(2015) 11 MAD CK 0035

In the Madras High Court

Case No : Criminal R.C. Nos. 1263 and 1238 of 2010

M. Selvaraj and Others APPELLANT

Vs

State RESPONDENT

Date of Decision : 06-11-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 248(2), 313, 428
Penal Code, 1860 (IPC) — Section 120(B), 120-B, 420, 467, 468

Citation : (2015) 11 MAD CK 0035

Hon'ble Judges : A. Selvam, J.

Bench : Single Bench

Advocate : L. Mahendran, for the Appellant; K. Srinivasan, Spl. P.P., for the Respondent

Judgement

A. Selvam, J.

1. The concurrent convictions and sentences passed in Calendar Case No. 8357/1999 and in C.A. Nos. 31 and 32 of 2010 by the Additional Chief Metropolitan Magistrate, Egmore, Chennai and Additional Sessions Court/Fast Track Court-V, Chennai-1 respectively are being challenged in the present Criminal Revision Cases.

2. The epitome of the case of the prosecution is that both the accused have entered into criminal conspiracy during June 1997 at Chennai to cheat Customs Department, Government of India by fabricating duty drawback copies of shipping bills in respect of endorsements relating to drawing of sample. In pursuance of their criminal conspiracy, the 2nd accused fraudulently and dishonestly fabricated drawback copies of shipping bills in question by way of adding the words "draw sample as per TM" to the ''open and examine'' order of the Assessment Appraiser. The 2nd accused has made these endorsements so as to show that the sample has been drawn and tested in the instant case and thereby facilitated the first accused to draw higher rate of duty drawback and the first accused has claimed the same. The second accused has also falsely created

test report relating to another export and shipping bills No. 5233 dated 27.01.1997. The second accused has forged documents for the purpose of clearing and also knowingly fully well that all documents are false. Under the said circumstances, the accused 1 and 2 are said to have committed offences punishable under Section 120-B , read with Section 420 , 467 , 468 and 471 of the Indian Penal Code (hereinafter called as "IPC"). The first accused has independently committed offences punishable under Section 420 read with 511 and 471 of the IPC. The second accused has independently committed offences punishable under Section 420 read with 511 , 467 , 468 and 471 of the IPC.

3. The Inspector of Police, CBI/ACB, Chennai has conducted investigation, collected materials and after completing the same, laid a final report on the file of the trial court and the same has been taken on file in Calendar Case No. 8357/1999.

4. The trial court, after hearing arguments of both sides and upon perusing the relevant records has framed necessary charges against both the accused and the same have been read over and explained to them. The accused have denied the charges and claimed to be tried.

5. On the side of the Prosecution, P.Ws.1 to 21 have been examined and Exhibits P.1 to P.51 have been marked.

6. When the accused have been questioned under Section 313 of the Code of Criminal Procedure as respects the incriminating materials available in evidence against them, they denied their complicity in the crime. On the side of the accused, D.Ws.1 and 2 have been examined and Exhibits D.1 to D.39 have been marked.

7. The trial court, after hearing arguments of both sides and upon perusing the available evidence on record has found both the accused guilty under Sections mentioned in the judgment and thereby imposed sentences upon them as under:--

"A1 and A2 are convicted and sentenced u/s. 248(2) Cr.P.C. and first accused is sentenced to undergo rigorous imprisonment for 6 months for the offence u/s.120(B) IPC and 6 months R.I., and Rs. 5000/- in default three months simple imprisonment for the offence u/s.420 r/w.511 and the 2nd accused is sentenced to undergo 6 months R.I., for the offence u/s.120(B) IPC, 6 months rigorous imprisonment and Rs. 1000/- in default 3 months simple imprisonment for the offence u/s.467 IPC, 6 months rigorous imprisonment and Rs. 1000/- in default 3 months simple imprisonment for the offence u/s.467 r/w.471 IPC, 6 months rigorous imprisonment and Rs. 1000/- in default 3 months simple imprisonment simple imprisonment for the offence u/s.468 IPC, 6 months rigorous imprisonment and Rs. 1000/- in default 3 months simple imprisonment for the offence u/s.468 r/w.471 IPC, 6 months R.I., and Rs. 1000/- in default 3 months simple imprisonment for the offence u/s.420 r/w.511 IPC. The above sentences of imprisonment to run concurrently with each other. Total Fine Rs. 10,000/-.

Period of detention undergone if any by accused 1 and 2 are ordered to be set off against the sentence of imprisonment u/s.428 of Cr.P.C."

Against the convictions and sentences passed by the trial court, the first accused has preferred Criminal Appeal No. 31 of 2010 and second accused has preferred 32 of 2010 on the file of the First Appellate Court.

8. The First Appellate Court, after hearing arguments of both sides and upon reappraising available evidence on record has found both the accused guilty under Sections mentioned in the judgment rendered by the trial court and thereby, confirmed the sentences imposed by the trial court and ultimately dismissed both the appeals. Against the concurrent judgment passed by the courts below, the first accused has preferred Criminal Revision Case Nos. 1238 of 2010 and 2nd accused has preferred Criminal Revision Case No. 1263 of 2010.

9. Since common questions of law and facts are involved in both the Criminal Revision Cases, a common order is passed.

10. The consistent case put forth on the side of the prosecution is that the first accused has served as Chief Executive of M/s. Classic Exports and the same has engaged during the relevant period to export textile materials to foreign countries and the same is situate at No. 2, 2nd Lance, Angappa Naicken Street, Mannady, Chennai. The accused 1 and 2, in the year 1997, have entered into criminal conspiracy for the purpose of making false records so as to cheat the Customs Department of the Government of India. In pursuance of the same, the 2nd accused has made so many false endorsements on the reverse sides of the shipping bills belonging to the said Classic Exports and thereby facilitated the same to claim duty drawback benefits. Under the said circumstances, both the accused have committed offences mentioned in the charges.

11. The learned Senior Counsel appearing for the Criminal Revision Petitioner in Criminal Revision No. 1238 of 2010 has contended that the first accused has served as Chief Executive of M/s. Classic Exports and during the relevant period, the said Exports Company has exported 100% Polyester Sarees and Dhoties to Srilanka by way of providing necessary shipping bills and since the said company is entitled to get duty drawback benefits as per the notification, the fabrication alleged to have been done by the second accused in furtherance of alleged conspiracy between the first accused has not caused any loss nor injury to the Government and the courts below, without considering the aforesaid fact has erroneously found the first accused guilty under the sections mentioned in the judgment passed by the trial court and therefore, the concurrent judgments passed by the courts below are liable to be interfered with.

12. The learned counsel appearing for the Revision Petitioner in Criminal R.C. No. 1263 of 2010 has completely adopted and also reiterated the argument put forth on the side of the Revision Petitioner in Crl.R.C. No. 1238 of 2010.

13. The learned Special Public Prosecutor, appearing for the respondent has

vehemently contended that in the instant case, the second accused has made so many false endorsements on the reverse sides of the shipping bills so as to enable the first accused to claim duty drawback benefits. Since all those endorsements have been dishonestly and fraudulently made, investigation has been done and the Investigating Officer, after collecting various documents and also examining more number of witnesses has rightly filed a final report and the same has been taken on file in Calendar Case No. 8357 of 1999 on the file of the trial court. In the trial court, the alleged endorsements have been clearly proved that the same have been written by the 2nd accused by way of utilising services of handwriting expert and on the side of the prosecution, enormous documents have been filed so as to prove the sinister motive of both the accused and also the frauds alleged to have been committed by them. The trial court, after evaluating the available evidence on records has rightly found both the accused guilty under Sections mentioned in the judgment and thereby sentenced them. The First Appellate Court has also properly reappraised the available evidence on record and ultimately found that the convictions and sentences passed by the trial court are proper and rightly dismissed both the Criminal Appeals and therefore, the concurrent convictions and sentences passed by the courts below do not warrant interference.

14. Before peering the rival submissions made on either side, the court has to look into as to whether as per Notification issued by the Government of India, the said Export Company is entitled to get benefits of Duty Drawback. It is an admitted fact that the 1st accused is the Chief Executive of M/s. Classic Exports and its avocation is to export textile materials to various foreign countries. In the instant case, the said company has sent polyester sarees and dhoties to Srilanka through the concerned shipping bills.

15. The entire argument put forth on the side of the Revision Petitioner in Revision Case No. 1238 of 2010 is based upon the Manual of Customs Department, wherein, under Chapter-54- Yarn & Fabric Made of Manmade Filaments, in Sub Serial No. 5404, under description of goods, it is stated that all fabrics including sarees and dhoties and Odhanies made of manmade staple fibers and filament yarn and made with 100% polyester filament yarn are entitled to 20% of f.o.b. Value, subject to a maximum of Rs. 62.00 per kg., of filament yarn content.

16. Further it is stated under Sub Serial No. 5503 that all fabrics, including Sarees, Dhoties and Odhanies made of manmade staple fibres, other than embroidered are entitled to 17% of f.o.b. value.

17. From the notification issued by the Customs Department, it is easily discernible that some polyester items are entitled to get duty drawback benefits at the rates of 20% and 17%.

18. The definite defence put forth on the side of the 1st accused is that the said export company has exported 100% polyester sarees and dhoties and therefore,

as per notification, the same is entitled to get 17% duty drawback benefits.

19. At this juncture, the court has to look into the evidence given by the following witnesses:--

"One Girija Srinivasan has been examined as P.W.2 on the side of the prosecution. During the course of cross examination, she has stated like thus:--

"I have verified the shipping bills of M/s. Classic Exports. Ex. P.18 is the shipping bill for export of goods under claim for duty drawback. The shipping bill mentions 100% polyester sarees and 100% polyester dhoties. After the goods are open and examined by myself and found that the goods are polyester sarees and polyester dhoties and put my signature. After that it was also verified by the appraiser and he also put the signature in the Let Export Column. Unless we are convinced that the goods are correct as per the shipping bill, we will not put our signature on the back side of the shipping bills and the appraiser also will put his signature in the let signature column. To claim the duty drawback claim for each goods Government of India is publishing notification for each year and there will be a schedule in the notification. Since the Exporter wants to claim duty drawback benefit, we mentioned the descriptions..."

20. From a close reading of the evidence given by P.W.2, it is pellucid that the exported goods are 100% polyester sarees and dhoties and the same have been duly verified and necessary let export order has been given by the customs authorities. Further it is made clear that as per notification issued by Government of India, the concerned exporter is legally entitled to claim duty drawback benefits in consonance with the rate of percentage mentioned therein.

21. The case of the prosecution is that the accused 1 and 2 have contrived themselves and in pursuance of their conspiracy, the second accused has made false endorsements on the reverse sides of shipping bills so as to facilitate the 1st accused to claim duty drawback benefits.

22. As per the evidence given by P.W.2, it is made clear that the said export company has exported only 100% polyester sarees and dhoties and only as per notification issued by the Government of India, the said company is entitled to get duty drawback benefits.

23. It is seen from the records that disputed handwritings have been collated with the admitted writings of the second accused by using abidance of an expert and ultimately found that the disputed endorsements have been made by the 2nd accused.

24. Even though the second accused has committed such kind of crime, since the company of the first accused has really exported 100% polyester sarees and dhoties with proper shipping bills, as stated in many places the said company cannot claim more percentage of duty drawback benefits other than the percentage mentioned in the notification.

25. Now the court has to look into the evidence given by P.Ws.10 and 21.

26. One Dhanasekaran has been examined as P.W.10. During the course of cross examination, he would say that he verified duty drawback claim bills submitted by Classic Exports. As per notification 21% has been corrected as 17%. Further, he would say that all duty drawback claims have been claimed as per law.

27. One Arulandu has been examined as P.W.21. He would say in his evidence during the course of cross examination that "to get 100% benefit for the consignment exported test memos are required. No particular document has been filed in this regard to show the test memo are must for the consignment sent. "

28. In the instant case, as stated in many places, the company of the 1st accused is entitled to get duty drawback benefits as per the percentage given in the notification and beyond the limit prescribed therein, the said company is not entitled to get duty drawback benefits. Further, it is seen from the evidence that the said company has claimed only 17% as duty drawback benefits as per the notification. Therefore, even the second accused has made such kind of endorsements on the reverse sides of the concerned bills, the company of the 1st accused cannot get benefits more than the percentage mentioned in the notification.

29. The main contention put forth on the side of the prosecution is that only for the purpose of drawing more percentage of duty drawback benefits, with the connivance of the 1st accused, the 2nd accused has made such kind of endorsements. It has already been pointed out that the company of the 1st accused has claimed 17% of duty drawback benefits as per the notification. Since the quantum of benefits has been fixed as per the category in the notification, the false endorsements alleged to have been made by the 2nd accused would not give any benefit to the company of the 1st accused. Therefore, the contentions put forth on the side of the prosecution cannot be accepted even on the basis of the evidence available on its side.

30. The learned Senior counsel appearing for the Revision Petitioner in Criminal Revision Case No. 1238 of 2010 has drawn the attention of the court to the decision reported in Dr. Vimla Vs. Delhi Administration, , wherein, the Larger Bench of the Hon''ble Supreme Court has held as follows:--

"defraud involves two elements, viz., deceit and injury to the person deceived. If there is no injury to deceived person, the accused cannot be found guilty under Section 467 and 468 of the IPC."

31. In the instant case, the case of the prosecution is that the accused 1 and 2 have contrived themselves so as to create or fabricate false records and in pursuance of their conspiracy, the 2nd accused has made some false endorsements on the reverse sides of the concerned bills. But from the evidence adduced on the side of the prosecution, the court can easily deduce that the

company of the 1st accused has exported 100% polyester sarees and dhoties to Srilanka and as per notification, it is entitled to get only 17% of the duty drawback benefits. Further, on the basis of evidence available on the side of the prosecution, it is made clear that the said company has exported only 100% polyester sarees and dhoties. Therefore, the endorsements alleged to have been made by the 2nd accused are nothing but supernumerary or unwarranted. Since the company of the 1st accused is legally entitled to claim 17% of duty drawback benefits as per notification, no loss nor injury has occurred to the customs department. Therefore, as per dictum given by the Larger Bench of the Honourable Supreme Court, this court is of the view that both the accused cannot be mulcted with the liability under any of the sections mentioned in the charges.

32. The courts below have erroneously found that the company of the 1st accused is not entitled to claim 17% of duty drawback and only for the purpose of getting the same, such endorsements have been made by the 2nd accused.

33. Even at the risk of repetition, the court would like to point out that the endorsements alleged to have been made by the 2nd accused are not at all necessary for the purpose of claiming duty drawback since the company of the 1st accused has exported 100% polyester sarees and dhoties. Further it is not the case of the prosecution that the said company has exported inferior quality or less percentage of polyester. Therefore, viewing from any angle, the contentions put forth on the side of the prosecution are not factually and legally sustainable and the judgments passed by the courts below are liable to be set aside.

In fine, these Criminal Revision Cases are allowed. The concurrent judgments passed by the courts below are set aside. The Revision Petitioners/Accused 1 and 2 are acquitted. Bail bonds if any executed by them shall stand cancelled. Fine amounts if any paid by them are ordered to be refunded forthwith.