(1998) 09 DEL CK 0011

In the Delhi High Court

Case No : Criminal W.P. No. 129 of 1998

Ajay Rajpal APPELLANT

Vs

Collector of Customs and Others RESPONDENT

Date of Decision : 07-09-1998

Acts Referred:

Citation : (1998) 7 AD 265 : (1998) 47 DRJ 5 : (1998) 2 ILR Delhi 737 : (1998) ILR Delhi 737

Hon'ble Judges : N.G. Nandi, J;Devinder Gupta, J

Bench : Division Bench

Advocate : Mr. B.R. Handa and Mr. Jitender Kumar Jha, for the Appellant; Mr. Sarbjit Sharma and Mr. Bhupinder Singh, for the Respondent

Judgement

N.G. Nandi, J.—By invoking the writ jurisdiction under Article 226 of the Constitution of India read with Section 482 of the Constitution of India read with Section 482 of the Code of Criminal Procedure (hereinafter ''the Code''), the petitioner has been seeking quashing of a complaint dated 23.12.1997 filed under Sections 135(1)(a) and (1)(b) of the Customs Act, 1962 (hereinafter `the Act'') against him and for the consequential relief of the return of the goods of the petitioner seized as per seizure memo dated 24.10.1997 and the release of a sum of Rs. 2 lacs cash seized from the house of the petitioner vide seizure memo dated 24.10.1997.

2. The facts giving rise to the present petition, shortly stated, are that the petitioner has been running his business of audio cassettes/CDs distribution of reputed companies for the last about 19 years in Chandni Chowk, Delhi in the name of Music Mahal; that the petitioner never indulged in any illegal business or smuggled goods; that on 23.10.1997, customs officers intercepted one Maruti car and a tempo and apprehended one Vipin Kalra and Sandeep Bhaskar with a consignment of 25000 complete watch movements made in Japan; that the said persons had alleged to have removed the said watch movements from the air cargo in a clandestine manner and without payment of customs duty thereon;

that the said watch movements were taken into possession by the officers of the customs; that the statements of Vipin Kalra and Sandeep Bhaskar were recorded u/s 108 of the Act wherein they have falsely, wrongly and malafidely implicated the petitioner by stating that the petitioner had instructed them on mobile telephone to get the said consignment cleared from the air cargo; that these statements of accused Vipin Kalra and Sandeep Bhaskar are totally wrong and illegal; that on the basis of the statements of Vipin Kalra and Sandeep Bhaskar, the customs officers raided the business and residential premises of the petitioner on 24.10.1997 and have illegally seized the cash worth Rs. 1,25,000/- and the electronics goods lying in the shop worth Rs. 3,41,190/- and a sum of Rs. 2 lacs from the residence of the petitioner; that the customs officers have failed to seize/ recover any incriminating documents against the petitioner, which may connect the petitioner, with the offence committed by aforesaid Vipin Kalra and Sandeep Bhaskar; that the petitioner has not been dealing in watch movements and the petitioner had shown the documents qua the seized electronic goods and also the details of the amount recovered from the shop and the residence stating that the goods lying in his shop are lawful as he has already paid the required customs duty thereon; that the amount of Rs. 2, lacs cash recovered from the residence was withdrawn from Oriental Bank of Commerce, Kingsway Camp, Delhi on 22.10.1997 against a chit of Sisganj Chit & Finance Company and the documents pertaining to the said chit funds and the bank statement were duly shown to the customs officer; that the petitioner was illegally arrested only on the basis of the illegal disclosure statement of other accused persons namely Vipin Kalra and Sandeep Bhaskar; that there is absolutely no evidence to even remotely connect the petitioner with the alleged consignment that the petitioner in his statement has denied all the allegations leveled against him and stated in his statement that he has no connection with the said consignment which was alleged to have been consigned in the name of M/s. Umesh Book Service, a concern of Vipin Kalra; that said Vipin Kalra was teaching Tikando (a sort of martial art) to his daughter and the petitioner had given a loan of Rs. 10,000/- to Vipin Kalra and thereafter one Sim Card was also arranged by the petitioner for Vipin Kalra from some of his friends on the request of Vipin Kalra and the petitioner has been asking Vipin Kalra time and again to pay the said sum of Rs. 10,000/- and Rs. 3,000/- for Sim Card but said Vipin Kalra has been avoiding the same on one pretext or the other but on hard insistence of the petitioner, Vipin Kalra became furious and threatened the petitioner to face consequences in case he ever dared to ask for the said sum of Rs. 10,000/- plus Rs. 3,000/- that it was due to the said incident that Vipin Kalra named the petitioner in his statement just to settle the score with the petitioner; that there is absolutely no evidence to connect the petitioner with the consignment of 25000 watch movements made in Japan which was intercepted by the customs officers on 23.10.1997.

3. In the complaint filed u/s 135(1)(a) and (1)(b) of the Act, it has been stated that the Commissioner of Customs, Air Cargo, Delhi has accorded sanction for

the prosecution of the accused persons; that acting on the information regarding the modus operandi of illegal removal of goods from the import shed, Air Cargo, Near IGI Airport, New Delhi without payment of customs duty and without filing of Bill of Entry, the officers of Customs of Air Cargo, Preventive Unit, IGI Airport, New Delhi kept a surveillance on 23.10.1997 and intercepted one blue colour Maruti car bearing registration No. DL 4CG 1513 outside the exit gate of ACAAI Agents Cargo Terminal, Old CWC Building, Old Gurgaon Road, New Delhi in presence of two independent witnesses; that the said car was containing a khaki coloured corrugated carton having stickers of Air India Cargo bearing Airway Bill No. 098 6685 3382 showing destination DEL and another sticker of KRM Freight Express Limited bearing House Airway Bill No. KRM 09960 showing destination DEL and from HKG and also having the markings as AI 313 dated 21.10.97/11913-098 6685 3382-H-09960/01 and on other side in the circle figure 517 was marked; that the occupants of the car introduced themselves as Vipin Kalra and Sandeep Bhaskar (accused No.1 and 2); that they were asked to produce the documents relating to the legal possession of the cartoons; that the occupants of the car could not produce any document for illegal possession of cartons; that they informed the Customs Officers that the carton was removed from the Import Shed of Air Cargo, Near IGI Airport Complex, New Delhi by concealing the carton with the packages of books; that the occupants of the car, the witnesses along with the blue coloured Maruti car containing the carton were escorted to New Customs House, Near IGI Airport, New Delhi; that the carton was opened and examined in presence of the witnesses, Vipin Kalra and Sandeep Bhaskar and found to contain 25000 boxes bearing labels of the following description and quantity, the details of which are as under :-

DESCRIPTION NO. OF BOXES QUANTITY 1. 2035-001 T.N.I-1000 Sets Printed with words ''Made in Japan'' 04 4,000 Sets 2. 2035-001 MNI-1000 sets Printed with words ''Made in Japan'' 09 9,000 Sets 3. 2035-001 H.N.I-1000 sets Printed with words ''Made in Japan'' 08 8,000 Sets 4. 2035-001 C.N.I-1000 sets Printed with words ''Made in Japan'' 04 4,000 Sets Total 25,000 Sets that 25 boxes were examined and the same were found to contain 25,000 sets of complete watch movements fitted with cells worth Rs. 50 lacs; that since the recovered 25,000 complete watch movements of foreign origin had been clandestinely removed from the Air Cargo without filing any Bill of Entry, without payment of customs duty, the same were seized u/s 110 of the Customs Act, 1962 and Panchanam to that effect was drawn; that in the voluntary statements tendered u/s 108 of the Act on 23.10.1997 and 24.10.1997, the occupants of car - accused No.1 and 2 - admitted the recovery and seizure of smuggled watch movements in the manner as detailed in the Panchanam and inter alias stated that they had removed the goods clandestinely from the Import Shed of Air Cargo Without filling of any documents and without payment of any duty at the instance of Sh. Ajay Rajpal, Accused No. 3 for consideration and also stated that accused No. 3 had communicated the Airway Bill Number and House Airway Bill Number on telephone but accused No. 3 did not give any delivery order in respect of the consignment which arrived from Hong Kong and that the earlier consignment which was cleared about 15 days back belonging to accused No.3, at that time also he had not given them the delivery order and communicated the House Airway Bill Number and the Airway Bill Number and that after the clearance of the said consignment, accused No. 3 had given them the letter of authority on a letterhead of Umesh Books, Naraina, in favor of their company and the delivery order was collected by their employee Sh. Chander Paul; that it was further stated that he has not seen the premises of M/s. Umesh Books, Naraina and that he did not know whether there was any such office or not; that the address and telephone number of M/s. Umesh Book Service, E-67, Naraina Vihar, New Delhi were also verified and it was found that at the said address no company in the name of M/s. Umesh Book Services was in existence whereas the telephone installed at the said premises was by the owner of the premises on 27.10.1997.

4. In the case of State of Haryana & Others Vs. Bhajan Lal & Others, 1992 Supp (1) Sup Court Cas 335, the Supreme Court pointed out the categories of cases by way of illustration wherein the powers under Article 226 of the Constitution of India or the inherent powers u/s 482 of the Code of Criminal Procedure wherein powers could be exercised either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. The categories of cases wherein such powers for quashing the FIR/complaint could be exercised reads:-

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constituted any offence or make out a case against accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by Police Officers under-Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a Police Officer without an order of a Magistrate as contemplated u/s 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can lever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provision of the Code or the concerned Act (which a criminal proceeding is institute) to the institution and continuance of the proceedings and/or wherein there is a specific provision in the Code or the concerned Act, providing efficacious redress for the

grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously institute with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

The Supreme Court in paragraph 103 of the judgment, observed "we also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise f the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

5. It is submitted by learned counsel for the petitioner Mr. Handa that there is absolutely no evidence to connect the petitioner with the consignment which was intercepted by the Customs Officers and 25000 complete watch movements made in Japan recovered from the Maruti car and that the only basis to implicate the petitioner (accused No. 3) is the statement of accused No.1 and 2 Vipin Kalra and Sandeep Bhaskar respectively recorded u/s 108 of the Act that the statement of Vipin Kalra implicating the petitioner is to settle the personal score inasmuch as the petitioner pressed hard for the return of Rs. 10,000/- given by way of load and the amount of Rs. 3,000/- for the Sim Card also given to Vipin Kalra; that even in the Panchnama suggesting the seizure of electronic goods from petitioner''s shop Music Mahal, Chandni Chowk, Delhi, no watch movements have been recovered/seized.

6. It is true that the basis of the complaint u/s 135(1)(a) and (1)(b) of the Act is the statement of co accused Vipin Kalra and Sandeep Bhaskar. We have perused the original file placed by the respondent/department. It contains statements of Vipin Kalra, Sandeep Bhaskar (Co-accused), Ajay Rajpal (petitioner) and C.K. Govil, Panchnama dated 23.10.1997 suggesting the seizure of 25000 compete watch movements made in Japan worth Rs. 50 lacs and the seizure on 24.10.1997 from the shop Music Mahal, electronics goods worth Rs. 3,41,000/-, cash worth Rs.1,25,000/- and from the residence of the petitioner cash amounting to Rs. 2 lacs.

7. Section 107 of the Act deals with the power to examine persons. This provision enables any office of Customs empowered to examine persons may by general or special order of the Commissioner of Customs, during the course of enquiry in connection with smuggling of any goods require any person to produce or deliver the document or things relevant to the enquiry and may also examine any person acquainted with the facts and circumstances of the case. Section 108 of the Act deals with the power to summon person to give evidence and produce documents.

8. In the case of Harbansingh Sardar Lenasingh and Another Vs. The State of Maharashtra and Others, , it has been held that the confessional statements recorded by an officer of Customs under the Customs Act are admissible in evidence and are not hit by Section 25 of the Evidence Act or Article 20(3) of the Constitution of India. It is the settled proposition of law that the statement recorded under Sections 107 or 108 of the Act since not being by a police officer, Section 161 of the Code of Criminal Procedure will have no application for the purpose of Customs Act. In other words, the statement recorded u/s 108 of the Act would be admissible in evidence provided the statement is free and voluntary.

9. In the instant case, the complaint is based on the statement of the co-accused impacting the petitioner inasmuch as according to co-accused Vipin Kalra and Sandeep Bhaskar, they had removed the goods clandestinely from the Import Shed of Air Chargo without filing of any documents and without payment of any duty at the instance of the petitioner (accused No.3) for consideration and that accused No. 3 had communicated the Airway Bill Number and House Airway Bill Number on telephone without giving any delivery order in respect of the consignment in question which arrived from Hongh Kong.

10. It is the say of the petitioner that he had given a loan of Rs. 10,000/- to Vipin Kalra who was teaching Tikando (Martial Art) to petitioner''s daughter and that thereafter one Sim Card was also arranged by the petitioner for Vipin Kalra from some of his friend on the request of Vipin Kalra. This would suggest, on petitioner''s own say, that Vipin Kalra was not a stranger to the petitioner. There has been giving of money by the petitioner to Vipin Kalra and also obliging Vipin Kalra by arranging the Sim Card (which is used for making the cellular telephone functional) from some of his friends. According to the statement of Vipin Kalra, on telephone the petitioner had given Airway Bill Number and House Airway Bill Number. It is pertinent to note that Vipin Kalra and Sandeep Bhaskar are in the business of clearing and forwarding of Air Cargo and Vipin Kalra is known to the petitioner for the last about 7 years which is also suggested from the statement of the petitioner recorded u/s 108 of the Act. It is petitioner''s say in the statement that Vipin Kalra and Sandeep Bhaskar told the petitioner that they can bring out the imported goods from the Import Shed without filing of any Bill of Entry or without paying any customs duty; that about 20 days back, the petitioner got one consignment of books to be cleared through Vipin Kalra and Sandeep Bhaskar. That petitioner has also admitted that he talked to the co-accused on mobile phone but according to him only once in the whole day dated 23.10.1997 at about 4.30 PM to 5.00 PM on mobile telephone and asked him about the payment of mobile Sim Card. Thus, it appears that the Sim Card for mobile telephone was arranged by the petitioner for Vipin Kalra and that there was a talk on mobile telephone by the petitioner on 23.10.1997 around 4.30 - 5 O''clock Vipin Kalra and Sandeep Bhaskar undisputedly are doing the business of clearing and forwarding air cargo. According to Vipin Kalra, on telephone the necessary details about the Airway Bill Number and House Airway Bill Number were provided by the petitioner.

11. The question of corroboration, if necessary, to the statement of the accused u/s 108 of the Act may arise at the time of trial. It would be premature to say at this stage whether any corroboration to the statement of any of the accused persons would be required or not or whether there would be any other evidence to lend assurance to the say of the prosecution/department. It cannot be said at this stage whether there would be any other evidence or not. The statement recorded u/s 108 of the Act being a legal evidence would be admissible, as pointed out above. Whether the statement is free, Voluntary and truthful or not, that could be seen at the trial. So far, there is not retraction to the statement u/s 108 of the Act by any of the co-accused.

12. In case of Hazi Abdulla Haji Ibrahim Mandhra Vs. Supdt. of Customs, Bhuj, 1992 Crim Law Jou 2800, it has been held by the Single Judge of the Gujarat High Court that the statement of co-accused recorded u/s 108, retracted subsequently would not be fatal to the prosecution and conviction not barred. All what is required to be seen at this stage is whether there is any admissible evidence in law on the basis of which the prosecution has been launched against the petitioner or not. As far as the statement u/s 108 of the Act is concerned, the same being admissible in evidence, the basis for launching the prosecution cannot be said to be in any manner illegal, capricious or mala fide.

13. In the case of Kashmira Singh Vs. State of Madhya Pradesh, , it is held that the confession of a co accused is an evidence of a weak type and is much weaker than that of accomplice or approver. It can be altogether excluded if there is another evidence on record sufficient to sustain the conviction. It may be seen that the confession of a co-accused is a very weak evidence, nevertheless it is a legal evidence admissible in law.

14. In the case of Nathu Vs. State of Uttar Pradesh, , it is held that the confessions of co-accused are not evidence as defined in Section 3 of the Evidence Act and no conviction can be founded thereon, but if there was other evidence on which a conviction can be based, they can be referred to as lending assurance to that conclusion and for fortifying.

15. One of the arguments advanced on behalf of the petitioner is that in the application u/s 110(1)(A) and 110(1)(B) of the Act, the name of the petitioner is not mentioned and it only refers to the other accused persons.

It is true that copy of the application u/s 110(1)(A) and 110(1)(B) at page 154 refers only to two accused - Vipin Kalra and Sandeep Bhaskar. It may be appreciated that Section 110 of the Act deals with seizure of goods, documents and things. Sub-section 1(B) thereof provides that where any goods, being goods specified under sub-section 1(A) have been seized by a proper officer under sub-section 1, he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceedings under the Act and shall make an application to a

Magistrate for the purpose of

(a) certifying the correctness of the inventory so prepared, or

(b) .....

(c) .....

In the application u/s 110(1)(A) and 110(1)(B) of the Act (page 154), the prayer is that after issuing notice to the aforesaid (accused) and after examining the goods in question, the correctness of the attached Panchnama may be certified. It may be recalled that, on 23.10.1997, the consignment containing 25000 sets of complete watch movement made in Japan was seized by intercepting the co-accused named in the aforesaid application under the Act. When the consignment was intercepted and seized, the present petitioner was not present and his name was revealed only in the statements of the co-accused recorded u/s 108 of the Act. The sets of watch movements were recovered from the custody of the persons referred to in the said application and the examination of the goods in question and the correctness of the content of the panchanam were prayed to be certified by the said application for which only Vipin Kalra and Sandeep Bhaskar would be relevant and necessary. As far as the seizure and the recover of consignment of 25000 sets of complete watch movements on 23.10.1997 from the custody of the co-accused as far as the prayer of examining the goods in question and the certification of the correctness of the Panchnama vide which the consignment in question was seized, the petitioner was not required to be referred to in the application and Section 110(1)(A) and 110(1)(B) of the Act and the non-mentioning of the petitioner is of no significance. We, Therefore do not find any substance in the argument advanced on behalf of the petitioner in this regard.

16. Another argument advanced on behalf of the petitioner is that the consignment in question the petitioner is that the consignment in question has come in the name of M/s. Umesh Book Service. According to the Statement of Vipin Kalra, copy whereof is at page 70, earlier consignment of imported goods was got cleared without filing any paper and without paying any duty by Ajay Rajpal (petitioner) and for this work Vipin Kalra was paid Rs. 10,000/- by the petitioner and that the earlier consignment was delivered at the shop of M/s. Music Mahal, Chandni Chowk, Delhi and Ajay Rajpal had himself taken the deliver of the said earlier consignment; that for the clearance of the present consignment also Ajay Rajpal had offered Rs. 10,000/-. It is further revealed from the statement that after the clearance of the earlier consignment, the house airway bill number and airway bill number of the earlier consignment were communicated by Ajay Rajpal and that Ajay Rajpal had given the letter of authority on a letterhead of Umesh Book, Naraina in favor of the company of Vipin Kalra.

It is suggested from the complaint that the address and telephone number of M/s. Umesh Book Service, E-67, Naraina Vihar, New Delhi were also verified and it was found that at the said address no company in the name of M/s. Umesh Book Service was in existence and the telephone installed at the said premises was 5792524, as per the written submissions made by the owner of the said premises Sh. Sudhis Kumar on 27.10.1997. Thus, at this stage, it appears prima facie from the statement of the co-accused that the consignment, though in the name of M/s. Umesh Book Service, E-67, Naraina Vihar, New Delhi, the delivery of the same is taken by the co-accused Vipin Kalra and Sandeep Bhaskar, according to them under the instructions of the present petitioner and that Rs. 10,000/- offered by the petitioner for clearance of the said consignment and the enquiry revealed that at the given address M/s. Umesh Book Service did not exist and the connection for the telephone number given was found to have been installed by the owner of the premises. As pointed out above, as per the statement of the co-accused, the earlier consignment was also in the name of M/s. Umesh Book Service, Naraina which was got cleared by the petitioner through the co-accused Vipin Kalra''s company and for which work Rs. 10,000/- were allegedly paid by the petitioner to Vipin Kalra, as revealed from the statement of Vipin Kalra. In view of this, it is prima facie suggested that the petitioner used to get the consignment coming in the name of M/s. Umesh Book Service, Naraina cleared through the co-accused Vipin Kalra without filing Bill of Entry and without payment of customs duty and, Therefore, the argument in this regard by the petitioner does not deserve any credence at least at this stage of the matter.

17. In the case of Mushtaq Ahmad Vs. Mohd. Habibur Rehman Faizi and others, it has been held that "Documents annexed prima facie made out case, it is not permissible to the High Court u/s 482 of the Code to proceed to consider version of accused given out in petition filed u/s 482 vis-a-vis that of complainant and enter into debatable area of deciding which of the version was true. The order of quashing complaint held illegal and set aside".

In the case of State of Bihar Vs. K.J.D. Singh, 1993 C L J 3537, it has been held by the Supreme Court that quashing of prosecution u/s 482 of the Code by invoking inherent powers prior to the commencement of the trial and leading of the evidence is not desirable. Power should be exercised only in exceptional cases. In paragraph 2, it is observed. "We are afraid that it is not permissible for us to appreciate these submissions of the learned counsel at the stage when evidence has yet to be led. In our opinion, the course adopted by the High Court to appreciate the `evidence'' was not proper. The observations made with regard to the alleged unsatisfactory nature of the evidence by the High Court, to say the least, were premature".

18. It will be seen from the above that the criterion laid down in the case of State of Haryana and Others Vs. Bhajan Lal and others (supra) for exercise of powers for quashing the complain/FIR is not satisfied in the present case inasmuch as it cannot be said that taking the allegations made in the complaint at their face value do not prima facie constitute any offence or make out the case against the accused. The allegations in the complaint and the evidence collected

in support of the same disclose the commission of a cognizable offence and make out a case against the accused. The allegations made in the complaint cannot be regarded absurd, inherently improbable, capricious or mala fide.

19. In this view of the matter, following the principles laid down in the decisions referred to above, we do not find any reason to exercise jurisdiction under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure for quashing the complaint dated 23.12.1997 filed by the respondent under sections 135(1)(a) and (1)(b) of the Act against the petitioner and the petition, Therefore, being devoid of merits is dismissed.

None of the above conservations shall be construed to mean an expression of opinion on the merits of the contentions raised by either party.

