

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Reserved on: 26th April, 2022**
Pronounced on: 25th May, 2022
+ CRL.M.C. 1416/2017 & CRL.M.A. 5836/2017

SURESH CHAND GUPTA & ANR Petitioners

Through: Mr. Mukesh Anand, Advocate

versus

STATE OF GOVT OF NCT DELHI & ANR Respondents

Through: Mr. Raghuvinder Varma, APP for
State.

Mr. Satish Aggarwala, Sr. SPP for
R-2.

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition under section 482 of the Code of Criminal Procedure, 1973 (hereinafter "Cr.P.C.") for quashing of order dated 5th March 2014 passed by learned CMM Patiala House Courts, New Delhi in CC No. No.75/1/2013 and to quash the CC No.75/1/2013 under Sections 132 and 135(1)(a) of the Customs Act, 1962 (hereinafter "the Act") and also order dated 29th July 2016 passed by learned ASJ, Patiala House Courts, New Delhi in Criminal Revision No. 47/2014.

BRIEF FACTS

2. On 26th February 2013 the respondent, i.e. Director of Revenue Intelligence, Head Quarter, (hereinafter "DRI") filed a criminal complaint

Case bearing CC No. 75/1/13 under Section 132 and 135 (1)(a) of the Act, before the learned Trial Court stating therein that intelligence reports have been received that M/s Elgin Electronics (hereinafter “the firm”), of which petitioner no. 1 is the Proprietor and petitioner no. 2 is the Manager, was in the business of importing public address systems, sound systems for auditorium etc. without payment of customs duty. On basis of the said inputs, search was conducted on 13th July 2009 by the DRI at the premises of the firm. Goods imported by the said firm were detained and inquiry was made from the accused persons about the value of the detained goods. The petitioner no. 1 furnished an approximate value of the goods vide letter dated 1st September, 2009, but no document regarding the same was given to the DRI. Goods detained were then seized on the reasonable belief that same has been imported without payment of customs duty.

3. It is further alleged that during the course of investigation, documents pertaining to retail Invoices raised by the firm were found to be fake. The statement of one Ramesh Gupta, partner of M/s Gupta Brothers was recorded under Section 108 of the Act in which he has stated that his firm had executed a project for M/s GAIL for an total amount of Rs. 7.46 Crores, out of which work pertaining to audio visual system for Rs. 1 Crore was outsourced to the firm. A retail invoice, recovered from one of the premises of the accused persons, was shown to Ramesh Gupta regarding sale of mobile phones for Rs.62,25,305/- which was stated to be fake. Investigation revealed that the accused persons had committed offences punishable under Sections 132 and 135(1)(a) of the Act.

4. Learned Trial Court vide order dated 5th March 2014 issued summons to the accused persons/petitioners dispensing with the examination of the complainant, who was a public servant at the pre-summoning stage. The petitioners being aggrieved, challenged the order dated 5th March 2014, by way of filing Criminal Revision No.47/2014 before Additional Sessions Judge-02, FTC, New Delhi. Vide order dated 29th July 2016, the aforesaid criminal revision was dismissed by the Revisional Court. Hence, the instant Criminal Misc Petition under Section 482 of Cr.P.C. has been preferred by the petitioners.

SUBMISSIONS

5. The learned counsel for the petitioner submitted that no case under Section 132 of the Act is made out against the petitioners as admittedly the petitioners never made, signed, used any document, declaration or statement in the course of the business of petitioner no.1's firm knowingly or under a belief that such declaration, document or statement is false. It is further submitted that there is no violation as contemplated under Section 111 of the Act as the petitioners are neither importer of goods nor associated in any capacity with any illegal import of the subject goods. It is further submitted that as per Section 135(1)(a) of the Customs Act, action can only be taken in respect of any goods, where market price of which exceeds Rs.1 Crore. However, in the present case, the value of the goods assessed by the Department is only Rs.77,16,228/-, which is less than 1 Crore.

6. Learned counsel further submitted that learned CMM did not have the territorial jurisdiction to entertain the complaint. There is a notification of the Registrar General vide No. 3089/DHC/Gaz./VI.E.2(a) 2008 of the Delhi High Court, as per which prosecutions for violation of the Customs Act are to be dealt with by the Criminal Courts at Patiala House, New Delhi. Therefore the Court of the CMM, New Delhi District has been specifically conferred with the jurisdiction to entertain all prosecutions under the said Act pertaining to Delhi. It is also submitted that the summoning order dated 5th March 2014 is a non-speaking order and the Revisional Court has also not dealt with the submissions/contentions made by the petitioners in the proper perspective and dismissed the revision without considering the aforesaid facts.

7. It is submitted that there is nothing to show that the petitioners made any false declaration or prepared false documents and therefore, they are not liable to be prosecuted under Section 132 of the Act. Learned counsel further submitted that the complaint is barred by limitation insofar as per the provision of Section 132 of the Act, the punishment which could have been imposed for violating Section 132 of the Act could have extended for a period of six months or with fine or with both. Limitation in such a case as provided under Section 468 of the Cr.P.C. is only 1 year. In the present case, the complaint was filed by the respondent No.2 on 26th October 2013, whereas the incident in this case pertains to the year 2009 and, therefore, the complaint was admittedly barred by limitation. It is settled law that if the complaint is time barred, for which neither any admissible evidence has

been filed nor sufficient reason has been shown for such delay, then the proceedings should be quashed.

8. It is further submitted that as per order dated 4th August 2011 passed by Custom Commissioner (Preventive) Custom, collective value of all the goods have been taken as Rs.77,16,288/-. It is further submitted that respondent no.2 did not prefer appeal against the aforesaid order passed by the Commissioner, the said order, therefore, attained finality.

9. Learned counsel for the petitioner submitted that the sanction by the Additional Director, DRI, for prosecution is invalid and *void-ab-initio* as it is a result of non-application of mind and suffers from grave lacuna of being mechanical in nature without going into the correct facts and without testing the applicability of the provisions of the Customs Act.

10. In support of his arguments the learned counsel has relied on the case of ***Canon India Pvt Ltd vs. Commissioner of Customs, Civil Appeal No.1827 of 2018*** in which the Hon'ble Supreme Court held as follows:-

“It is, therefore, clear to us that the Additional Director General of DRI was not “the” proper officer to exercise the power under Section 28(4) and the initiation of the recovery proceedings in the present case is without any jurisdiction and liable to be set aside.”

11. It is submitted that the complaint and prosecution launched by the DRI is contrary to their circular no. 27/2015 customs dated 23rd October 2015, according to which the prosecution has been guided. In the present case, sanction was granted by Additional Director General without applying the mind and even in the order of sanction nowhere it has been

mentioned that on which basis he is *prima facie* making his mind that the DRI has fit case to prosecute the petitioner. It is further submitted that the Additional Director General in his order of sanction has not specified whether he had any knowledge of order dated 4th August 2011 passed by the Commissioner of Customs. Thus, the order of sanction is improper and the complaint filed on the basis of the aforesaid sanction also becomes improper and invalid.

12. The Hon'ble Supreme Court in the case of ***Joseph P. Bangera vs. State of Maharashtra and Anr (2005) 13 SCC 558*** held as under:-

*“It appears that after interception of a vessel on 24-10-1982 adjudication proceeding started in which the vessel in question was confiscated and penalty was imposed against the appellant. Arising out of the penalty proceeding, the matter was taken to the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as “CEGAT”) and, by order dated 18-4-1995, the appeal has been allowed and penalty has been deleted on merit. It has been submitted that in view of the fact that penalty imposed, against the appellant under the provisions of the Act, has been deleted by CEGAT on merit, it would be just and expedient to quash the prosecution as continuance thereof would amount to an abuse of the process of court. In support of his submission, the learned counsel has placed reliance upon the judgment of this Court, in *K.C. Builders v. CIT* in which, following its early decisions, this Court quashed criminal prosecution of the accused under the provisions of the Income Tax Act on the sole ground that penalty imposed against him was deleted on merit. In our view, the present case is squarely covered by the aforesaid decision of this Court, as such, it would be just and expedient to quash the prosecution of the appellant.”*

13. It is submitted that the Hon'ble Supreme Court in the aforesaid case has postulated the law that if the penalty amount is deleted by the Appellate Tribunal then the criminal prosecution must be quashed. In the instant case also the Appellate Tribunal has already deleted the penalty which has been imposed by DRI. Learned counsel for the petitioner vehemently submitted that in view of the aforesaid law laid down by the Hon'ble Supreme Court, the criminal complaint filed by the respondent may be quashed and the subsequent proceedings, i.e., summoning order dated 5th March 2014 and revisional order dated 29th July 2016 may be set aside.

14. *Per Contra*, learned counsel for the respondent vehemently submitted that there is no illegality in the orders impugned. Learned CMM after considering the facts and circumstances and material on record passed the summoning order and issued summon to the petitioners. The petitioners filed the criminal revision before learned Additional Sessions Judge. The said revision was dismissed after considering the contentions of the petitioners herein as well as after perusing the reasons given by learned CMM while passing the summoning order. The Revisional Court did not find any illegality or error in the impugned order passed by the learned CMM. Learned counsel for the respondent submitted that on the intelligence report, search was conducted and investigation was carried out by the DRI and on the basis of the said search and investigation, the criminal complaint was filed before the Trial Court after obtaining the sanction from the competent authority of DRI for purpose of prosecuting the petitioners. It is submitted that while passing the summoning order, the

Trial Court is only required to appreciate the evidence and to consider whether the material on record is sufficient to *prima facie* make out a case against the accused persons and is not required to go into the merits of the case and conduct a roving enquiry into the matter of summoning. It is premature stage to raise all the contentions before this Court and therefore the instant petition lacks of merits and deserves to be dismissed.

15. Heard learned counsel for the parties and perused the material on record.

ANALYSIS AND FINDINGS

16. The question, before this court, is whether from the facts and circumstances, enumerated above, it could be inferred that the Court below has passed the impugned order summoning the petitioners without taking into consideration the material as well as the provisions of the statute.

17. The impugned order dated 5th March 2014 passed by the Court of learned CMM, Patiala House Courts, New Delhi and relevant portion of order dated 29th July 2016 passed by learned ASJ, Patiala House Courts, New Delhi, are reproduced herein below:-

i. Order dated 5th March 2014

*“Present: Ms. Pooja Bhaskar, Ld. SPP for complainant
with Complainant Shri Rajeev Sadana*

*Accused persons are stated to be on court bail but not
Present today*

An application for exemption of personal attendance of complainant and for dispensing of recording preliminary evidence is filed along with the complaint.

As this complaint is filed by a public servant in discharge of his public duties, hence, recording of preliminary evidence is dispensed with. Personal attendance of complainant is also dispensed with till further orders. Complainant is allowed to be represented through Ld. SPP for complainant.

Complaint and documents perused. Heard.

After going through the complaint, the documents and arguments raised before me by Ld. SPP, I am of the opinion that at this stage there are sufficient grounds to proceed against accused U/s. 132/ 135 (1) (a) of The Customs Act, 1962 and. therefore I take cognizance for the offence U/s. 132/ 135 (1) (a) of The Customs Act, 1962.”

ii. Order dated 29th July 2016

“9. I have heard the counsel for the parties and have perused the record of the trial Court. My findings are as under:-

10. With respect to the submission regarding market value of the goods for which the petitioner was being prosecuted not exceeding one crore, the records contains statement of Ramesh Gupta of M/s Gupta Brothers stating that they had outsourced their contract to the petitioner for public announcement systems and value of work given to the petitioner was worth Rs. 1 crore.

11. The next submission made was that the complaint was barred by limitation. In this regard the provisions of the Economic Offences (Inapplicability of Limitation) Act 1974 excludes the applicability of Chapter XXXVI of the Code of Criminal Procedure in respect of prosecution for certain economic offences. The Schedule to the said Act included offences under the Customs Act 1962. Hence, the issue of limitation cannot arise for the present case.

12. The petitioner had submitted that without summoning panch / seizure witnesses at the pre-summoning stage summons could not have been issued. He relied upon the case of Customs vs. Dina Aruna Gupta (supra). Perusal of the said judgment reveals that in that case the said finding was given in a case at the final stage i.e. after recording of pre-summoning, pre-charge and post charge-evidence under sections 244 and 246 of the Cr.P.C. There is no ratio laid down in the said judgment that without summoning panch witnesses at the presummoning, summons cannot not be issued to the accused.

13. The petitioner had submitted that since the CESTAT had stayed the departmental proceedings against the petitioner, the complaint was not maintainable. He had relied upon the judgment in the case of Dinesh Aggarwal vs. DRI (supra). Having gone through the said judgment it appears that the ratio laid down in the said case is that once there is a final finding of the CESTAT in favour of the importer against a charge of mis-declaration and undervaluation, proceedings of a criminal complaint for offences under section 132 and 135 (1) (a) of the Customs Act 1962 for the same charge cannot proceed. In the present case counsel for the petitioner himself had stated that the proceedings before the CESTAT were pending and only an order of stay had

been passed. In these circumstances the ratio laid down in the case of Dinesh Aggarwal vs. DRI (supra) will not apply to the present case.

14. Petitioner had submitted that he could not have been prosecuted for smuggling of non-notified goods and goods which are easily available in the market. He had relied upon the case of Sayed Ibrahim & Ors. vs. CC (supra). The said judgment is of a Tribunal at Bangalore and cannot be said to be a binding precedent.

15. The petitioner had submitted that the Ld. CMM did not have the territorial jurisdiction to entertain the complaint. There is a notification of the Registrar General vide No. 3089/DHC/Gaz./ VI.E.2(a)2008 of the Delhi High Court as per which prosecutions for violation of, amongst others, the Customs Act are to be dealt with by the criminal courts at Patiala House Courts, New Delhi. Therefore the Court of the CMM, New Delhi District at Patiala House Courts has been specifically, conferred the jurisdiction to entertain all prosecutions under the said Act pertaining to Delhi.

16. The counsel for the petitioner had submitted that the impugned order was a non-speaking order-TMs Court has gone through the contents of the complaint and the documents attached to the same. Issuance of summons to the petitioner does not suffer from any illegality whatsoever.

17. Hence for the reasons recorded above, the revision petition has no merit and is dismissed....”

18. Section 135 of the Act reads as under:-

135. Evasion of duty or prohibitions.—

(1) Without prejudice to any action that may be taken under this Act, if any person—

(a) is in relation to any goods in any way knowingly concerned in misdeclaration of value or in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods; or

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111 or section 113, as the case may be; or

(c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under section 113; or

(d) fraudulently avails of or attempts to avail of drawback or any exemption from duty provided under this Act in connection with export of goods, he shall be punishable,—

(i) in the case of an offence relating to,—

(A) any goods the market price of which exceeds one crore of rupees; or

(B) the evasion or attempted evasion of duty exceeding thirty lakh of rupees; or

(C) such categories of prohibited goods as the Central Government may, by notification in the Official Gazette, specify; or

(D) fraudulently availing of or attempting to avail of drawback or any exemption from duty referred to in clause (d), if the amount of drawback or exemption from duty exceeds thirty lakh of rupees, with imprisonment for a term which may extend to seven years and with fine: Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than one year;

(ii) in any other case, with imprisonment for a term which may extend to three years, or with fine, or with both. 2[(2) If any person convicted of an offence under this section or under sub-section (1) of section 136 is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine: Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court such imprisonment shall not be for less than one year.

(3) For the purposes of sub-section (1) and (2), the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than one year, namely:—

(i) the fact that the accused has been convicted for the first time for a reference under this Act;

(ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods which are the subject matter of such proceedings have been ordered to be confiscated or any other action has

been taken against him for the same act which constitutes the offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party to the commission of the offence;

(iv) the age of the accused.”

19. As per Section 135(1)(a) of the Act, prosecution can be initiated if the market price of the goods exceeds Rs.1 Crore. It is an admitted fact that in the order dated 4th August 2011 passed by the Commissioner of Customs (Preventive), collective value of all the goods was taken to be Rs.77,16,288/- and it is further admitted that no appeal was preferred against the said order, which therefore, attained finality.

20. Section 132 of the Act reads as under:-

“Whoever makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document in the transaction of any business relating to the customs, knowing or having reason to believe that such declaration, statement or document is false in any material particular, shall be punishable with imprisonment for a terms which may extend to [two year], or with fine, or with both.”

21. At the outset, it may be observed that in the present case there is nothing to show that the petitioners made any false declaration or prepared false documents and, therefore, he is not liable to be prosecuted under Section 132 of the Act. In this case, moreover the complaint is barred by limitation inasmuch as per the provisions of Section 132 of the Act, which existed at the relevant time the punishment which could have been imposed

for violating Section 132 of the Act could have extended for a period for a period of six months or with fine or with both and limitation in this case as provided under Section 468 of Cr.P.C. is only 1 year.

22. This Court has perused the aforesaid orders. I find that the learned Courts below did not consider that at the stage of Section 200 of Cr. P.C., the exemption can only be given to a public servant who has filed a case in his official capacity, but such exemption is not available with the other witnesses. In the present case, it was the duty of respondent no.2 to prove its case against the petitioners and show sufficient evidence on record, however, the respondent no. 1 in the present case did not examine even the *panch* witnesses to prove its case. Therefore, the Court below has summoned the petitioner without any material on record for *prima facie* satisfaction. The impugned order, passed in the instant case, is bad in law in five folds: firstly, the prosecution of the petitioner cannot be initiated under Section 135(1)(a) of the Act as valuation of the goods is less than Rs.1 Crore; secondly, the respondent-department has not examined any witness to prove its case against the petitioner; thirdly, the complaint was admittedly barred by limitation; fourthly; the sanction by the Additional Director for prosecution is invalid and *void-ab-initio*; and lastly, the Court below while passing the summoning order has not assigned any reason for summoning the petitioner.

CONCLUSION

23. In view of the aforementioned facts, circumstances and law established, I am inclined to hold that the impugned orders passed by the

Courts below summoning the petitioners and dismissing the criminal revision are bad in law. The summoning order dated 5th March 2014 passed by learned CMM and order dated 29th July 2016 passed by learned ASJ are set aside. Accordingly, criminal complaint bearing CC No.75/1/2013 filed under Sections 132 and 135(1)(a) of the Customs Act and all proceedings emanating therefrom are hereby quashed. The petition is allowed and stands disposed of.

24. Pending application, if any, also stands disposed of.

25. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

MAY 25, 2022

Aj/ct

सत्यमेव जयते