



Crl.R.C.(MD).No.767 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 04.09.2024

PRONOUNCED ON :13.09.2024

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

Crl.R.C.(MD)No.767 of 2024
and
Crl.M.P.(MD)Nos.8217 and 8221 of 2024

Nagarathinam

... Petitioner/Petitioner/Accused No.1

Vs.

The Deputy Commissioner of Customs,
Customs Division,
Ramanathapuram District. ... Respondent/Respondent/Complainant

PRAYER: Criminal Revision Petition has been filed under Section 397 r/w 401 of the Code of Criminal Procedure, against the order passed in Cr.M.P.No.553 of 2024 in C.C.No.43 of 2021, on the file of the Additional Chief Judicial Magistrate Court, Madurai, dated 14.05.2024.



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For Petitioner : Mr.RM.Arun Swaminathan

For Respondent : Mr.Arul Vadivel @ Sekar
Senior Counsel for NCB cases.

ORDER

This Criminal Revision is directed against the order passed in Cr.M.P.No. 553 of 2024 in C.C.No.43 of 2021, dated 14.05.2024, on the file of the Additional Chief Judicial Magistrate Court, Madurai, dismissing the petition for discharge filed under Section 245(2) Cr.P.C.

2. The petitioner is the accused in C.C.No.43 of 2021 for the offences under Section 135(1)(a) and 135(1)(b) of the Customs Act, 1962. It is evident from the records the the respondent has laid a complaint against the petitioner and another for the offences under Section 135(1)(a) and 135(1)(b) of the Customs Act, 1962 and that the case was taken on file in C.C.No.43 of 2021 and is pending on the file of the Additional Chief Judicial Magistrate, Madurai. It is further evident that the prosecution has examined 5 witnesses as P.W.1 to P.W.5 and exhibited 16 documents as Exs.P.1 to P.16 during the pre charge evidence and after closure of the prosecution side evidence and when the case was



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pending for framing of charges, the petitioner-first accused has filed the petition under Section 245(2) Cr.P.C., seeking discharge from the above case.

3. The petitioner's case is that for initiating prosecution proceedings against any person under Section 135 of the Customs of the Act, the nature of the offence, the role of the person in the offence and evidence available to substantiate the knowledge / mens rea of the persons in the offence are the major factors for consideration and the Sanctioning Authority, without considering the above aspects, has accorded the sanction for filing criminal complaint against the petitioner, that the main condition to attract term “improperly imported goods” under Section 111 of the Customs Act is that the goods should have been brought from outside India, that the gold in question has not been seized at the point of entry in India, that DRI investigation has not brought any evidence except the statements of the notices to show that the gold was smuggled from Srilanka, that the gold assayer who assayed the seized gold bars has not certified whether the seized gold is of foreign origin gold or not and he has only appraised the crude gold bars seized and stated to be foreign origin by the DRI and has certified the number of pieces, weight, purity and value of the seized gold, that DRI narrated some occurrences to the independent witnesses without any corroborative



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evidence, while drawing mahazar at customs division, Ramnad and the hearing the narration, the witnesses have certified the proceedings happened in their presence and hence, it cannot be stated that the gold bars seized by the DRI at customs division, Ramnad under a mahazar belonged to the petitioner, that the petitioner was not given any liberty to cross-examine the assayer in the adjudication proceedings, despite the request made by the petitioner, that DRI had identified that Shri Faji was instrumental in the smuggling activities, but there was no proposal made in the SCN apprehension of Shri Faji even in future, that the gold bars were not seized from the possession of the petitioner and it was seized from the possession of the pillion rider Shri.K.Ramanathan, while the petitioner was driving the motorcycle at the time of interception of the officers, that the petitioner has not claimed the ownership over the gold and the petitioner is no way connected with the seized gold, that DRI has not established the involvement of the petitioner in the seizure of gold and the entire case is based on the inculpatory statements of the witnesses and notices alone and that therefore, the petitioner is entitled to get discharge from the above case under Section 245 Cr.P.C.



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4. The respondent has filed a counter statement raising objections and wherein they have stated that when the petitioner himself has accepted the riding of the motorcycle and the seizure from the first accused K.Ramanathan, the role of the petitioner amounts to constructive possession and the onus is on the petitioner to dislodge the presumption and the same can be decided only at the time of trial, that the prosecution has examined gold assayer to prove the weightment of the gold and its purity and origin, that when the gold has been seized and it is of suspicious nature, then duty is cast upon the accused to prove that the same is not smuggled gold under Section 123 of the Customs Act and Section 106 of the Indian Evidence Act, that the adjudication is conducted only for confiscation of the gold and when the petition has disowned the gold in his petition, the claim of the petitioner that he was not allowed to cross-examine the witnesses cannot stand, that the burden is on the accused as per Section 23 of the Customs Act and moreover, the independent witnesses have signed the recovery mahazar which is contemporaneous document and the said document speaks for itself, that the averments in the petition are general in nature, that the prosecution not only relies on the confessional statements, but also relies on the other materials to prove the seizure and smuggling, that the contention of the petitioner



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is that the main accused Fazi has not been apprehended cannot be a ground for discharge or acquittal and that therefore, the petition is liable to be dismissed.

5. Before entering into further discussion, it is necessary to refer the judgment of the Hon'ble Supreme Court in *State by the Inspector of Police, Chennai Vs. S.Selvi and another* reported in (2018) 13 SCC 455.

“7. It is well settled by this Court in catena of judgments including the cases of Union of India v. Prafulla Kumar Samal (1979) 3 SCC 4, Dilawar Balu Kurane v. State of Maharashtra (2002) 2 SCC 135, Sajjan Kumar v. CBI (2010) 9 SCC 368, State v. A.Arun Kumar (2015) 2 SCC 417, Somu Gupta v. Deepak Gupta (2015) 3 SCC 424, State of Orissa v. Debendra Nath Padhi (2003) 2 SCC 711, Niranjan Singh Karan Singh Punjabi vs. Jitendra Bhimraj Bijjayya (1990) 4 SCC 76 and Superintendent & Remembrancer of Legal Affairs, West Bangal v. Anil Kumar Bhunja (1979) 4 SCC 274 that the Judge while considering the question of framing charge under Section 227 of the Code in sessions cases (which is akin to Section 239 CrPC pertaining to warrant cases) has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing the charge; by and large if two views are equally possible and the Judge is



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satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his rights to discharge the accused. The Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the statements and the documents produced before the court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the materials as if he was conducting a trial”

6. It is settled law that at the stage of framing charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused and the Court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused.

7. It is also settled law that while considering an application seeking discharge from a case, the Court is not expected to go deep of the probative value of the material on record, but on the other hand, the Court has to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, and for that purpose, the Court cannot conduct a roving enquiry into the pros and cons of the matter and weigh the evidence as if it is a main trial.



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8. It is pertinent to note that the Courts while dealing with the application for discharge, are required only to see whether a prima facie is made out against the accused and detailed enquiry is not required at this stage. Bearing the above legal position in mind, let us consider the case on hand.

9. The main contention of the petitioner is that the gold bars were not seized from his possession, but only from the possession of the pillion rider Ramanathan, who is the second accused. It is pertinent to note that the petitioner had alone driven the motorcycle bearing Registration No.TN-65-K-7704 and the same came to be intercepted by the respondent officials and that they have recovered the gold from the possession of the pillion rider Ramanathan. As rightly contended by the learned Senior Counsel for the respondent, the petitioner has neither disputed his riding of motorcycle at the time of alleged interception nor his presence when the gold was seized from the possession of the pillion rider Ramanathan. Since the gold was seized from the possession of the pillion rider of the motorcycle which was driven by the petitioner, whether the petitioner was also involved in the alleged occurrence, cannot be gone into the present stage and it is a matter for trial.



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10. No doubt, the petitioner has taken a stand that despite his specific request for cross-examination of the assayer, he was not permitted to cross-examine him in the adjudication proceedings and that the denial of the adjudicating authority would go to show that he was not satisfied with the assayer's evidence. As rightly contended by the learned Senior Counsel for the respondent, when the petitioner himself has stated that he was not claiming any ownership over the gold seized and he is no way connected with the seized gold and he has no objection to confiscate the seized gold, the question of permitting the petitioner to cross-examine the assayer does not arise at all and that too at the pre-charge stage.

11. Though the petitioner has challenged the sanction order on the ground that the sanction was accorded without considering the nature of evidence, the role of the person in the evidence and mens rea of the person, the petitioner has not whispered anywhere, what are the facts that were not considered in the sanction order and that the petitioner has not shown that there is apparent error on the face of the sanctioning order.



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12. The petitioner has also taken a stand that the non arrest of Bajibai, Kumar and Mohammed who are the main accused is fatal to the prosecution case. But the non-arrest of some of the co-accused by itself is not a ground to discharge other accused from the case. As rightly contended by the learned Senior Counsel for the respondent, the prosecution has produced sufficient materials to proceed against the accused. The learned trial Judge, by also observing that the evidence of P.W.1 to P.W.8 and the statement recorded from the co-accused and the petitioner under Section 108 and other exhibits marked, that there existed prima facie materials to frame charge against the accused. Moreover, the petitioner has not produced any evidence or materials so as to enable the Magistrate to give a finding that the charge is groundless.

13. Considering the above, the order dismissing the petition cannot be found fault with. Consequently this Court concludes that the Criminal Revision Case is devoid of merits and the same is liable to be dismissed.

14. In the result, the Criminal Revision Case is dismissed and the order dated 14.05.2024, passed in Cr.M.P.No.553 of 2024 in C.C.No.43 of 2021, on the



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file of the Additional Chief Judicial Magistrate Court, Madurai stands confirmed.

Consequently, the connected Miscellaneous Petitions are also dismissed.

13.09.2024

NCC : Yes/No
Index : Yes/No
Internet: Yes/No

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To

1. The Additional Chief Judicial Magistrate Court, Madurai.
2. The Deputy Commissioner of Customs,
Customs Division,
Ramanathapuram District.



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K.MURALI SHANKAR, J.

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Pre-Delivery order made in

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