
(1987) 01 BOM CK 0017

In the Bombay High Court

Case No : Criminal Writ Petition No. 702 of 1986

Rajnikant Maganghai Patel

APPELLANT

Vs

Asstt. Collector of Customs, Bombay

RESPONDENT

Date of Decision : 19-01-1987

Acts Referred:

Customs Act, 1962 — Section 108, 11, 135, 135(1), 138A

Citation : (1987) 2 BomCR 100 : (1987) 14 ECC 36 : (1988) 38 ELT 271

Hon'ble Judges : V.S. Kotwal, J

Bench : Single Bench

Judgement

1. While an International Flight enroute to Hongkong was awaiting its departure and the passengers were in hectic action undergoing formalities before boarding the plane at Sahar International Airport, Bombay, on March 19, 1985, a scene in contrast was witnessed at the Air India counter meant for checking of baggages for Flight No. A-1-316. A person was just viewing the said scene enacted at the counter for some time, but as the events progressed, he became more watchful and ultimately suspecting some illegal activities he went into action, rushed to the spot and nabbed two persons with the tracing of yet another person who by then had gone to the Domestic Terminal to catch a Flight to Ahmedabad. The said person was an officer of the Air Intelligence Unit of the Customs Intelligence posted only duty at Sahar International Passenger Terminal. The said two persons apprehended at the counter are original accused Nos. 2 and 3 while the third one traced at the Domestic Terminal is the original accused No. 1. These three accused prominently figure in the said episode which occurred at the Air Port on that day.

2. According to the said Officer he noticed accused No. 1 handing over two Passports and two Tickets to the Air India Staff who was on duty at the counter. A query being made as to whether the three suit cases which figured in the incident were to be pooled together and if so, all those would be subjected to examination, accused No. 1 declined and thereafter checked one suitcase in the

name of one passenger who happened to be accused No. 2 and two separate suit-cases in the name of other passenger who happened to be accused No. 3. Accused Nos. 2 and 3 were not seen at the counter at that time. The Officer then noticed accused No. 1 leaving the counter after checking baggage and contacting accused Nos. 2 and 3 who were by then waiting in the Departure Hall and he handed over two tickets and two Passports to them, which obviously was indicative of the fact that accused Nos. 2 and 3 and not accused No. 1 who were the passengers travelling by the said Flight. The event that occurred at the counter was obviously witnessed by the said Air India Staff. The Custom's Officer instructed that said Staff at the counter to keep aside the said three suit-cases. Accused Nos. 2 and 3 were directed for baggage examination. They, therefore, questioned, if they were carrying any Indian or Foreign currency or any drug or any item of contraband article either in their baggages or on their person to which they replied in the negative and they posed to be Executives of a reputed firm. This, however, did not satisfy the Officer, whose suspicion was on the mounting scale. He, therefore, called two panch witnesses and after observing the formalities the said three suit-cases as also the person of accused Nos. 2 and 3 came to be searched in their presence. A small hand-bag and a brief-case were also carried by these two passengers. It is claimed that it transpired that the suit-case checked in the name of accused No. 2 was claimed by accused No. 3 and the two suit-cases claimed by accused No. 2 were checked in the name of accused No. 3. In one of the suit-cases which was checked in the name of accused No. 3, the search revealed existence of Foreign Exchange to the tune of more than Rs. 46,00,000/-, while on the person on search of accused No. 2 some amount of U.S. Dollars equivalent to Indian Currency of Rs. 6969/- concealed in his left shoe was recovered. The person on search of accused No. 3 some documents and a small amount of U.S. Dollars was found which however were clarified to have been legally acquired and were therefore returned. A small Indian Currency and some Travellers Cheques were also found. Thus in all Foreign Currency in bulk as also small amount of Indian Currency collectively equivalent to Indian Rs. 46,63,840/- came to be recovered and attached under panchnama in the reasonable belief that the same was being illegally exported out of India and as such the said amount was liable to confiscation under the Customs Act. On being questioned it was revealed that the said accused had not obtained any permission from the Reserve Bank of India and thus it was alleged that there was an attempt to illegally export the said currency out of India clandestinely.

3. In the next phase came in the picture accused No. 1 once again. On interrogation accused Nos. 2 and 3 are alleged to have disclosed the identity of accused No. 1 who by then had gone to the Domestic Terminal to catch a Flight for Ahmedabad. The Officers rushed there and were able to trace accused No. 1 who was brought back to the spot where accused Nos. 2 and 3 were detained. His baggages were also searched as also his person which revealed certain documents. However, nothing incriminating was found with him. The said

Customs Officers and the Air India Staff are alleged to have identified the three accused persons as involved in that episode.

4. Further formalities of the investigation then followed. Statements of these three persons came to be recorded u/s 108 of the Customs Act. The investigation further revealed the participation of some other persons and thus entered the arena accused Nos. 4 to 7. Accused No. 4 is the wife of accused No. 1 and the couple runs a travelling agency known as "Sky Jet Aviation Private Limited" located at Ahmedabad with an office in this metropolis. In due course the statements of accused Nos. 4 to 6 were recorded under the Customs Act while the statement of accused No. 7 was recorded by the officers attached to the Wing under the Foreign Exchange Regulation Act ("Shortly FERA"). Some of those statements are alleged to have referred to the activities which have been traced backward to an event alleged to have occurred on 25th of February 1985 when it is alleged that accused Nos. 5 and 6 came from Ahmedabad carrying large amount of Indian Currency worth about Rs. 20,00,000/- on the avowed mission to purchase Foreign Currency in the form of U.S. Dollars which they are alleged to have purchased from one Million in Bombay and carried the same to Ahmedabad and as per the allegations they are presumed to have given it to accused No. 1. There is, however, no trace of events in between these two dates when the final episode occurred on 19th of March 1985 when as per the allegations an attempt to smuggle out of India Foreign Currency was frustrated.

5. On the basis of this material, the officers attached to Customs Department came to the conclusion that primarily an offence u/s 135(1)(a) read with Section 135(1)(ii) of the Customs Act was formulated along with the contravention of the provisions of Section 13(2) of FERA and those are sought to be tagged together by an under current of the so-called criminal conspiracy between these accused and others on account of which provisions of Section 120B of the Indian Penal Code were also sought to be attracted.

6. After having been armed with the sanction from the Competent Authority, the Assistant Collector of Customs (Revenue and Intelligence) Bombay, filed a complaint against the seven accused persons u/s 120B of the Indian Penal Code read with Section 135 of the Customs Act and Section 13(2) of the Foreign Exchange Regulation Act and Section 135(1)(a) read with Section 135(1)(ii) of the Customs Act in the court of the Chief Metropolitan Magistrate, Bombay, which is the subject matter of Case No. 28/CW/1986.

7. The learned Magistrate perused the complaint and the material placed before him and addressed himself on the preliminary question at the threshold of issuance of process. He recorded a speaking order holding that prima facie case has been made out to issue process against all the accused on the said counts. This order under which process was issued was recorded on 30th of January 1986.

8. It is only accused No. 7 who has assailed the order of issuance of process

against him invoking inherent jurisdiction u/s 482 of the Code of Criminal Procedure and also powers of superintendence under Article 227 of the Constitution of India, praying for the relief to quash the said order and the proceeding and dismiss the complaint against him.

9. To complete the circuit on fact, only a few features need be mentioned at this stage which are prominently reflected in the complaint. According to the complainant, accused No. 1 in his statement u/s 108 of the Customs Act accepted that he came to Bombay from Ahmedabad on 19.3.1985 with accused Nos. 2 and 3 and he is alleged to have accepted the incident at the Air Port as was seen by the Customs Officer and the Air India Staff in that he checked the baggage for accused Nos. 2 and 3, then contacted the said two accused and handed over the Passport and Tickets and further accepted that he was brought back from Domestic Terminal. The complainant alleges that accused No. 1 accepted the Foreign Currency and Travelling Cheques recovered from accused Nos. 2 and 3 as belonging to him which he wanted to send for safe custody to his relation. It is alleged that more or less on the same lines are the statements of accused Nos. 2 and 3 who are alleged to have accepted as to what had transpired at the Air Port and that they were carrying Foreign Currency for and on behalf of accused No. 1. In so far as the alleged incident of 25th of February 1985, which is more germane because it is only in that incident that the present petitioner has stepped in the picture, the prosecution rests more on the statements of accused Nos. 1, 5 and 6 recorded u/s 108 of the Customs Act and also the statement of accused No. 7, the petitioner herein, recorded by the officers of the other Wing under FERA. According to the prosecution, those statements reveal that accused Nos. 5 to 7 are the employees in the said Sky Jet Travelling Agency of which accused No. 1 is the Chairman and accused No. 4 is the principal share holder and accused Nos. 5 and 6 are employed at Ahmedabad Office while accused No. 7 is employed at Bombay Office. It is alleged that accused No. 1 paid quite a large amount in several lakhs in Indian Currency to accused Nos. 5 and 6 on 24.2.1985 at Ahmedabad to purchase U.S. Dollars with directions to accused Nos. 5 and 6 to go to Bombay for acquiring Foreign Exchange from one Noor Mohamad and Mahesh Parwari. It is alleged that in pursuance thereof accused Nos. 5 and 6 came down to Bombay carrying about Rs. 20,00,000/- in Indian Currency in a suit case and occupied a room in Ambassador Hotel though registered under different names. It is alleged that accused Nos. 5 and 6 purchased U.S. Dollars out of the said Indian Currency from one Millan, went back to Ahmedabad and handed over the same to accused No. 1.

10. The allegations as against the present petitioner which are more relevant fall in a narrow field. According to the prosecution, obviously on the basis of these statements, the petitioner is also an employee of the said Travelling Agency posted and stationed to counterpart office in Bombay. He was summoned in the said room in the hotel on the arrival of accused Nos. 5 and 6 on 25.2.1985 and he was posted with specific instructions, first to guard the suit case which

contained the said Indian Currency which was alleged to have been brought by accused Nos. 5 and 6 from Ahmedabad for being paid to Millan and second he was engaged on the duty to attend to the phone calls which he may receive from accused No. 1 from Ahmedabad. According to the prosecution, the petitioner is alleged to have discharged both these duties religiously and faithfully. The third item of the so-called overt-act alleged against the petitioner and reflected mainly through those statements is to the effect that he paid Indian Currency to the tune of Rs. 4,00,000/- to the said person Millan which was the balance of the amount for the Foreign Exchange which was already acquired by accused Nos. 5 and 6 from Millan. Admittedly, even as per those statements, the petitioner did not even inferentially figure in the incident that occurred on March 19, 1985 at the Air Port.

11. All these features including the gist of the statements of various accused are boldly reflected in the complaint. Though the petition is directed only by original accused No. 7, reference to the entire incident and the part alleged to have been played by the other accused became necessary by reason of the fact that not only the complaint but even on this forum the prosecution claim to saddle the liability on the petitioner even for the main incident of 19th of March 1985 through the provisions of Section 120B of the Indian Penal Code. In effect the prosecution contend and is reiterated by Shri A. R. Gupte, the learned counsel, that though in the incident of 25th of February 1985 accused Nos. 5 to 7 only figured while in the incident of 19th of March 1985 accused Nos. 1 to 3 prominently appeared, still all of them were bound by the bond of closely knit association and which is the outcome of a criminal conspiracy joining both the incidents. Accused No. 4 is also sought to be made liable for the alleged involvement in the offence in question with which however we are not concerned in this proceeding. Since, however, all the accused including accused No. 4 except accused No. 7 are not the contesting parties in this proceeding challenging the order of issuance of process, the question of their liability, its adequacy or otherwise in the context of the order of issuing process against them is not germane to this proceeding and therefore whatever are the allegations levelled against them thus need not detain us in this proceeding, except while considering the question of conspiracy and it would therefore be appropriate to concentrate on the allegations as levelled against the present petitioner who is arrayed as original accused No. 7.

12. It would not be out of place to observe at this juncture itself as a relevant feature that all the accused persons who are alleged to have made inculpatory statements u/s 108 of the Customs Act have expressly retracted the said statements and their letters of retraction are on the file of the Customs Department. In so far as accused No. 4 is concerned her statement however is totally exculpatory as she does not admit any of the allegations sought to be levelled against her. In respect of the present petitioner accused No. 7, it is very relevant to note that his statement has not been recorded by the Customs Officer under the Customs Act but his statement is purported to have been recorded

under FERA. Even that statement has been expressly retracted by him. Thus the main and the only dominant item of evidence or circumstance against the present petitioner relates to the alleged incident occurred in Ambassador Hotel on 25th of February 1985 and for this the prosecution apparently fall back predominantly on the statements of accused Nos. 5 and 6, who are the co-accused, recorded u/s 108 of the Customs Act which statements are retracted and the statement of the petitioner himself recorded under FERA which is also retracted by him. The obvious limitation imposed on the statements of such co-accused is well accepted. Those could be admissible against themselves and if those are mere statements u/s 108 of Customs Act containing no confession and not being inculpatory has no relevance as against the other accused and even if those contained confession, still it hardly goes to the rescue of the prosecution while dealing the case against co-accused.

13. However, even assuming otherwise at least in so far as the statement of the petitioner himself is concerned, which admittedly has been retracted and thereby narrowing down further its evidentiary value requiring adequate corroboration, which is missing in the instant case, which by itself would not justify to discard the said statement against the maker at this stage, and even taking the recitals therein which are canvassed by the prosecution as their case at the maximum, still the order of issuing process against the petitioner would be equally assailable. Some of the salient features which are quite relevant in the context of the controversy are apparent even as per the prosecution case and therefore it would be the proper point of time to consider the same while considering the case of the petitioner. The first as stated is that the petitioner is only an employee of the said Travelling Agency conducted by accused Nos. 1 and 4. He is admittedly posted in Bombay and not at Ahmedabad and he is not shown to have been at Ahmedabad at any relevant time when any transaction was effected including the one alleged involving accused Nos. 1, 5 and 6 on 24th and/or 25th of February, 1985. There is also nothing even to inferentially suggest that he could have at least the knowledge of any such transaction through any source. Even the instructions given to him as to what he was supposed to do in the said room of Ambassador Hotel do not raise his status any higher than that of a mere employee, because he was armed with the directions to keep the guard on the suit cases and attend to the phone calls, which acts by themselves clearly suggest his capacity only as the paid employee and to do only such acts and nothing higher than that. Even assuming that he could be a man of confidence of accused No. 1, still that confidence was reflected only in that restricted field of guarding the suit cases and attending to the phone calls and ultimately paying Indian Currency to Millan. Amongst the employees or the servants he may be more trusted but it cannot be confused to be equated to mean that he could be a participant in the entire activities or even could has been posted with the knowledge about the so-called activities, since his acts could have been performed without having any knowledge whatsoever about the real nature of the transaction. Significantly he is not even inferentially alleged to have

accompanied accused Nos. 5 and 6 when they are supposed to have acquired the Foreign Currency in the shape of U.S. Dollars from Millan. There is also nothing to indicate that he was specifically informed by accused No. 5 and 6 about the purpose of their mission or about their going to Millan and that too for the purpose of purchasing Foreign Currency. He is not suggested to be acquainted or associated with Millan any time in the past. Further even according to the prosecution the suit case which he was supposed to guard did not contain any Foreign Exchange but contained exclusively Indian Currency and that there is nothing to indicate that he knew exactly as to how much amount was contained in that suit case and even assuming otherwise still that by itself would not be a factor against him as his Master or somebody on his Master's behalf possessing such large amount may not be an unusual feature so as to raise suspicion. Further the amount which he was directed to pay to Millan was also not in the shape of Foreign Exchange but was exclusively in the form of Indian Currency. Significantly beyond paying the said amount of Indian Currency as per directions to Millan he did nothing. The significance further lies in the fact that even according to the prosecution it is not at that stage and at that time that any Foreign Exchange was given by Millan to accused Nos. 5 and 6 or to the petitioner, but according to the prosecution, the so-called transaction of purchase of Foreign Exchange was complete between accused Nos. 5 and 6 and Millan even prior thereto in which the present petitioner did not figure at all. Even the statements of the petitioner and accused Nos. 5 and 6 do not implicate the petitioner in that behalf. Thus even as per the statement of the petitioner as also as per the prosecution case it is subsequent to the transaction between accused Nos. 5 and 6 and Millan that the present petitioner was asked to pay an amount of Rs. 4,00,000/- to Millan. It is true that his statement suggests as disclosed in the complaint that he made the said balance payment to Millan for the Foreign Exchange that was acquired by accused Nos. 5 and 6 from Millan and it further indicates that accused No. 1 on telephone from Ahmedabad enquired with him in the hotel-room whether or not accused Nos. 5 and 6 had purchased Foreign Exchange. The implication of this statement inclusive of this so-called admission falls very much short of the main aspect of the prosecution case. This would be further elaborated in other context.

14. Then it is quite relevant to note that the statement of the present petitioner was never recorded by the Officers of the Customs at any time, but the statement was recorded by the Officers of the other Wing under FERA presumably u/s 40. As to why his statement was not recorded u/s 108 of the Customs Act is really not understood though it is contended on behalf of the petitioner that the Customs Officials really did not want to involve the petitioner in any offence under the Customs Act. It is also relevant to note in that behalf that the petitioner was not arrested by the Customs Officers for any offence under the Customs Act, but he was arrested by the Officers under FERA. This also has its own relevance.

15. The last item which is however extremely relevant relates to the formulation

of the offence which is the subject matter of the case at hand. The tenor of the complaint and the order of sanction, the nature of allegations, the formulation of offences as also the order of the learned Magistrate issuing process for some specific offences cumulatively make the picture absolutely clear. The complaint specifically alleges in the complaint that the accused person tried to export large amount of Foreign Exchange in contravention of the prohibition imposed under FERA and in particular under the provisions of Section 13(2) of the said Act read with the Notification issued thereunder which is deemed to have been issued also u/s 11 of the Customs Act. That is on the basis that Export of Foreign Exchange without general or special permission of the Reserve Bank of India is prohibited in terms of Section 13(2) of FERA read with Notification No. SER/92 dated 1.2.1974 issued thereunder and under the deeming clause it also becomes a Notification and Prohibition u/s 11 of the Customs Act. Thus Section 13(2) of FERA read with the said Notification in question has been introduced in the picture for the purpose of prescribing prohibition on Import or Export of Foreign Currency. The said section itself has the title of restrictions on Import and Export of certain currency including Foreign Exchange without the general or the special permission of the Reserve Bank of India. Section 11 of the Customs Act relates to the power to prohibit Importation or Exportation of certain goods which by reason of this deeming feature takes under its fold even the said Notification and thus the prohibition for Export or Import of Foreign Exchange is carved out u/s 13(2) of FERA as also Section 11 of the Customs Act, both of which flow out of the said Notification. It is however relevant to note that in both these provisions under FERA and Customs Act, the restriction relates to the process of Import or Export. The relevance lies in the fact that these provisions are pressed into service by the complainant because the factual basis is obviously restricted to the act of attempt to export Foreign Exchange. The main offence that is clearly indicated in the complaint relates to the incident that occurred on 19th of March 1985 when there was an attempt to export Foreign Exchange formulating an offence u/s 135(1)(a) read with Section 135(1)(ii) of the Customs Act. No doubt the offence of criminal conspiracy u/s 120B of the Indian Penal Code as is reflected in the complaint running as an undercurrent may be ostensibly to connect the two incidents though the conspiracy is expressly for trying to export the Foreign Exchange inspite of the prohibition u/s 13(2) of FERA. It is, therefore, manifestly clear that not only the offence under the Customs Act but the prohibition referred to in Section 13(2) of FERA is formulated on the process that the Foreign Exchange in question was sought to be exported or smuggled out of India without the permission of the Reserve Bank of India. No doubt, the prosecution want to contend that acquiring Foreign Exchange illegally on 25th of February 1985 was a prelude for ultimately exporting it out of India on 19th of March 1985. It was further alleged in the complaint that there was a continuing criminal conspiracy between the said two dates to illegally export out of India large amount of Foreign Exchange in contravention of the prohibition imposed by FERA read with the Notification issued thereunder and which is also deemed to have been issued u/s 11 of the Customs Act. It is further alleged that in

pursuance of the said conspiracy accused Nos. 1 and 4 arranged for acquisition of Foreign Exchange with the help of other accused and further arranged for the export thereof through accused Nos. 2 and 3 by attempting to send them to Hongkong with the said Foreign Exchange. On the basis of these allegations the complainant stated that the accused have committed offences punishable u/s 120B of the Indian Penal Code read with Section 13(2) of FERA read with the said Notification thereunder and deemed to have been issued u/s 11 of the Customs Act and also for offences punishable u/s 135(1)(a) read with Section 135(1)(ii) of the Customs Act. Section 135(1) of the Customs Act spells out an offence where a person is knowingly concerned with the goods which are the Foreign Exchange in this case evading the prohibition imposed under the said Act or any other law and which is sought to be covered by the allegation that Foreign Exchange was sought to be exported inspite of that prohibition. Clause (1) sub-clause (2) prescribes the punishment for the said offences. Notwithstanding all the features the bare fact remains which is quite relevant and which is accepted by the Department that at least upto this day admittedly no complaint or prosecution has been launched nor any action taken for any of the offences under FERA and especially an offence for acquisition of Foreign Exchange in contravention of the provisions under the said Act including the prohibitions and restrictions and other allied offences.

16. It is true the complaint alleges that there is a continuing criminal conspiracy in which there is participation of all the accused though all may not appear on the scene in each of the two incidents. However, it would not be irrelevant to note a very prominent deficiency in the complaint which practically stares in the face which is to the effect the except making a bald statement that there is a continuing criminal conspiracy to illegally export out of India large Foreign Exchange and a further bald statement that the same was acquired with the help of other accused and was sought to be exported with the help of accused Nos. 2 and 3, there is no indication worth the name as to the circumstances or other features which would justify such an inference. It is apparent that all these allegations practically flow only out of the statements of these accused and not through any other independent investigation at least in so far as the event that is alleged to have been occurred on 25th of February 1985 in a room in Ambassador Hotel. As stated, accused Nos. 5 and 6 as also the petitioner have all retracted their statements. However, even taking the worst against the petitioner and accepting his own statement recorded u/s 40 of FERA at its face value without any demur on the footing that it is acceptable at this stage inspite of its retraction by the accused, it is very difficult to spell out that he is a member of any such main conspiracy merely by reason of his associating in the alleged incident of 25th of February 1985. I have already dealt with the allegations and the overt-acts which are alleged against the petitioner at the maximum, apart from the consequence, in one category there are only the statements of co-accused which themselves are retracted and which would therefore can hardly be the basis whereas the statement of the petitioner himself

is retracted and as stated by the learned defence counsel there is no corroboration thereto, which however by itself would not be a valid ground to discard that statement of the petitioner at this stage. However, without embarking on that field and accepting the recitals in the said statements as if it is the prosecution case at the maximum and without searching for any corroboration as it would entail in the process of appreciation and thus accepting the said statements of the petitioner as it is and even accepting it at this stage to be voluntary as also true, still no sufficient grounds have been made out to proceed against the petitioner. Shri Gupte, the learned counsel for the Department sought to rely on the said circumstances which are already discussed and further added a few more circumstances. According to him, accused Nos. 5 and 6 were booked in the hotel in the fictitious names. Both of them contacted two persons on telephone from the hotel which could be within the hearing of the petitioner. The petitioner arrived in the hotel at about 10.00 A.M. while accused Nos. 5 and 6 left at about 11.30 A.M. and during this period they had asked the petitioner to guard the brief-case or the suit-case which contained large amount of Indian Currency and to attend to receiving telephone calls and the petitioner was asked merely to receive the phone calls but not to himself make any call. It is alleged that petitioner received phone call from accused No. 1 inquiring about accused Nos. 5 and 6 and whether they had purchased Foreign Exchange. Shri Gupte also submitted that the Indian Currency in the bag was counted, may be in the presence of the petitioner, when accused Nos. 5 and 6 left. The petitioner subsequently paid more than Rs. 4,00,000/- of Indian Currency to Millan. That the petitioner is in the employment of the travelling agency with which accused Nos. 1 and 4 are associated was also pressed into service. On the basis of these and other circumstances Shri Gupte, the learned counsel, endeavoured to submit that the petitioner could be easily posted with the knowledge that accused Nos. 5 and 6 were on the mission to acquire Foreign Exchange which they did out of the Indian Currency which they had brought from Ahmedabad and thus he had further knowledge that the amount of Rs. 4,00,000/- and odd that he was paying to Millan though subsequently was the balance out of the said transaction. Shri Gupte, however, does not want to put a full-stop to the inferences at that point, but endeavoured to submit further, realising that without it no advantage can be gained by the prosecution in this proceeding, that even these bare facts make the petitioner co-conspirator in the conspiracy to export the Foreign Exchange that was attempted to be done on 19.3.1985. This last item of the inference sought to be drawn is the pivot of the controversy.

17. As rightly submitted by Shri K. M. Desai, the learned counsel for the petitioner, even if these circumstances are taken at the maximum they very much fall short of the most crucial element under which the petitioner is tagged with the involvement in the criminal conspiracy not merely to acquire Foreign Exchange but to subsequently export the same out of India by accused No. 1. The circumstances relied upon may at the maximum post knowledge to the

petitioner about the transaction of purchase of Foreign Exchange by accused Nos. 5 and 6 on 25th of February 1985 from Millan but it does not go beyond that, though Shri Desai, the learned counsel, has controverted that position also as according to him it may not be permissible to attribute its knowledge to the petitioner. Any way, even taking the maximum, as stated earlier, the capacity of the petitioner as a mere employee and he being asked to do some overt-acts of watching the brief-case or the suit-case and attending to the phone calls in the hotel room on the contrary makes a graphic picture of his status on the lower pedestal as a mere employee since even according to the prosecution he was not taken in association by accused Nos. 5 and 6 in the acquisition or purchase of Foreign Exchange nor had he contacted Millan before or at the time of purchase of Foreign Exchange. He was left out completely but was posted to do only such jobs which could be done by a servant though at the most he might be the trusted servant or employee of accused No. 1 but this element of trust or confidence cannot be confused and equated to mean that he was in the conspiracy not merely to acquire Foreign Exchange in Bombay but to try to export the same subsequently on the 19th of March, 1985.

Though it is alleged that the conspiracy was to smuggle out the currency on 19th of March 1985 the acquisition of 25th February was for that purpose, still even on the basis of these circumstances relied upon by the prosecution and even accepting the statement of the petitioner as it is and also even accepting the recitals in the complaint as they are, it would not be permissible even to inferentially hold that he was or could be the member of a conspiracy to export Foreign Exchange by accused Nos. 1, 2 and 3. It is apparent that at least insofar as the petitioner is concerned, a distinction is writ large even on the basis of the complaint without involving any process of appreciation of evidence or even without discarding or disbelieving the evidence as it is that there is absolutely no material worth the name either to post him with the knowledge that the Foreign Currency which was acquired in Bombay, assuming of course that he knew about the acquisition or purchase, which is denied by the defence, was for the purpose of smuggling it out or exporting which was to be done subsequently. His capacity as a servant or an employee is quite relevant in that behalf and merely because he is employed not with accused No. 1 but in the travelling agency with which accused Nos. 1 and 4 are associated, though he is posted only in Bombay, cannot raise any presumptive inference against him vis-a-vis the conspiracy in question. Even as per these allegations the chapter could have been closed so far as he is concerned the moment the incident occurred on 25th February 1985.

The parties left from Ahmedabad and there was no further association or meeting between them in Bombay thereafter. Even on the 19th of March 1985 when it is alleged that accused Nos. 1, 2 and 3 came together from Ahmedabad to Bombay still none of them had contacted the petitioner and thus the petitioner had absolutely no inkling as to what had happened either to the said Foreign Exchange much less to the incident at the Air Port that occurred on 19th of March, 1985. It is true as contended by Shri Gupte, the learned counsel, that in

case of a continuing criminal conspiracy each conspirator may not necessarily participate in each phase of the network and even some of the conspirators may drop out while others may join at different stages and it is equally true that there cannot be any direct evidence about the conspiracy. However, this argument cannot be expanded to cover the case at hand since the most vital part is blissfully missing. The principles regarding the conspiracy as such and regarding a single general or continuing conspiracy are well settled as enunciated by the Supreme Court in Mohd. Husain Umar Kochra etc. Vs. K.S. Dalipsinghji and Another etc., and which have been reiterated even subsequently in different ratios. The fundamental ingredient to constitute a single general conspiracy there must be a common design and common intention of all to work in furtherance of the common design. Each of such conspirator may play his separate part but in one integrated and united effort to achieve the common purpose. It is necessary that each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. Nonetheless the basic fact of he being aware of the common purpose and common design and acting in furtherance of the same cannot be dispensed with.

It is also enunciated therein that where different groups of persons co-operate towards separate ends without any privity with each other, each combination constitutes a separate conspiracy and the common intention of the conspirators in that event would be to work for the furtherance of the common design of his group only. It is not necessary to reproduce the further observations as the principle is well settled. As stated, merely making a bald statement in the complaint that there has been a continuing conspiracy meaning thereby a single general conspiracy would not suffice. Though this can be established on the basis of inferences from the attendant circumstances as there cannot be any direct evidence and also from the acts themselves, still the inferences first must be based on tangible material and the inferences must be logical, rational and inescapable. As already discussed, even if all the circumstances which are sought to be relied upon by Shri Gupte are considered not itemwise but even in their totality, still the most fundamental and necessary ingredient for constituting such a single general conspiracy is very much wanting. On the contrary, the circumstances taken together strongly indicate that the petitioner had not only participated, had not only not shared the common design of the so-called main conspiracy but was not even aware of the said designed and the common object which was to be achieved and he lent his services only for a limited purpose at an intervening stage and that too exclusively in the capacity of a servant. As stated, the circumstances themselves suggest that he was excluded even from being made aware of the main object but was directed to do only such overt-act which could not have the necessary nexus with being aware of much less sharing the common object of the so-called conspiracy. If a proper complaint is filed and proceedings is initiated for the alleged acts of acquisition of Foreign Exchange on 25.2.1985 and when a question would be posed about the liability of the

petitioner, if of course, there is any admissible evidence against him, alleging formulation of any offence under FERA, a further consideration may become relevant to find out if there was a separate and distinct conspiracy merely to acquire Foreign Exchange illegally, which nonetheless could certainly be distinct from the so-called object of the conspiracy to export Foreign Exchange.

Realising obvious difficulties Shri Gupte, the learned Senior counsel for the Department, made a faint attempt to rely on the so-called presumption available u/s 138A of the Customs Act vis-a-vis culpable mental state. Under the said provision where an offence requires a culpable mental state on the part of the accused the same would be presumed to exist whereas it would be then for the defence to establish to the contrary and the culpable mental state has been explained to include intention, motive, knowledge of a fact and belief in a fact. The argument traversed much farther as according to Shri Gupte even assuming that there is no evidence against the petitioner except the alleged overt-acts played by him on 25th of February 1985 and even though he was not present at the Air Port on 19th of March, 1985, still by reason of doing such overt-acts on the first date a culpable mental state can be presumed for committing an offence not only which was done on that day only, which may be a subject matter of some other chapter, but even of the main offence which was ultimately culminated in an attempt to export the contraband which was about one month after the first incident. The rationale behind this argument is absolutely non-existent and it hardly requires any serious comments or consideration to discard the said plea. This would become manifest even on the cursory reading of the provision itself along with the legislative intent and the object behind the same. Shri. K. M. Desai, the learned counsel, rightly submitted that acceptance of this plea would entail into such un-tenable and un-reasonable consequences that the prosecution can be relieved even of the fundamental duty to establish at least some basic facts. As stated, the acts alleged to have been committed on 25th of February 1985 in the absence of any material, at least insofar as the petitioner is concerned, cannot be tagged with the one which ultimately culminated on 19th March 1985. Even in this inner circle a distinction is apparent between the case of the other accused and the present petitioner. Any element of culpable mental state to be pressed into service will have to be restricted in that field, more concentrating on the acts committed in 25th February 1985 and not any further though Shri K. M. Desai, the learned counsel seeks liberty even to contest that if a proceeding for an offence under FERA is subsequently launched. There is parallel provision contained u/s 59 of FERA about the presumption of culpable mental state which need not be elaborately considered at this stage which need not be elaborately considered at this stage since that relates only to the offences under FERA. Any way such presumption under the provisions of both these Acts relate only to the offences under those respective Acts. It may, however, be suggested that on the basis of such presumption even restricting to that field the further link can be supplied by drawing the inference leading to the ultimate object, which for obvious reasons, cannot be accepted. The object behind

enacting these two provisions is well defined. It is to overcome the difficulty where in a given case the defence about absence of culpable mental state or mens rea is to be met with. However, the bare necessary feature on the basis of which such element of mens rea can be presumed must exist.

Thus for instance in the offence under the Customs Act some contraband is found or in an offence under FERA any contravention is practised vis-a-vis some Foreign Exchange, in the respective Acts that it was so contravened with the guilty mind or with the knowledge can well be presumed provided of course the basic and the fundamental premise about the act in question is in existence. Restricting to the offence u/s 135(1)(a) of the Customs Act, the prosecution must basically show that the accused is concerned in a fraudulent evasion of any prohibition as alleged in the instant case and to formulate the offence, the knowledge is required so as to create the concept of "knowingly concerned" and therefore it is only this element of knowledge or mens rea that would be supplied through such a presumption u/s 138A of the said Act, though the basic foundation of the Act showing concern in doing the acts in that particular evasion by itself must exist. Therefore, on the facts, it would not be proper to assume the foundation that the act of the petitioner alleged to have been committed on 25th of February 1985 by itself was such that he was not only concerned with the same but had the knowledge that the Foreign Currency acquired on that day was to be smuggled out or exported subsequently by any one. Though in a given case if prima facie tangible material exists for an offence under FERA vis-a-vis possession or acquisition of Foreign Exchange without the permission, the prosecution may seek to rely on the presumption available u/s 59 of the said Act. The two things are absolutely distinct or otherwise by expanding the scope of presumption to formulate an offence under the Customs Act about the subsequent attempt to export not by himself, it would tantamount to using the presumption for establishing the conspiracy and the object thereof and thus obviously would exceed the permissible limits and the legislative intent. In other words for certain offences under FERA vis-a-vis Foreign Exchange regarding its acquisition, possession, etc. without the permission of the concerned authority, presumption u/s 59 may be invoked to formulate mens rea and for certain offences under the Customs Act where the accused is alleged to be concerned in any manner with the contraband with the knowledge of the evasion of the prohibition, presumption u/s 138A about the mens rea can equally be invoked.

However, the field of operation of both is distinct and especially in one the knowledge restricts about there being no permission even to acquire or possess whereas in other the knowledge required is that the same is to be exported. One cannot confuse with the other. Factum of a criminal conspiracy which is an offence under other Act through which liability of the accused is sought to be established for the offence in question cannot be so presumed. So also the acts of the accused in connection with the offence cannot equally be presumed, since such act which itself should have the requisite nexus with the nature of the offence is the basic foundation while only the other requirement of mens rea

behind such act is to be supplied through such presumption. Otherwise, through such process the whole of the offence with all its ingredients and requirements would be presumed and thereby displacing the fundamental; burden of the presumption as also the proof thereunder. Under of presumption in such a spacious manner would really be eluding and begging the issue. Consequently, therefore, the presumption if available would restrict itself to the act of the accused getting himself involved or concerned in acquisition or purchase of Foreign Exchange with the knowledge of its illegality in the mere purchase itself but it cannot be extended to spell out knowledge with the guilty mind that it was so done for being exported much later thereafter because the act, the knowledge and the presumption therefore will have to be restricted to that field when it cannot be said that the petitioner did everything for the purpose of exporting Foreign Exchange subsequently its sweep the main act of the so-called conspiracy to export the Foreign Exchange which was three weeks thereafter while the petitioner may not be even aware of the ultimate object and thus formulation of offences under the Customs Act on the basis acts done earlier which themselves have limited implications. In any event, the validity of the argument advanced by Shri Gupte obviously cannot be up-held on the fact of this case.

18. As stated, the question as to whether any offences under FERA even limiting to the incident of acquisition of Foreign Exchange in Bombay on 25th of February 1985 and the liability of the petitioner in that incident need not detain us since that question is not raised by the prosecution for adjudication in this proceeding. Admittedly, till now no complaint is filed in respect of any such offences under FERA vis-a-vis the said incident of 25th February 1985. Shri Gupte, the learned Senior counsel for the Customs Department, submits that the said chapter is still not closed and the Department may even now decide to file a complaint against the petitioner for any of the offences under FERA mainly relating to the said Foreign Exchange that is alleged to have been acquired in Bombay on 25th of February 1985, Shri Desai, the learned counsel, submits that even in that field no offence could be made out at least against the petitioner. However, as to whether any such action would really be taken for any such offences and if so initiated what would be their impact as against the present petitioner would be a matter which could be properly considered at that stage if an occasion arises and as such at present it would be merely an exercise in speculation. Consequently, therefore, on the basis of propriety no comments are being offered either way and the chapter is left open.

19. In view of this discussion it harmoniously flows out of the circumstances and the allegations even taken at the maximum that there is no sufficient material to proceed against the petitioner in the proceeding arising out of the complaint as it has been filed and the process issued by the learned Magistrate for the said offence which essentially pertain to the allegation of attempt to export the Foreign Exchange. It is the material that is reflected through the complaint that would be germane to decide the concept of sufficiency thereof and this concept is

well marked though with subtle dimensions. Some stray allegations with loose ends and that too essentially based on the exercise of drawing inference can hardly formulate such a material, especially in the instant case as even the inferences sought to be drawn by the prosecution are not available in a rational manner. A few expressions or terminology used in the complaint cannot convey the real nature of the allegations and it is also not difficult even on the bare reading of the allegations to un-mask the inferences that are sought to be drawn by the prosecution against the petitioner. Surmises, suggestions, inferences or even insinuations which might have crept in complaint have many times ostensibly deceptive appearance but those cannot displace the need of material which would constitute sufficient ground for proceeding further. The assertions of this type even if associated with conclusions which are sought to be drawn by the complaint on the basis of certain inferences can hardly make out "sufficient ground for proceeding further".

20. Analysing the thrust of the said allegations and the factual aspects the question of quashing of this proceeding as canvassed on behalf of the defence can well be resolved at this point of time.

21. The principles and guidelines in this field are well settled which have been stated and re-stated by the Supreme Court in various decisions and a detailed discussion, therefore, may not be necessary. Reference to a few features and some of the ratios would suffice the purpose. The celebrated decision which prescribes almost as the foundation is reflected in *R.P. Kapur Vs. The State of Punjab*, wherein the Supreme Court while dealing with this subject carved out about three categories wherein it would be not only permissible but necessary to quash the proceeding where process has been issued, with the counterpart that in such cases the process need not be issued. The first relates to some legal bar for instituting a prosecution such as want of sanction. The second relates to the process of merely reading the complaint or the F.I.R. and taking their contents at the maximum on their face value and in their entirety it would become manifest that those do not constitute the offence alleged; this is more so, as it does not involve any process of appreciation of evidence in close allegations which constitute an offence as alleged but there is either no legal evidence adduced in its support or alternatively the evidence so adduced manifestly fails to prove the charge. A caution is levelled that this should not be equated with the case where there is legal evidence which only on its appreciation may or may not appear to support the accusation which process would involve appreciation and which cannot be done at the threshold. This obviously could be illustrative and not exhaustive. In *Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others*, wherein the same principles are reiterated and four illustrative categories are carved out for quashing the order of issuance of process which are more or less in consonance with those pronounced in *Kapur's* case. Thus the first relates to there being no case made out or there is no disclosure of essential ingredients of an offence which would become manifest even by mere reading of the complaint adduced. The second, which is an added illustration is such that the complaint

contains allegations which are patently absurd and inherently improbable so that no prudent person can accept it as a sufficient ground to proceed. The third of course refers to some fundamental legal defect such as want of sanction. The fourth relates to the vulnerability of the order of the learned Magistrate in issuing process if it is shown to be capricious and arbitrary being based either on no evidence or on irrelevant or inadmissible material. It also lays down a caution that the Court should not take upon it onerous obligation at that stage to get involved in fullfledged appreciation of evidence in all such respects. Therein even the documents produced by the defence were exhaustively considered and relied upon at the threshold which was not accepted when it was indicated that otherwise at that stage itself there would be full dressed trial.

22. In *State of Karnataka Vs. L. Muniswamy and Others*, this principle was once again reiterated though the Supreme Court highlighted that in a fit case the High Court would be fully justified in quashing the proceeding after examining the reasons assigned by the Lower Court. The Supreme Court thus held that the High Court would be entitled to go into the reasons given by the Sessions Judge and to determine for itself whether the order is justified or not and "in the exercise of the wholesome power u/s 482, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice requires that the proceeding ought to be quashed." The Supreme Court further indicated that for determining about sufficiency of grounds of proceed the Court possesses comparatively wider discretion than in the exercise of which it can determine the question whether on the record, if unrebutted, a conviction is reasonably possible or not though in *Nagawwa's* case cited (*Supra*) a distinction was sought to be made though it was observed that there was a very thin line of demarcation between the probability of conviction an assessment of a *prima facie* case.

The Supreme Court further had an occasion in *L. Muniswamy's* case itself to consider the allegations of a conspiracy and examine the sufficiency of material even for making a *prima facie* case when it was observed that a few bits here and a few bits there on which the prosecution proposes to rely are "woefully inadequate for connecting the respondents with the crime, howsoever skillfully one may attempt to weave those bits into a presentable whole". On facts it was indicated that there was no material on which any tribunal can reasonably convict the respondents for the assault though they were sought to be made liable by reason of alleged conspiracy. Then the Supreme Court eloquently observed that this is one of those cases in which a charge of conspiracy is hit upon "for the mere reason that evidence of direct involvement of the accused is lacking". A Division Bench of this Court had an occasion to consider this point in *Jacob Harold Aranha and Another Vs. Mrs. Vera Aranha and Another*, . The learned Judges levelled a caution indicating the limitations and the powers of the Magistrate at the threshold of a proceeding and observed that it is not the duty of the Court at that stage to find out whether the accused will be ultimately convicted or acquitted and the object of consideration of the merits of the case

could only be to determine whether there are sufficient grounds for proceeding further or not. It was also indicated that inherent powers u/s 482 of the Code of Criminal Procedure should be exercised sparingly with circumspection. However, even in the said ratio the learned Judges accepted the permissibility of quashing of such a proceeding in case of certain contingencies which have been reproduced from the decision in Smt. Nagawwa's case cited Supra. On the facts of the said case, however, the learned Judges felt that a prima facie case was fully made out which justified issuance of process. In *Sardar Trilok Singh and Others Vs. Satya Deo Tripathi*, , the complaint was quashed on the ground that even ex facie it disclosed only a civil dispute and not criminal offence at all and as such quashing of the complaint was necessary "to prevent abuse of the process of the Court".

23. In *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, a prosecution was launched against the Company, its Directors and the Manger for an offence under the Contravention of Food Adulteration Act. Quashing the process against the Directors the Supreme Court held that even the recitals of the complaint of the Food Inspector on their face value there was not even the whisper nor shred of evidence nor anything to show, apart from the presumption that any act was committed by the Directors from which a reasonable inference could be drawn about their vicarious liability and therefore it was held that no case was made out against them even ex-facie. As regard the Manager, however, it was held otherwise that he was directly incharge of the affairs of the company and having regard to the provisions of the said Act it was held that in the nature of his duties he must be in the knowledge of the affairs of the sale and thus would be vicariously liable. The Supreme Court reiterating the same principles laid down a further test that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then it becomes a justified case for quashing of the proceeding by the High Court in exercise of its inherent powers. In *Municipal Corporation of Delhi Vs. Purshotam Dass Jhunjunwala and Others*, , a similar argument was advanced where the Directors of the Company were being sought to be made liable for an offence under the Prevention of Food Adulteration Act where it was held that on the plain reading of the complaint a prima facie case has been made out as the allegations were not vague and those did implicate the Directors attributing active role played by them and their extent of liability. Thus the distinction on facts was made in the context of the ratio in *Ram Kishan Rohtagi's* case cited (Supra).

24. It is unnecessary to multiply the ratios since the underlined principles are on identical pattern.

25. These ratios make the position quite clear in theory though a difficulty may arise some time in the application of those principles to the facts of each case. Therefore, each case normally will have to be considered on its own merits. The various categories and the contingencies contemplated speak for themselves though the under-current is that there should not be involvement of any process

of appreciation of evidence or to undergo an exercise to find out whether the evidence is reliable or not and it would be necessary merely to read the contents of the complaint, still even on that basis there can be a case where the allegations fall short of making out a prima facie case or the necessary ingredients of offence are lacking or the material links to establish the nexus are very much missing. Equally there might be a case where there may be evidence but which cannot be styled as legal evidence such as hear-say evidence or wholly inadmissible evidence like a confession before the Police Officer or the matter may rest merely on conjecture, speculation and suspicion without any tangible material. Similarly there may be a case where there is evidence which however even ex-facie fails to prove the charge. It would also cover a case where there are apparent inconsistencies or absurdities writ large on the face value itself which cannot be accepted even ex-facie. Yet another category may exist where the allegations wholly make out a civil dispute though there is some distortion so as to give the colour of a criminal offence. In many of the cases in such categories, it becomes many times necessary to properly scrutinise the complaint to find out the real nature of the dispute, as it is not uncommon that some terminology are lifted from various provisions relating to offences or a camouflage is sought to be made in a shrewd manner by flourish of language and as put by the Supreme Court, there might be a skillful attempt to weave the bits into a presentable whole, and the recitals ostensibly tend to formulate a criminal offence though the reality may be otherwise and even prima facie on the mere reading of the complaint without involving any process of appreciation of evidence or of any finer shades, sometimes it may not become difficult to pierce through such gloss. In contrast, there might be a case where the so-called improbabilities or un-reliability or other doubtful quality of the evidence would come on the surface only at the trial and that too only on the basis of appreciation of evidence, which exercise cannot be taken at the threshold by the trial Court. It would also not be proper to process with the case with an initial distrust unless it is manifestly even ex-facie demonstrated otherwise, whereas a bulk of evidence which is apparently acceptable cannot be discarded on any spacious ground, otherwise the necessity of a full dressed trial will be displaced. Thus for instance, where there are several eye witnesses whose statements apparently need not be doubted, then it would not be proper to discard that evidence on some flimsy or assumed grounds at the threshold. Similarly in a given case a specific plea of the accused like acting in exercise of self defence or the plea of alibi; which is such that it does not get established ex-facie but requires presentation of proper evidence, will have to be tested on evidence which can be properly done at the trial and not at the threshold. It is not possible to put all these illustrations in a straight jacket so as to lay down a principle of universal application.

26. Reference in this context, though incidentally, to the statements recorded u/s 108 of the Customs Act and u/s 40 of FERA may not be out of harmony. Their admissibility in contrast to similar statements recorded by police officer is well

accepted and takes within its fold not only the statement of a witness but even that of a prospective accused. This would also cover the case of judicial confession recorded under Criminal Procedure Code which thus becomes admissible. As against the maker, if it is ex-culpatory, it has hardly any relevance; if inculpatory, it assumes the character of a confession whose admissibility as also the evidentiary value is not diluted much less wiped out at the inception, even if it is retracted. The exercise to consider other features about its voluntary and true nature and necessity of corroboration etc. involving the process of appreciation cannot be undertaken at the threshold while issuing the process. The confession of a co-accused however creates a different situation. If it is a mere statement, it has no relevance; if inculpatory and tarnishing the co-accused, it gets the label of confession of co-accused. Its character and value as also the prescribed mode of use are well reflected in *Haricharan Kurmi and another v. State of Bihar* AIR 1984 SC 1184 and reiterated subsequently also, where it is observed that it is no evidence in the strict sense u/s 3 of the Evidence Act though at the most it would be the evidence in generic sense and the Court cannot start with such confession of the co-accused but it must begin with other evidence and after it has formed its opinion with regard to the quality and effect of the said other evidence then and only then it is permissible to turn to such confession "in order to receive assurance to the conclusion of guilt the judicial mind is about to reach on the said other evidence" and thus it serves "to lend assurance to fortify the Court's faith in the belief and conclusion based on the other evidence", and thereby "to lend additional assurance to the conscience of the Court to the correctness of such a conclusion of guilt reached on the basis of other evidence". If it is retracted, it obviously creates further difficulties. This accepted principle can well be pressed even at the initial stage of issuing process, since its character, capacity, potentiality and mode of use would remain the same and it cannot get any higher status and get infused with any higher evidentiary value even at the threshold. Therefore, in a given case there is absolutely no other material whatsoever - direct, circumstantial or otherwise - except confession of a co-accused, then it would be manifest that as the confession cannot be the starting point while there is no material to begin with for reaching any conclusion whatsoever against the accused, not necessarily about his guilt as the final conclusion, but there being nothing which is capable of formulating such a conclusion may be at a later stage and in any event for reaching a prima facie conclusion at least about sufficiency of ground to proceed, there would be no question or occasion of looking into such confession to lend additional assurance because the basic and fundamental feature the correctness of which is required to be reassured is itself non-existent and therefore such a confession would lie in vacuum.

On the same parity, therefore, this ratio can be applied justifiably to the initial stage. Even if as held in *Kochra's case* (Supra) that such confession of co-accused can be used only to support other evidence when considered in this context, the situation remains the same as there is no other evidence which is

sought to be supported by such item, because such item by itself is not enough at all. Consequently, therefore, if in a given case there is absolutely not a single item of other evidence and the prosecution have no other material whatsoever to unfold at the trial, then the only item of confession of co-accused, which thus lies in isolation or vacuum, cannot by itself and all alone formulate sufficiency of ground to proceed against the accused and, therefore, unlike in the case of a confession against the maker, in an appropriate case the learned Magistrate can well be within the ambit of his powers and jurisdiction to examine that aspect at the threshold and may with justification refuse to issue process instead of mechanically acting otherwise, provided of course such features are brought to his notice. This, however, is obviously restricted only to such a case which relates wholly and exclusively to the only item of confession of co-accused without there being an iota of any other material. If, however, there are other items of evidence in existence then obviously a different consideration in the context of sufficiency of ground for proceeding would arise including the question of their adequacy and impact since all the items, even may be including such a confession, will have to be taken into account in association with each other. Everything would thus depend on the facts and circumstances of each case.

27. As rightly observed in *State Vs. Narain Singh and Another*, even in respect of a complaint filed by public servant the learned Magistrate cannot mechanically on the basis of averments in the complaint issue process. The requirement of making out a prima facie case and sufficiency of ground to proceed and to arrive at such a conclusion after application of mind very much exists even in respect of such complaints filed by public servants.

28. The Code of Criminal Procedure does envisage different stages in a proceeding and advisedly different terminology has been used for such stages such as - "sufficient ground for proceeding", "no case being made out, which if unrebutted would warrant into conviction", "there is ground for presuming that the accused has committed an offence", "the charge is groundless", etc. etc. and equally distinction is sought to be made in respect of a case instituted on the police report and the one on a private complaint, which distinction would be obviously because in the former case there is a prescreening by the police machinery after collecting the material and before sending the charge-sheet which may not be available in the later case.

29. All the aforesaid discussion in the context of various ratios considered herein above would harmoniously suggest that a caution levelled in those ratios about the limitations of the inherent powers while dealing with such proceedings by this Court and restricted field available before the trial Court while considering the question of sufficiency of ground to proceed along with the normal requirement to allow the proceeding to reach the logical destination need be present while dealing with such matters. However, notwithstanding this caution, the permissibility to quash a proceeding and the order of issuance of process even under the inherent powers or jurisdiction for the learned Magistrate concerned

for not issuing process is well recognised in firm manner. In that field it would be necessary to undergo the exercise to find out if a proper and prima facie case has been made out or not on the touch stone of those guidelines and the various illustrative categories carved out. The concept of prima facie case or sufficiency of ground contains assorted factors. If a case on facts has been made out which would manifestly indicate that the order of issuing process is wholly unjustified then the Court would step in even under the inherent powers to rectify the error in the interest of justice and also to prevent any further abuse of process of law or avoid waste of public money, energy and time. Just as a genuine litigation with all the requirements of making out a prima facie case being available on the face of the record cannot be short-circuited at the inception by embarking on an onerous obligation of appreciation as is done in the full dressed trial, equally a litigating which on the basis of the material as it stands in the context of these guidelines deserves to be discouraged, cannot be allowed to continue in the larger interest and the Court in that behalf cannot be a mere spectator or an onlooker. The harmonious blending of these considerations would be the outcome of the discussion of the said ratios.

30. Applying these principles to the facts of the instant case, it becomes manifest that there absolutely no sufficient grounds to proceed against petitioner much less insofar as the complaint filed against him, sanction obtained and the process issued, which are filed for the offences under the Customs Act. I have already indicated the nature of the evidence which very much falls short. In order to get satisfied I had called for and perused the statements of some of the accused including accused Nos. 5, 6 and the present petitioner. In so far as the statement of the petitioner is concerned, and which is the only relevant document which can be taken at the maximum at this stage, it becomes clear that in the first statement recorded on 1st of April 1985 he has not admitted any incriminating item against himself. According to that statement, he was just an employee acting as the counter clerk in the office of Sky Jet Company at Bombay. When he went to the hotel he was not told anything about the mission of accused Nos. 5 and 6 nor was he knowing as to how much amount was there in the suitcase. In the subsequent statement recorded on 4th of April 1985 however he admitted that he went to the room in question on instructions from accused No. 6 on 25th of February 1985 and he was guarding the suit cases containing Indian Currency in the absence of accused No. 5, though he did not know how much was the said amount. He then stated that he knew that accused No. 5 had presumably gone out of the hotel to purchase Foreign Currency. In the hotel he had attended incoming calls may be from accused No. 1 who used to inquire about accused Nos. 5 and 6 which the witness felt may be in connection with purchase of Foreign Currency. He further admitted that on the asking of accused No. 5 he paid to one Millan more than Rs. 4,00,000/- of Indian Currency presumed as the balance for purchase of Foreign Currency. This according to him occurred on 10th of March 1985. Even the statements of the co-accused are more or less on the same lines though one of the co-accused has added that the Indian Currency

that was in the suitcase was counted in the presence of the petitioner though the other accused does not support him on that count.

31. Taking these statements and especially the statement of the petitioner who is himself the author of that statement it becomes clear that it at the most would post him with the knowledge that Foreign Currency was being purchased in Bombay for which purpose Indian Currency was brought by accused Nos. 5 and 6 and may be that the accused No. 1 was interested in that transaction. He is supposed to have paid the balance on 10th of March 1985. Significantly his statement itself indicates that between 10th and 15th of March though one or the other two accused had come to the office they had to talk with him and on the 19th of March though according to his statement accused No. 1 had visited the Travelling Agency's office, he had not met him at all. The statement, therefore, makes it clear that he was not at all knowing the crucial aspect either prior to 25th or subsequent thereto nor was he contacted by any of the accused including accused No. 1 and it is further demonstrated that he was never taken in confidence any time after 25th of February much less about the object behind purchase of the Foreign Exchange. He had not gone to Ahmedabad at any relevant time nor was he contacted by any of the accused in Bombay at any relevant period including the date of the main incident even though he was working in Bombay's office of the said Travelling Agency. His association and doing certain overt-acts fall in isolation in one incident only. All these features make it abundantly clear that he had absolutely no knowledge about the said object and also of the event that occurred on the 19th as he was not contacted by any of the accused even though he was in Bombay at that time. As discussed earlier, his capacity was just an employee who was to obey the directions and that too employed in the Travelling Agency with which accused Nos. 1 and 4 were associated and not in the personal employment of accused No. 1 at Ahmedabad as he was along in Bombay. He was never taken by accused Nos. 5 and 6 along with them when they were alleged to have contacted Millan and others for the purchase of Foreign Exchange and in fact there are compelling elements to suggest even from all these statements that he was deliberately excluded even from getting any knowledge or an inkling about the object behind the said purchase and as to what was to be done about the same. His liability, therefore, at the most would be considered regarding the overt-acts alleged against him on 25th of March 1985, vis-a-vis acquisition of Foreign Exchange and the prosecution want to contend that he was knowingly concerned with the same which is controverted by the learned defence counsel.

However, since that controversy by the learned defence counsel. However, since that controversy need not be resolved in this proceeding, it follows that at least insofar as the petitioner, whose case stands absolutely on different footing even than that of accused Nos. 5 and 6, even his participation in those acts are in isolation and may be relating to a separate chapter and taking the worst even relating to a separate conspiracy, which however, is very stoutly denied by Shri Desai. On similar pattern the charge of conspiracy was negated when the

Supreme Court observed in Muniswamy's case (Supra) that the charge of conspiracy is hit upon for the mere reason that evidence of direct involvement is lacking. Case of the petitioner is wholly distinct than that of other accused including accused Nos. 5 and 6. To discard the allegations of main conspiracy against the petitioner, no process of appreciation of any finer shades is involved. It is manifest even on the face of the record. Hence its discarding at this stage itself would be certainly permissible. This is being mentioned only to highlight the fundamental deficiency in the prosecution case that this event of 25th of February 1985 even accepted on the statement of the petitioner which has been already retracted, cannot make him a co-conspirator in the so-called single general conspiracy and therefore cannot make him liable even prima facie for sharing any common design or common object which was according to the prosecution to export the Foreign Exchange in the face of the prohibition. At the maximum, these acts would tend to post him with the knowledge about acquisition of Foreign Exchange in Bombay on that day by accused Nos. 5 and 6 and even doing the said overt-acts with that knowledge. According to Shri Gupte, this would make him knowingly concerned with acquisition of Foreign Exchange.

As stated, the complaint, the sanction and the issuance of process all are concentrated and even restricted to the offences under Customs Act only. It is accepted that as yet no complaint has been lodged or no proceeding has been initiated for any offence under FERA, though Shri Gupte, submits that the Department does intend to move in that behalf. Even the order of sanction indicates that the investigation for the allege offences under FERA is still in progress. The petitioner is not called upon to meet any complaint or process for any offence under FERA. If these facts are considered in proper perspective it would become justified to observe that the statement of the petitioner cannot be styled as a confession as such vis-a-vis the offence complained of since the confession is always the amalgam of clear admission of guilt. Significantly even the statements of accused Nos. 5 and 6 and for that matter even that of accused No. 1, do not implicate the petitioner even inferentially vis-a-vis the main offence nor do they tend even to post him with the requisite knowledge of the main object. Therefore, even if those statements are considered, still that does not improve the situation. Shri Desai, therefore, posed a question whether even those statements of accused Nos. 5 and 6 could be styled as containing confession regarding the main offence which however, need not be resolved in this proceeding. As stated, even the statements of accused Nos. 5 and 6 and also of accused Nos. 1 who are co-accused are considered in their entirety against the petitioner also along with his own statement and the other material, which may be in the shape of statements of other persons such as Millan, etc., the conclusion remains the same. Those statements and in particular that of accused Nos. 5 and 6 refer to the same acts of participation as disclosed by the petitioner such as watching the suit-case, answering the phone calls and subsequently paying Indian Currency to Millan. Two things which are being added are that accused No. 1 enquired on phone from Ahmedabad with the petitioner whether

Foreign Exchange was purchased by accused No. 5 and 6 and secondly the Indian Currency in the suit-case was counted in the presence of the petitioner.

All the said statements of the co-accused therefore stop at that insofar as the petitioner is concerned. Further apart from not making his participation in any manner with any other events either at Ahmedabad or at Bombay those statements on the contrary very strongly indicate that the petitioner was deliberately excluded from all such other activities including the main incident, even though he was all along working in Bombay office of the Agency and some of the accused used to visit that office. The statements of Millan and other persons may at the most confirm that the balance amount was paid by the petitioner for the purchase of Foreign Exchange by accused Nos. 5 and 6. The most vital link even inferentially is bliss-fully missing and thereby reinforcing the conclusion that the acts done by the petitioner were in isolation and his participation would be at the maximum with the knowledge that accused Nos. 5 and 6 were to purchase or acquire Foreign Exchange in Bombay on that day. The main object, its knowledge, much less participation therein are not even inferentially reflected in those statements. Therefore, even if these statements are read and relied upon at this stage against the petitioner also, still the situation remains unchanged. A distinction about the likelihood of an offence under FERA and the formulation of an offence under the Customs Act in the context of these facts is quite real. As stated, surprisingly the Customs have not recorded his statement u/s 108 of the Customs Act nor had they arrested him for any offence under the Customs Act. Admittedly his statement was recorded u/s 40 of FERA though he has retracted the same and he has been arrested only by that agency though it is the Customs Department which have filed the complaint against him for the offence under the Customs Act while the Wing under the FERA have so far remained inactive in the matter of proceeding against him. If this is the position then on the basis of these guidelines the case squarely falls in more than one categories, such as the recitals in the complaint by themselves do not constitute the offence alleged or that the said recitals and the nature of evidence in support thereof manifestly fail to prove the charge or fail to make out the necessary ingredients or requirements of the alleged offences and all this becomes apparent without embarking on any process of appreciation of evidence much less of finer shades. It so becomes apparent even on the surface on the mere reading of the complaint. This inescapable conclusion is writ large on the face of the record. I may observe in this context that leaving aside all the controversy about the statements of all accused including the petitioner and their evidentiary value, but irrespective of all such statements, accepting these items of overt-acts on the part of the petitioner and his involvement therein as if it is the prosecution case based on the evidence as such, on par with any other good piece of evidence, still this conclusion becomes inescapable. It would, therefore, be sheerly an abuse of process of law as also waste of time, money and energy to continue the proceeding as it stands against the petitioner especially when it is manifest that no prima facie case has been made out nor are there any sufficient

grounds to proceed against the petitioner. This is preeminently a fit case wherein the Court is called upon to step in to prevent the mis-carriage of justice. It is clarified that any reference to the formulation of an offence under FERA in any prospective proceeding that may be filed has been made in the context of the controversy about making out sufficient ground to proceed against the petitioner in the proceeding arising out of the complaint as it is filed under the Customs Act and it cannot be confused with anything more as an expression of opinion in that field, since everything as yet is in vacuum as there is only a statement on behalf of the Department that a prosecution under FERA is under contemplation and if that is ultimately filed, as to what would be the impact of the items of evidence that are available would be a matter to be examined at the appropriate stage. Recording of any finding either way in that respect which may tend to cause prejudice to either side is required to be deliberately avoided in this proceeding. Any attempt to do so at this stage would be sheerly an exercise in speculation.

32. The learned trial Magistrate no doubt undertook the industry to go through these statements in the complaint and decided to record a speaking order as he was obviously addressing himself to the basic question about the propriety and legality of issuing process; still except reproducing the gist of the allegations as reflected in the complaint he has not applied his mind as to whether a case for issuance of process has been made out against the petitioner. The deficiency, therefore, is apparent. This, therefore, furnishes an additional ground since as per the dictum in various ratios this Court would be justified in examining and assessing the reasons assigned by the learned trial Magistrate and the material makes it further clear that there is no proper application of mind or at least the impugned order has been recorded when there is wholly inadequate material even in ex facie field to support that conclusion and the order. This by itself falls in one of those principles. From that point of view also the impugned order is not only vulnerable but deserves to be set aside even exercising the inherent powers under the Code.

33. All said and done, even independent and irrespective of all these considerations and discussion, on the basic premise of propriety, the proceeding deserves to be quashed against the petitioner who is a mere employee and acted in that capacity only and that too lent his services religiously and faithfully as directed without anything more. There is no charm in asking him to go back to the trial and to extend the benefit to him at a later stage, even though the said inference and the benefit is available in his favour at the threshold itself. The contention on behalf of the prosecution that the petitioner can press for discharge at the later stage of the proceeding is too rigid and artificial to be accepted. This is also not one of those cases where the prosecution could contend that the accused can well bring all these features to the notice of the trial Court and get appropriate order of discharge as it can be done at any stage of the proceeding, because herein it is not as if that the Magistrate merely issued process without considering anything, but the learned Magistrate very much addressed himself to that aspect as he himself wanted to find out whether it is a

case for issuance of process and therefore he recorded a speaking order. This, therefore, furnishes additional ground to justify interference at this stage itself.

34. The net result, therefore, is that the proceeding as against the present petitioner deserves to be quashed since the order of issuance of process against him is wholly un-justified.

35. Rule made absolute.

36. The impugned order dated 30th of January 1986 recorded by the learned Trial Magistrate in Case No. 28/CW/1986 issuing process against the petitioner (original accused No. 7) only, is set aside and the proceeding only against the petitioner-accused No. 7 is quashed and he is discharged.

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