

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.06.2022

Pronounced on : **14.07.2022**

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.R.C.No.372 of 2022

The Assistant Commissioner of Customs,
Prosecution Unit,
Air Cargo Commissionerate,
New Custom House,
Chennai – 600 016.

... Petitioner

Versus

S.Ganesan

... Respondent

Prayer: Criminal Revision Petition is filed under Section 397 of Criminal Procedure Code, to set aside the order dated 20.04.2021 in Crl.M.P.No.55 of 2020 in R.R.No.8 of 2015 in F.No.DRI/CZU/VII/48/Enq.-01/Int-11/2015, on the file of the Learned Judicial Magistrate, Special Court for Customs, Alandur, for the reason stated above.

For Petitioner : Mr. N.P.Kumar,
Special Public Prosecutor,
Central Government.

For Respondent : Mr. S.Ganesan
(Party-in-Person)

ORDER

This Criminal Revision is filed by the Assistant Commissioner of Customs, Prosecution Unit, Air Cargo Commissionerate, New Custom House, Chennai – 600 016, against the order of the Learned Judicial Magistrate, Special Court for Customs, Alandur, dated 20.04.2021 in Crl.M.P.No.55 of 2020, in and by which, the application filed by the petitioner, in which, the respondent is the first accused in un-numbered C.C.No..... of 2019, arising out of in R.R.No.8 of 2015 in F.No.DRI/CZU/VII/48/Enq.-01/Int-11/2015, in O.S.No.08/2017-INT-AIR, was allowed and thereby, dropping the proceedings against the accused No.1/respondent, in this case.

2.For the sake of convenience, the petitioner is referred to as the Complainant and the respondent is referred to as Accused No. 1, as per their ranks arrayed before the Court below.

3.The gist of the allegations made in the complaint is that the third and fourth accused, in the guise of importing electronic goods viz., mobile phones etc., had actually smuggled gold bars, inside the cartons and the first accused, who is running a security agency, authorized by the Airports

Authority of India, with full knowledge of the said illegality, through his employees viz., the second accused/K.Francis and the fifth accused/P.Karunanithi, had help in bringing the gold bars in the cover of mobile phones from the Cargo shed inside the Airport out of the customs frontier and thus all the accused have colluded, conspired and committed the offenses punishable under Section 132, 135 of Customs Act, 1962 and therefore, the private complaint was filed.

4. When the private complaint was adjourned to be listed under the caption as to be “check and call on”, even before recording of the sworn statement and the complaint was taken on file and at the diary number stage itself, the Accused No. 1 had filed an application for dropping proceedings and the same was allowed, against which the present revision is filed. This complaint was presented before the Special Court for Customs, on 31.12.2019 and it was adjourned as “check and call on” on 04.01.2020. Again, on 04.01.2020, an endorsement was made that back file from the Judicial Magistrate has not reached and it is adjourned for call on, on 13.01.2020. From then onwards, the case has been adjourned under the same caption from time to time. On 06.11.2020, the accused No.1 appeared before the Court and filed the present petition at this stage.

5.The contentions raised by the Accused No.1 in the above application is that the Hon'ble Supreme Court of India, in ***Radheshyam Kejriwal Vs. State of West Bengal and Anr.***¹, has held that once the Appellate Authority decided the case on merits, in respect of particular charge, the prosecution in respect of self-same charge cannot be thereafter maintainable as against the accused person. The Customs Department itself has incorporated the said ruling of the Hon'ble Supreme Court through its various circulars and the same has been followed.

6.In this case, there are two offenses in complaint. The first offense is under Section 132 of the Customs Act. The same punishes making false declaration for evading duty. When the matter in respect of instant transaction went before the Appellate Authority, by an order dated 11.09.2017, bearing No.F.No.DRI/ CZU/VII/48/Enq.-01/Int-11/2015, in O.S.No.08/2017-INT -AIR, the Learned Appellate Authority had held that as far as the allegations against the Accused No. 1 is concerned, he is not an importer and there was no any omission or commission on the part of the accused/respondent in making mis-declaration and he cannot be penalized for such mis-declaration or evasion of duty and therefore, held in paragraph

1 (2011)3 SCC 581

No.18.5 that the penalty imposed under Section 114 (AA) of the Customs Act is unsustainable.

7.Section 114(AA) imposes penalty and Section 132 punishes the person on prosecution in respect of the same act of false declaration. Therefore, once the penalty imposed under Section 114(AA) of the Customs Act is found to be not leviable on merits, the prosecution cannot be launched for the offense under Section 132 of the Customs Act.

8.Similarly, the petitioner had contended that for the offense under Section 135(1)(b), which is alleged against the accused that he was concerned with carrying, removing, concealing or dealing with the goods, which he had reason to believe to be improper and his confiscation is concerned, the corresponding provision for levy of penalty Section 112(b) will follow. The Appellate Authority by its finding in paragraph No.19.1 of the Judgment has again held that the penalty under Section 112(b) is unsustainable as against the accused/appellant and as a matter of fact, ordered that the penalty should be imposed as under Section 112(a). Therefore, this penalty has also been found to be unsustainable on merit by the Appellate Authority and the accused cannot be prosecuted for the

offense under Section 135(1)(b) also.

9. Therefore, the penalty for both the offenses alleged as against the Accused No. 1 having been dealt with on merits by the Appellate Authority and having become the final, by virtue of the dictum of the Hon'ble Supreme Court of India, in *Radheshyam Kejriwal's case* (cited supra), the charge against the accused is groundless and therefore, he sought for dropping all further proceedings.

10. Apart from the above grounds, it is also the further case of the Accused No. 1 that for the purpose of prosecution, sanction has been obtained only from the Commissioner and as per circulars, since the case is investigated by the Directorate of Revenue Intelligence, sanction has to be obtained from the Director General also and therefore, for want of sanction, as per the circulars of the department, the proceedings are liable to be dropped.

11. This apart, it is further contention of the Accused No. 1 that the entire prosecution is launched against the accused only based on retracted confession and there is evidence on record to demonstrate duress

at the time of extracting confession. Therefore, there is no material at all to proceed the case against the Accused No. 1 and therefore, the further proceedings should be dropped.

12.The learned Magistrate considered the case of the Accused No.1 and found that since for an identical allegations Quasi Judicial proceedings have been initiated and the order has attained finality, the prosecution is unsustainable. Further, the approval of the Chief Commissioner or the Principal Chief Commissioner of Directorate of Revenue Intelligence for launching prosecution was also not obtained and the circular No.27/2015 is applicable to this case. Therefore, the Trial Court stated that prosecution should have been withdrawn and upon holding the Judgments being relied upon by the Accused No.1 applicable to the case on hand, held that circulars and guidelines are binding on the complainant and dropped the proceedings against the Accused No.1. Aggrieved by the same, the present revision is filed by the complainant.

13.The contentions raised in the revision by the petitioner is that the application for dropping the proceedings is pre-mature, as the case is yet to be taken cognizance by the learned Magistrate and the accused has no

hearing or has got no say, during the pre-cognizance stage and therefore, the very entertaining of the application is erroneous in law. Secondly, as far as the circulars of the department is concerned, their contention is that they are intra-department circulars which are binding only on the complainant but cannot be taken advantage of by the accused. As far as the prosecution is concerned, the prior sanction is required as per Section 137 of the Customs Act, only from the Commissioner. No circular is violated by the petitioner in this case. As a matter of fact, the petitioner had obtained a prior approval of DGRI also, in this case.

14.As far as the contentions based on the Judgment of the Hon'ble Supreme Court of India, in *Radheshyam Kejiriwal's case(cited supra)*, the learned counsel for the complainant would submit that atleast in respect of the allegation under Section 135(1)(b), the findings of the Appellate Authority was based on the fact that the confiscation proceedings were not initiated in respect of earlier batches and therefore, there was no finding on merits and thus, the decision would not bind the Criminal Court. Therefore, the *prima facie* offense under Section 135(1)(b) is made out. Since the Accused No. 1 through his accomplices have helped in the smuggling of the gold bars and the Appellate Authority as well as this Court in the Civil

Miscellaneous Appeal preferred before this Court have not upturned the findings regarding the said omissions and commissions and as a matter of fact the said delinquencies have been confirmed. Therefore, the learned Magistrate erred in dropping the proceedings against the Accused No.1.

15.I have considered the rival submissions made on behalf of both sides and before deciding to consider the question as to whether the accused had made out a case to drop all further proceedings against him, it is necessary to consider the preliminary objection made on behalf of the petitioner, in this revision as to whether the application filed by the accused, even before the complaint is taken on file and even before the sworn statement is recorded is maintainable.

16.The offense complained is punishable with a maximum punishment of Seven years and therefore, this is a warrant case otherwise than by police report. Therefore, Section 245 Cr.P.C is the relevant provision applicable. Discharge under Section 245(1) is after recording of evidence , if there is no ground to proceed. Only under Section 245(2), the accused can be discharged at any state prior to the same. It is necessary to extract the ***Section 245(2) of Cr.P.C.***, which reads as follows:-

“245(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless. ”

17.Thus, if the charge is groundless then the learned Magistrate is empowered to discharge the Accused under Section 245(2) of Cr.P.C. It is in this context, this case begs the question that the phrase “at any previous stage of case” whether would amount even at the presentation and “check and call on” stage of the complaint, that is, when the complaint is neither taken on file, nor the proceedings under Section 200 of the Code of Criminal Procedure has taken place by examination of the complainant on oath and or taking cognizance of offenses.

18.In this regard, the meaning of phrase “at any previous stage of the case”, came to be examined, by the Hon'ble Supreme Court of India, in *Ajoy Kumar Ghose v. State of Jharkhand*², and it is useful to extract the entire paragraphs Nos.26 to 31, which reads as hereunder:-

“26. It will be better to see what is that “previous stage”. The previous stage would

2 (2009) 14 SCC 115

obviously be before the evidence of the prosecution under Section 244(1) CrPC is completed or any stage prior to that. Such stages would be under Section 200 CrPC to Section 204 CrPC. Under Section 200, after taking cognizance, the Magistrate examines the complainant or such other witnesses, who are present. Such examination of the complainant and his witnesses is not necessary, where the complaint has been made by a public servant in discharge of his official duties or where a court has made the complaint or further, if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192 CrPC. Under Section 201 CrPC, if the Magistrate is not competent to take the cognizance of the case, he would return the complaint for presentation to the proper court or direct the complainant to a proper court.

27. *Section 202 CrPC deals with the postponement of issue of process. Under sub-section (1), he may direct the investigation to be made by the police officer or by such other person, as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. Under Section 202(1)(a) CrPC, the Magistrate cannot give such a direction for such an investigation, where he finds that offence complained of is triable exclusively by the*

Court of Session. Under Section 202(1)(b) CrPC, no such direction can be given where the complaint has been made by the court.

28. *Under Section 203 CrPC, the Magistrate, after recording the statements on oath of the complainant and of the witnesses or the result of the inquiry or investigation ordered under Section 202 CrPC, can dismiss the complaint if he finds that there is no sufficient ground for proceeding.*

29. *On the other hand, if the Magistrate comes to the conclusion that there is sufficient ground for proceeding, he can issue the process under Section 204 CrPC. He can issue summons for the attendance of the accused and in a warrant case, he may issue a warrant, or if he thinks fit, a summons, for securing the attendance of the accused. Sub-sections (2), (3), (4) and (5) of Section 204 CrPC are not relevant for our purpose. It is in fact here, that the previous stage referred to under Section 245 CrPC normally comes to an end, because the next stage is only the appearance of the accused before the Magistrate in a warrant case under Section 244 CrPC.*

30. *Under Section 244, on the appearance of the accused, the Magistrate proceeds to hear the prosecution and take all such evidence, as may be produced in support of the prosecution. He may, at*

that stage, even issue summons to any of the witnesses on the application made by the prosecution. Thereafter comes the stage of Section 245(1) CrPC, where the Magistrate takes up the task of considering on all the evidence taken under Section 244(1) CrPC, and if he comes to the conclusion that no case against the accused has been made out, which, if unrebutted, would warrant the conviction of the accused, the Magistrate proceeds to discharge him.

31. The situation under Section 245(2) CrPC, however, is different, as has already been pointed out earlier. The Magistrate thereunder has the power to discharge the accused at any previous stage of the case. We have already shown earlier that that previous stage could be from Sections 200 to 204 CrPC and till the completion of the evidence of prosecution under Section 244 CrPC. Thus, the Magistrate can discharge the accused even when the accused appears, in pursuance of the summons or a warrant and even before the evidence is led under Section 244 CrPC, and makes an application for discharge.” (Empahsis Supplied)

19. Therefore, it is clear that previous stage could be from the stage of Section 200 of Cr.P.C., whereby the learned Magistrate upon taking cognizance, is entitled, either to straight away issue process or conduct an

enquiry by postponing the issue of process under Section 202 of Cr.P.C. Thereafter, either he can issue process or dismiss the complaint under Section 203 of Cr.P.C., In this regard, the Hon'ble Supreme Court of India, in *Manharibhai Muljibhai Kakadia v. Shaileshbhai Mohanbhai Patel*³, had an occasion to consider the question as to when the learned Magistrate can be said to have been taken cognizance of the offense after considering the entire law in the subject. The Hon'ble Supreme Court, has held in that case, in paragraph No.34, which reads as follows:-

“34. The word “cognizance” occurring in various sections in the Code is a word of wide import. It embraces within itself all powers and authority in exercise of jurisdiction and taking of authoritative notice of the allegations made in the complaint or a police report or any information received that an offence has been committed. In the context of Sections 200, 202 and 203, the expression “taking cognizance” has been used in the sense of taking notice of the complaint or the first information report or the information that an offence has been committed on application of judicial mind. It does not necessarily mean issuance of process. ”

(Emphasis supplied)

3 (2012) 10 SCC 517

20. Therefore, depending on the circumstances of the case, it can be held that even before the issue of process or examining the sworn statement of the complainant, there could be cognizance in a particular case. The only requirement is that the learned Magistrate should have taken authoritative notice of the allegations made in the complaint. In this case, upon presentation of the complaint, without taking any authoritative notice, the matter was simply adjourned to another day with the endorsement “check and call on”. Neither the complaint is numbered nor the sworn statement is recorded. This is the stage, in which the form of the complaint is being looked into before taking notice of any kind of the allegations in the complaint.

21. It is in this context, the phrase “at any previous stage of the case” means a case on file with cognizance being taken, as otherwise, there cannot be a 'discharge' from the case. Therefore, I am of the view that in this case, the stage of Section 200 of Cr.P.C., itself has not commenced and even before that such application (discharge) cannot be filed. Even by giving the meaning of widest import, ignoring the procedure of sworn statement, even ignoring the numbering of the complaint, if one has to see only whether there was any application of mind or authoritative notice of allegations by

the Magistrate, the answer in this case, is in the negative. Thus, except for receiving a complaint under Section 190 (a) of Cr.P.C., the case the proceedings as per Section 200 have not even commenced.

22. Therefore, even though the words “at any previous stage of the case” is meant to from the stage of inception i.e., under Section 200 of Cr.P.C., the same would not be extended to the 'check and call on' stage as it will be in the domain of the complainant, if the complaint is returned to modify, add, delete the contents of the complaint . I am of the view that the learned counsel for the petitioner is right in contending the application filed by the Accused No. 1, even though the couched in the phrase of ' dropping of all further proceedings' can mean an application for discharge as per Section 245(2) only and still it is pre-mature.

23. In view of the above, findings, sustaining the preliminary objection raised in the revision in favour of the petitioner/complainant, I am of the view that the other questions raised for the purpose of discharging the Accused No. 1 cannot be gone into by this court at this stage, leaving it open to be raised at the appropriate stage to be considered on merits in accordance with law.

24.The Criminal Revision Case is ordered on the following terms :

(i) The order dated 20.04.2021 in Crl.M.P.No.55 of 2020 in R.R.No.8 of 2015 in F.No.DRI/CZU/VII/48/Enq.-01/Int-11/2015, on the file of the Learned Judicial Magistrate, Special Court for Customs, Alandur, is set aside;

(ii) The learned Magistrate is entitled to proceed with the complaint filed by the petitioner as such in accordance with law;

(iii) The accused will be at liberty to file the discharge application under Section 245(2) of the Code of Criminal Procedure, if he is of the view that if the case is groundless, at any stage, immediately, after the cognizance of the offenses by the learned Magistrate.

14.07.2022

Index : Yes/No
Speaking / Non-Speaking order

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D.BHARATHA CHAKRAVARTHY. J.,

klt

To

- 1.The Judicial Magistrate, Special Court for Customs, Alandur.
- 2.The Public Prosecutor, High Court of Madras.
- 3.The Special Public Prosecutor, Central Government.
- 4.The Assistant Commissioner of Customs,
Prosecution Unit, Air Cargo Commissionerate,
New Custom House, Chennai – 600 016.

Pre- Delivery Order in

Crl.R.C.No.372 of 2022

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