that the said error is rectified. The Judicial Magistrate on 04/06/2024 has passed the following order taking note of the error crept earlier:-

> "*Accused absent. Petition filed and allowed. The memo filed by the accused side is carefully perused. The case of the prosecution also based on private complaint. But this case not followed the prosecution on contemplate U/s 245 Cr.P.C, hence this court is inclined to rectify the same by the way of this order. Accordingly, the charge based on the materials framed is omitted. Issue summons to LW-1 to LW-3 for pre-charge evidence. Call on 14/06/2024*"

19. Regard to the pendency of Writ Petition, challenging the Order-in-Original dated 06/03/2023, on perusing the affidavit filed by the petitioner in support of his writ petition, this Court find that the said writ petition is filed to question the admissibility and reliability of the statements given to the Customs Officials as well the admissibility and reliability of the digital evidence without following the mandate laid in Section 65 B of the Evidence Act.

20. Even if the Court in W.P.(MD).No.13814/2023 for some reason hold that these documents were not proved in the manner known, it will be only in respect of the proceedings conducted under Section 112 of Customs Act by the Adjudicating Authority and it shall not have any bearing on the criminal Trial for offence under Section 135 of the Customs Act. Dehors of proof or failure to prove the case against the petitioner and others in the adjudicating proceedings, the prosecution before the Court has to be proved independently as per the law. The stay of the Order-in-Original passed by the Addl. Commissioner, Trichy will not be an impediment to continue the criminal prosecution.

21. The judgments cited and relied by the Learned Counsel for the petitioners and other judgments of the Supreme Court and High Courts had consistently held that the criminal prosecution cannot be allowed to continue if a person is exonerated in the adjudication proceedings, provided the criminal prosecution is on the same set of facts. It may be recollected the bedrock case on this point in ***P.Jayappan -vs- S.K.Perumal, First Income Tax Officer*** reported in ***1984 (149) ITR 696*** followed by ***G.L.Didwania -vs- ITO*** reported in ***1999 (108) ELT 16 (SC)***.

22. In ***Radheshyam Kejriwal –vs- State of West Bengal and another*** reported in ***2011 (3) SCC 581*** the Hon'ble Supreme Court referring *P.Jayappan* case and other cases, laid down the following ratio :-

> *19: "The ratio which can be culled out from these decisions can broadly be stated as follow :-*
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> *(i) Adjudication proceeding and criminal prosecution can be launched simultaneously;*
>
> *(ii) Decision in adjudication proceeding is not necessary before initiating criminal prosecution;*
>
> *(iii) Adjudication proceeding and criminal*

proceeding are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceeding by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue; and

(vii) In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of facts and circumstances can not be allowed to continue underlying principle being the higher standard of proof in criminal cases.

In our opinion, therefore, the yardstick would be to judge as to whether allegation in the adjudication proceeding as well as proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceeding is on merits. In case it is *found on merit that there is no contravention of the provisions of the Act in the adjudication proceeding, the trial of the person concerned shall be in abuse of the process of the court".*

23. Thus, the Law as well the judicial pronouncements is well settled and had made clear that the adjudicating proceedings under the Customs Act and the criminal prosecution under the Customs Act are not in alternate but independent to each other. They can be launched simultaneously. There is no legal impediment for parallel proceedings of adjudication and prosecution. Only in case the adjudication ends in exoneration, the continuation of criminal prosecution will be on the touch stone whether the prosecution is on the same set of facts and for the same act or omission. Otherwise, even the outcome of one will not have bearing on the other.

24. For further clarity, this Court add that, if the exoneration in departmental adjudication is on technical ground or by giving benefit of doubt and not on merits or the adjudication proceedings were on different facts, it would have no bearing on criminal proceedings. If, on the other hand, the exoneration in the adjudication proceedings is on merits and the concerned person(s) is/are innocent, and the criminal prosecution is also on the same set of facts and circumstances, only in such circumstances the criminal prosecution cannot be allowed to continue.

25. As far the case in hand, the adjudicating authority had held the petitioner liable for penalty. That order is under challenge before High Court, bye-passing the remedy available under the statute (i.e.,) Appeal before the Commissioner (Appeals). Courts can never fail to note the difference between the adjudication proceeding before the Authority of the Department and the prosecution before the Court of Law. Adjudication under Section 112 of the Customs Act is with regard to the property/article smuggled into India. It is an action in *personam.* Whereas criminal prosecution under Section 135 of the Customs Act is for the offence affecting the economy of the Country. This is an action in *rem.* One action cannot be a substitute for the other action.

26. On the similar set of facts, this Court in ***S.J.Surya -vs- The Deputy Commissioner Of Income Tax*** *vide* its order dated 26th May, 2022 declined to entertain the quash petition. In view of the facts and circumstances discussed above, this Court holds that the petition to quash the C.C.No.446/2023 on the file of Chief Judicial Magistrate, Coimbatore is devoid of merit.

27. As a result, the Crl.O.P.No.14756 of 2024 stands dismissed. Consequently, connected Miscellaneous Petitions are closed.

07.08.2024

Index :Yes/No.
Internet :Yes/No.
Speaking Order/Non-Speaking Order.
bsm
To:-

1. The Learned Chief Judicial Magistrate, Coimbatore.
2. The Assistant Commissioner of Customs,
Customs Preventive Unit, 21B, Raagavis Centre, 1st Floor, Netaji Nagar,
Nanjundapuram Main Road, Ramanathapuram,
Coimbatore – 641 036.
3. The Public Prosecutor, High Court, Madras.

DR.G.JAYACHANDRAN,J.

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Pre-delivery order made in
Crl.O.P.No.14756 of 2024

07.08.2024