

IN THE HIGH COURT OF DELHI

Crl. Revision Petition No.461/2001

S.Swaminathan Petitioner

VERSUS

\$ State of Delhi Respondent

Crl. Revision Petition No.605/2001

Joseph Alphonso & Anr. Petitioners

VERSUS

\$ State of Delhi Respondent

Crl. Revision Petition No.618/2001

S.S.Sawant & Anr. Petitioners

VERSUS

\$ State of Delhi Respondent

Present: Mr.Arvind Kumar Nigam and
Mr.Dinesh Kumar for petitioners
Mr.Anil Soni for respondent.

RESERVED ON: 27.08.2007

% DATE OF DECISION: 11.09.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y
2. To be referred to the Reporter or not? Y
3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. The 3 captioned revision petitions lay a challenge to the order dated 2.5.2001 passed by Shri Rakesh Kapoor, Additional Sessions Judge, Delhi and the consequential order dated 21.7.2001 passed by the learned Metropolitan Magistrate framing charges against the petitioners.

2. Vide order dated 2.5.2001, learned Additional Sessions Judge, Delhi has partially allowed a revision filed by the State against the order dated 16.11.2000 passed by the learned Metropolitan Magistrate where-under learned Metropolitan Magistrate did not frame charges against the petitioners under Section 420 and Section 120-B IPC. The learned Metropolitan Magistrate had framed a charge against the petitioners only for the alleged offence under Section 68 of the Punjab Excise Act.

3. Briefly stated case of the prosecution was that M/s.G.M.Breweries Ltd. (hereinafter called the company) was a wholesale licensee for supply of whisky and rum. That the company was granted a licence to sell 3 brands of whisky and a brand of rum. That seeking renewal of the licence for the ensuing year, wrong sale figures were provided by the company for the year 1993-94. It was alleged that for the year 1993-94, the company falsely stated that it had sold 65700 cases of Reporters Ch. Whisky, 64100 cases of Target Whisky

and 32000 cases of Hotshot Rum. According to the prosecution the company has resorted to fabrication of record pertaining to the alleged sales. That by resorting to deception, the company had managed to obtain from the excise department the L-1 licence for the ensuing year and pursuant thereto had effected sale of liquor in Delhi.

4. Petitioner S.Swaminathan is a chartered accountant who had issued a certificate to the company on 13.7.1994 which was submitted by the company to the excise officials while seeking renewal of the licence for the ensuing year. Allegation against him is of conspiring with the officers in charge of the affairs of the company to prepare false documents and based thereon seek a benefit from the excise authorities at Delhi, benefit being of renewal of the L-1 licence.

5. Petitioners Joseph Alphons and John William Almedia are stated to be the factory manager and the executive director of the company who are alleged to have been a part of the conspiracy and creators of the documents which were relied upon by the company while seeking renewal of the licence.

6. Petitioners S.Sawant and B.D.Rathod are excise officials in the State of Maharashtra and have been impleaded as accused inasmuch as they have statedly issued false documents to the company evidencing manufacture and sale of

liquor by the company.

7. It may be noted that the brewery of the appellant where liquor is brewed is in district Thane in the State of Maharashtra.

8. A 2 fold contention has been urged by learned counsel for the petitioners. A 3rd submission pertaining to petitioner S.Swaminathan has been urged. The two common submissions pertaining to the petitioners are, firstly, that the Punjab Excise Act is a complete code and therefore prosecution, if at all, has to be restricted to the offences under the Punjab Excise Act. Thus, it is urged that no charge of cheating or criminal conspiracy under the penal code could be framed.

9. Second contention urged was that Article 21 of the Constitution guarantees right to life and liberty which would include a right to fair trial. It was urged that as per law and Clause 3.2 of the terms and conditions of the licence, the applicant was required to furnish export passes/EVC issued by the excise authorities in the State where the brewery was situated. It was urged that the export certificates have to be statutorily maintained by the excise authorities. That on 12.3.1996, the investigating officer had seized 11 documents. Vide serial No.9 the original certificate issued by the

Superintendent, State Excise Department, Thane, Maharashtra regarding sale figures of the company for the period 1.4.1993 to 31.3.1994 was seized. That it was the duty of the inquiry officer to have verified the genuineness of the said certificate from the record maintained by the excise authorities at Thane, for, said investigation would have revealed that the authorities at Thane had documentary record to sustain that the company had exported from district Thane the number of cases of whisky which were stated to have been sold by the company.

10. Pertaining to S.Swaminathan it was urged that as per charge-sheet filed, he had issued a certificate to the company clearly certifying that the certificate was based upon the records produced by the company before the chartered accountant. It was thus submitted that no charge can be framed against S.Swaminathan.

11. Pertaining to S.Swaminathan suffice would it be to note that the only allegation against him is of issuing a certificate which contains false certification.

12. No role is attributable to S.Swaminathan of having applied for extension of the licence. What is alleged against him is of issuing a certificate which was enclosed along with the application filed by the company. The certificate does not certify any personal satisfaction. It merely certifies that on the

basis of the record produced by the company stated quantities were evidenced as having been manufactured and sold by the company.

13. In the decision reported as 1973 SCC (CrL.) 309 Hiralal Chand vs. Delhi Administration, the Supreme Court had opined that lawyers could not be charged for conspiracy of an offence of falsification of document merely because they certify, as true copies, documents relied upon by their clients. The reason is obvious. Where a client furnishes a document to a counsel and instructs the counsel to rely upon the document, it is not the duty of the lawyer to conduct an inquiry pertaining to the authenticity or the truthfulness of the document. Photocopy of the relied upon document when filed in the Court is merely certified by the counsel as true copy of the original produced by his client.

14. Similarly, where a chartered accountant merely certifies a statement of fact based on the recorded produced by a company, on the allegation that the record is fabricated, charge of a conspiracy cannot be framed against the chartered accountant unless there is some more material against the chartered accountant. Thus, petition filed by S.Swaminathan has to be allowed on aforesaid short count.

15. Pertaining to the 2 main submissions made by

learned counsel for the petitioners, in respect of the first submission made, suffice would it be to state that an act can constitute more than one offence. If it does so, the accused would be liable to face trial for more than one offence.

16. In the decision reported as 2005 (11) SCC 600 State Vs. Navjot Sandhu, in para 255, Hon'ble Supreme Court clarified that Bar of Double Jeopardy applies where an act or omission constituting an offence is penal under 2 or more enactments but would not apply if offences are distinct notwithstanding some overlapping features. With reference to the decision reported as (1988) 4 SCC 655 State of Bihar Vs. Murad Ali Khan it was clarified that the same set of facts can constitute offences under 2 different laws. An act or an omission can amount to and constitute an offence under IPC and at the same time constitute an offence under any other law. The bar to the punishment of offender twice over for the same offence would arise only where the ingredients of both the offences are the same. In the instant case, it is not the contention of the petitioners that ingredients of offences of which the petitioners are charged with under the Excise Act and the IPC are the same.

17. There is thus no merit in the first submission.

18. The second submission made by learned counsel for

the petitioners, at first blush appears to be very attractive. Indeed, it merited acceptance by the Supreme Court in the decision reported as (1996) 9 SCC 766 Satish Mehra vs. Delhi Administration & Anr.

19. In para 13 of the report, Supreme Court held that where the accused succeeds in producing reliable material even at the stage of framing the charge which might fatally affect even the very sustainability of the case it would be unjust to hold that the same cannot be looked into by the Court at that stage.

20. But, the said decision stands expressly overruled by a larger Bench of the Supreme Court, decision being reported as (2005) 1 SCC 568 State of Orissa vs. Debendra Nath Padhi.

21. In Debendra Nath Padhi's case (supra), Supreme Court revisited the ratio of Satish Mehra's case (supra) and in particular the contention of the accused based on grounds of justice, equity, fairness and also on the touchstone of Article 21 of the Constitution of India. [Vide para 4 and 5 of the decision in Debendra Nath Padhi's case (supra)].

22. Noting Sections 209, 227, 228, 239 and 246 of the Code of Criminal Procedure 1973 and that provisions analogous to Sections 207 and 207-A of the Code of Criminal Procedure 1898 were omitted from the Code of Criminal Procedure 1973,

Hon'ble Supreme Court held that the expression 'the record of the case' as used in Section 227 of the Code of Criminal Procedure 1973, (the provision applicable for discharge of an accused) must find colour from Section 209 of the Code of Criminal Procedure 1973. In para 8 it was observed as under:-

“8. What is the meaning of the expression 'the record of the case' as used in Section 227 of the Code. Though the word 'case' is not defined in the Code but Section 209 throws light on the interpretation to be placed on the said word. Section 209 which deals with the commitment of case to the Court of Session when offence is triable exclusively by it, inter alia, provides that when it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall commit 'the case' to the Court of Session and send to that court 'the record of the case' and the document and articles, if any, which are to be produced in evidence and notify the Public Prosecutor of the commitment of the case to the Court of Session. It is evident that the record of the case and documents submitted therewith as postulated in Section 227 relate to the case and the documents referred in Section 209. That is the plain meaning of Section 227 read with Section 209 of the Code. No provision in the Code grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial.”

23. Dealing with the contention predicated on Article 21 of the Constitution of India, in para 17 and 18 of the report in the Debendra Nath Padhi's case (supra) it was observed as under:-

“17. As opposed to the aforesaid legal position, the learned counsel appearing for the accused contended that the procedure which

deprives the accused to seek discharge at the initial stage by filing unimpeachable and unassailable material of sterling quality would be illegal and violative of Article 21 of the Constitution since that would result in the accused having to face the trial for a long number of years despite the fact that he is liable to be discharged if granted an opportunity to produce the material and on perusal thereof by the court. The contention is that such an interpretation of Sections 227 and 239 of the Code would run the risk of those provisions being declared ultra vires of Article 14 and 21 of the Constitution and to save the said provisions from being declared ultra vires, the reasonable interpretation to be placed thereupon is the one which gives a right, howsoever limited that right may be, to the accused to produce unimpeachable and unassailable material to show his innocence at the stage of framing charge.

18. We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced. The scheme of the Code and object with which Section 227 was incorporated and Sections 207 and 207-A omitted have already been noticed. Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini-trial at the stage of framing of charge. That would defeat the object of the Code. It is well settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well-settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce

materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the stage of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police."

24. It would be interesting to note that the Hon'ble Supreme Court even considered Section 91 of the Code of Criminal Procedure 1973 in Debendra Nath Padhi's case (supra) and in para 25 and 27 observed as under:-

"25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is "necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code". The first and foremost requirement of the section is about the document being necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under

Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessary and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227, what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by court and under a written order an officer in charge of a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof.

26. xxx xxx xxx xxx

27. Insofar as Section 91 is concerned, it was rightly held that the width of the powers of that section was unlimited but there were inbuilt, inherent limitations as to the stage or point of time of its exercise, commensurate with the nature of proceedings as also the compulsions of necessity and desirability, to fulfil the task or achieve the object. Before the trial court the stage was to find out whether there was sufficient ground for proceeding to the next stage against the accused. The application filed by the accused under Section 91 of the Code for summoning and production of document was dismissed and order was upheld by the High Court and this Court. But observations were made in para 6 to the effect that if the accused could produce any reliable material even at that stage which might totally affect even the very sustainability of the case, a refusal to look into the material so produced may result in injustice, apart from averting an exercise in futility at the expense of valuable judicial/public time, these

observations are clearly obiter dicta and in any case of no consequence in view of conclusion reached by us hereinbefore. Further, the observations cannot be understood to mean that the accused has a right to produce any document at the stage of framing of charge having regard to the clear mandate of Sections 227 and 228 in Chapter 18 and Sections 239 and 240 in Chapter 19.”

25. I may record that in the charge-sheet filed, prima facie discrepancies in the record produced by the company are surfacing. Since no argument was advanced that on the relied upon material by the prosecution no charge can be framed I am not expressing any opinion thereon. As would be noted from the submissions recorded herein above, argument was projected on the limited plea that the prosecution was acting unfairly by not investigating the record maintained by the excise authorities in Thane, Maharashtra and in particular the export certification by the Excise Commissioner at Thane which would establish the number of cases of liquor manufactured and exported out from district Thane.

26. Needless to state, in view of the decision in Debendra Nath Padhi's case (supra) since charges have been framed, it would be open to the petitioners to file an application before the learned Trial Court under Section 91 of the Code of Criminal Procedure 1973.

27. But noting the fact that petitioners are heavily relying an export certificate issued to them by a statutory

authority and the fact that export certificates are statutory documents I am of the opinion that the rigours of personal appearance before the learned Metropolitan Magistrate at each date of hearing needs to be waived in favour of the accused.

28. The petitions are accordingly disposed of as under:-

- (i) Crl. Revision Petition No.461/2001 is allowed.
- (ii) Impugned order dated 2.5.2001 and the charge framed on 27.7.2001 against the petitioner S.Swaminathan are quashed.
- (iii) Crl. Revision Petition Nos.605/2001 and 618/2001 are dismissed. However, exemption is granted to the petitioners of said petitions from personally appearing before the learned Metropolitan Magistrate at each hearing, provided they are represented through a counsel. If personal presence of said petitioners is required, for reasons recorded direction would be issued for their personal presence by the learned Metropolitan Magistrate, and on said date the petitioners would so appear.

29. LCR be returned.

30. No costs.

September 11, 2007
dk

(PRADEEP NANDRAJOG)
JUDGE

