(2010) 02 BOM CK 0013

In the Bombay High Court

Case No : Criminal Writ Petition No. 421 of 2010

V. Rama Rao APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 10-02-2010

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 482
Customs Act, 1962 — Section 108, 132, 135(1)
Penal Code, 1860 (IPC) — Section 120B

Citation : (2010) 254 ELT 241

Hon'ble Judges : S.C. Dharmadhikari, J

Bench : Single Bench

Advocate : Niranjan Mundargi and Vijay Rode, for the Appellant; D.N. Salvi and S.R. Shinde, APPs, for the Respondent

Final Decision : Allowed

Judgement

S.C. Dharmadhikari, J.—Rule : Respondents waive service. By consent, Rule made returnable forthwith.

2. The Petitioner, who is a senior citizen, aged 70 years is arrayed as an Accused (Accused No. 3) in the complaint filed by Respondent No. 1 in the Court of Chief Metropolitan Magistrate, Esplanade, Mumbai, being Case No. 330/CS/1992.

3. The offences alleged are punishable u/s 135(1)(a), 132 of Chapter XVI of the Customs Act, 1962 r/w Section 120B of I.P.C.

4. He applied for discharge from the proceedings and that application having been rejected by the impugned order that he has approached this Court invoking its jurisdiction under Article 227 of the Constitution of India r/w Section 482 of Cr.P.C.

5. Mr. Mundargi, learned Advocate appearing on behalf of Petitioner/Accused contended that the Petitioner is dragged in a Criminal Case which is pending on

the file of the Metropolitan Magistrate for past more than 17 years. The Petitioner is Accused No. 3. On the facts as set out in the complaint itself, it is apparent that the Petitioner is not guilty of the offence alleged. The role of the Petitioner is extremely limited inasmuch as he was a non-executive Director of Accused No. 1 M/s. P.J. Pipes & Vessels Ltd. The only role attributed to him was he had a Power of Attorney in his favour from Accused No. 1. However, the Petitioner is neither a shareholder nor has any pecuniary interest in the company. Further, he has absolutely no concern with the day-to-day business and is not responsible therefor. He was not concerned with the transaction of sale of duty free imported raw materials and/or in applying for two duty free import licenses in question. The Petitioner had not subscribed to any of the declarations made to the Customs Authority by the Company. In such circumstances, and when the First Respondent recorded his statement u/s 108 of the Customs Act and issued letters dated 18th April, 1991/25th April, 1991 calling upon the Petitioner to show cause as to why a penalty of Rs. 2.5 lakhs be not imposed, that the proceedings ended in the order being made by the Adjudicating Commissioner of Customs, Mumbai dated 26th November, 1991. However, the order of the Adjudicating Commissioner was challenged by the Petitioner by filing an Appeal to the Customs and Central Excise Service Tax Appellate Tribunal. The Appellate Authority, by order dated 26th August, 2003 set aside the order of the Adjudicating Commissioner imposing penalty on the Petitioner. That order of the Tribunal/Appellate Authority has not been challenged by the First Respondent. It has been allowed to gain finality. Even the amount deposited as a precondition has been refunded to the Petitioner.

6. In such circumstances, on the same set of facts and allegations, the Criminal Proceedings cannot continue. Their continuation is an abuse of the process of the Court in so far as the Petitioner is concerned. Further, the Petitioner would be unduly harassed if he is to face criminal proceedings. It is submitted that the standard of proof in Adjudication proceedings is less rigorous than that of the criminal proceedings. The adjudication proceedings could have been decided on the basis of preponderance of probabilities. However, when in the adjudication proceedings the department could not bring home the charge and allegations are not proved, then, a different result or outcome is not possible in Criminal proceedings. Therefore, even if both proceedings can continue, yet, in this peculiar case this Court should exercise its inherent powers and quash the proceedings.

7. Mr. Salvi, learned Advocate appearing on behalf of the Respondents on the other hand contended that the Hon''ble Supreme Court has already held that adjudication proceedings and criminal prosecution are two distinct matters. The criminal proceedings are not liable to be quashed merely because the adjudication proceedings have come to an end or resulted in a favourable order. He submits that if both can continue parallel to each other and the law being clear, then, this is not a fit case for interference in the inherent jurisdiction of this Court. Moreover, prima facie, the Court below has found that the Petitioner had

played a role in the transaction. He was involved in signing of ''H'' form. He new the details of the transaction. Therefore, his innocence cannot be presumed. These are proceedings which must continue in public interest and therefore, the Petition be dismissed.

8. The Petition has been argued on the basis of the Judgment rendered by this Court in two Writ Petitions i.e. the case of Raichand C. Jain v. Surendra Prasad reported in AIR 2006 Bom. 411 and in the case of Manoj Kumar Sarangi v. Dy. Commissioner of Cus. (P) R. & I. reported in 2007 (219) E.L.T. 114 (Bom.). Both decisions have been rendered by me and in the second decision I have taken note of identical contention of Mr. Salvi relying on the Supreme Court decision in the case of Standard Chartered Bank and Others Vs. Directorate of Enforcement and Others, . This decision has also been noted by me. In Manoj Kumar Sarangi (supra) this is what is held by me:

25. The present case is based upon self-same allegations. All that is alleged is that the charge is under Customs Act and not under I.P.C. but Prevention of Corruption Act. However, the acts of omissions and commissions, if any, are the same. The transaction is the same. The documents are also the same. It is in this context that the adjudication proceedings assume some significance. Although an order was passed by the Commissioner of Customs Act (Preventive), Mumbai, that order was impugned by the petitioner before the Tribunal by filing an appeal. The Tribunal has after referring to the allegations in the show cause notice, the explanation thereto of the parties so also the documents on record clearly observed that no case of whatsoever nature is made out to proceed against the petitioner. In fact, the observations are that there is no evidence against the petitioner. The matter was made worst by the Commissioner in those circumstances inasmuch as he did not permit cross-examination of the handwriting expert. Thus, there is substance in the contention of Mr. Mundargi that paragraph 10 of the order passed by the Tribunal would show that further continuation of the proceedings before the Magistrate in the subject private complaint is nothing but an abuse of the process of the Court.

26. There is no necessity of entering into the larger controversy inasmuch as Mr. Mundargi would contend that the authorities/ruling relied upon by Mrs. Kejriwal is not for the proposition that continuation of such proceedings cannot be made subject matter of a petition u/s 482 of the Code of Criminal Procedure r/w. Article 227 of the Constitution of India, while it may be true that both proceedings being independent and their continuation is not bad in law. Their continuance cannot also be invalid and illegal in all cases, but, if it is demonstrated that their continuance would be an abuse of the process of the Court, then, in the interest of justice, the inherent powers of this Court can always be invoked and applied.

27. I had an occasion to consider similar controversy in the case of Raichand C. Jain v. Surendra Prasad reported in 2006 (3) AIR Bom R 411 wherein, in paragraphs 20 and 24,1 had observed thus:

20. However, as has been stated above, it is not as if both proceedings cannot go oh. The nature of the proceedings has also been noted and the difference spelt out in the Supreme Court decision referred to above. It is equally true that at the stage where the criminal proceedings are today, namely, framing of charge, it cannot be said that their continuance further is impermissible in law. However, it is also well settled that if the continuation of the criminal proceedings after final conclusion of adjudication proceedings is an abuse of process of the Court, then certainly powers u/s 482 of Cr.P.C can be exercised. Precisely, this has been done in the case of U.N. Mehta by a learned Single Judge of this Court. There the charges were under the FERA. In mat case, adjudication proceedings were in favour of the applicant before this Court. The Department did not carry the matter further and allowed the order of the Special Director to gain finality. In these circumstances, after noticing the judgments referred to above, the learned Single Judge has quashed the criminal proceedings. The proceedings have been quashed after noticing the fact that the Department has accepted the finding that the petitioner before this Court has not admitted to transfer of the foreign currency. In doing so, the learned Single Judge has referred to a decision rendered by Delhi High Court to this effect that once the Department does not succeed in proving the charge when the degree of proof is not as rigorous as criminal trial, then an attempt to foist criminal law, when, the degree of proof is more strict cannot be understood.

24. It is not the case of Shri Salvi that in exercise of inherent powers of this Court the reliefs prayed for cannot be granted. He does not dispute that provision of FERA apart, in exercise of such powers this Court can quash the criminal proceedings if their continuation amounts to an abuse of the process of the Court, further, he does not dispute that they can be exercised to secure ends of justice. Of course, these powers are to be sparingly exercised. A case must be made out for exercise of the same. In my view, applicants have out such a case. It is not as if materials other than those before the Adjudicating Authority are available. The nature and degree of proof in a criminal trial being strict and more rigorous, then, in the present facts and circumstances, allowing criminal prosecution to continue is not in the interest of justice. The scope of inherent powers of this Court is by now well settled. The principles in that behalf have been reiterated in a decision reported in Zandu Pharmaceutical Works Ltd. and Others Vs. Md. Sharaful Haque and Others, of this decision reads thus:

8. Exercise of power u/s 482 of the Code in a case of this nature is the exception and not the rule. The Section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of Court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that

may possible arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All Courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non protest" when the law gives a person anything it gives him that without which it cannot exist. While exercising powers under the section, the Court does not function as a Court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the Section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone Courts exist. Authority of the Court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the Court has power to prevent abuse. It would be an abuse of process of the Court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers Court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of Court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the Court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether an offence is made out even if the allegations are accepted in toto.

28. In the light of the said provisions noted above, in my view, considering the fact that the petitioner has been exonerated in adjudication proceedings where the rigour is not what is required in the criminal proceedings, then, this is a fit case where regular criminal case should be quashed. The standard of proof required in the criminal case is much stronger and rigorous. In adjudication proceedings itself, the respondents could not bring home the charge. It is not now possible for the prosecution to prove the case against the petitioner, more so, in the light of its report in the C.B.I. Special case. In such circumstances and when the participation and role of the petitioner in the entire transaction is in grave doubt, then, interest of justice would be sub served by holding that continuation of the subject criminal proceedings is an abuse of the process of the Court. The prosecution having not been able to succeed in adjudication proceedings and the facts of the present case being peculiar inasmuch as the C.B.I. Special Case is also dropped, then, forcing the petitioner to go through a trial would not be in the interest of justice but would be a clear abuse of the process of the Court.

9. Applying the principles laid down in these decisions to the facts of this present case would demonstrate that in this case the show cause notice was issued. The

show cause notice alleges the same violations as are set out in the complaint before the Criminal Court. Upon the Petitioner appearing before the Adjudicating Authority and placing the records, the Adjudicating Authority was not satisfied with his explanation and proceeded to pass an order imposing penalty. That order had been challenged by the Petitioner before the Tribunal and the conclusion recorded by the Commissioner of Customs has been set aside. The allegations are that the Company was issued the Special Imprest licences, details of which are set out in the order of the Commissioner. They were for import of total quantity of 547.962 MT (approx.) of Stainless Steel Plates, imported material to be utilised for manufacture of thread protectors for pipes. The Company imported from September, 1989 to February, 1990 this large quantity of stainless steel plates. It claimed and was granted benefit of exemption from duty under Notification No. 513/86 dated 30th December, 1986. The Notification allows import of raw materials and components required for manufacture of goods supplied to ONGC.

10. On certain information, the Directorate of Revenue Intelligence investigated the matter and found that the thread protectors supplied to ONGC were not made of stainless steel and the goods supplied to ONGC were ordinary carbon steel thread protectors. The investigation revealed that out of the imported quantity of 547.962 MT, the Company sold 276.928 MT in the open market and rest of the quantity is seized by DRI. That is how, the show cause notice was issued to the Company. The show cause notice resulted in a finding of the Commissioner of Customs that there is a violation of the duty liability by the Company. The demand on the company therefore, was confirmed. Thereafter, it is a common ground that the Commissioner of Customs passed an order in adjudication proceedings against the present Petitioner as well. The Petitioner had approached the Tribunal and the Tribunal had passed an order in favour of the Petitioner, copy of which order is annexed to the Petition paper-book as Annexure "C" pages 78-79. The Tribunal''s order records as under:

(3) The contentions of the Counsel for the appellant are these. The appellant at the relevant time was a Director looking after import and exports of the company. He was not aware that the imported goods were not utilised in the manufacture of thread protector for casing by supply to Oil and Natural Gas Corporation this being the basis upon which the exemption of duty was claimed and granted. The appellant had not even signed the declaration in the bill of entry filed for the import of the goods. The orders for the goods were placed by Vohra, who had also signed the application to the licensing authority for advance licence. There was no material to implicate the appellant in the wrongful disposal of the goods. The only reason the Commissioner has advanced for imposing penalty on the appellant that he has signed on part H of the DEEC book certifying that the imported goods had been used in the manufacture of the thread protectors. This was done by the appellant because he saw, records showing supply of thread protectors to ONGC and had no means of knowing that the goods which had been supplied were made out of locally processed steel. The

departmental representative emphasises this last aspect and says that this shows the appellant''s involvement.

(4) In our main order in which the facts of the case we have noted that while diverting the goods to the local market, the importer had supplied to ONGC the thread protector made out of indigenously material. The appellant was not a metallurgist or otherwise qualified in this regard. Therefore, unless it can be shown that his certification that the imported goods were used for making the thread protector supplied to ONGC was made despite his being aware that this was not the case, that fact cannot be held against him. It is quite possible as is contended on his behalf that he went by the invoice showing supply of thread protectors of the ONGC without being aware that they were not made out of the imported steel. There is no other evidence implicating anything in the activity which has resulted in the demand of duty or liability to confiscation of the goods. There is nothing to show that he was aware of the plan by Vonhra in disposal of the goods in the market. No financial benefit seems to have flown to him his earnings not more than Rs. 5,000/- per month salary that he got. In these circumstances, we do not think that a case has been made out for imposing penalty on him.

(5) The appeal is accordingly allowed and the impugned order set aside to that extent.

11. It is pertinent to note that the Department allows this order of the Tribunal to gain finality. The Petitioner had applied for discharge earlier but his application was not considered and granted. He approached this Court and he was granted liberty to apply on the conclusion of the proceedings in adjudication. That adjudication proceedings concluded by the Tribunal''s order dated 26th August, 2003 and pursuant to the liberty granted, a discharge application dated 7th October, 2003 was filed. The Magistrate concerned has rejected this application by his order dated 10th September, 2009 (impugned order).

12. From a perusal of the order passed by the Magistrate, it is apparent that he has relied upon the same facts and allegations as are incorporated in the show cause notice. He has concluded that there is sufficient evidence in the Adjudication proceedings against Respondent Nos. 2 and 3 at this stage. However, even if the prima facie material in Adjudication proceedings against the Applicant has been referred and that is nothing different than what is made part of the show cause notice and adjudication proceedings. In the instant case, while the settled principles are applicable, yet, this Court can exercise its inherent jurisdiction to quash the proceedings if they are an abuse of process of the Court. The powers are exercised sparingly if it is found that in the proceedings where the standard of proof is less rigorous, the department could not bring home the charge, then, I do not see on the same allegations against this Petitioner, the department can succeed in the criminal prosecution. The only role played by a nonexecutive Director like the Petitioner, who was a salaried person is of the signing of the documents and more particularly, a form and the power of

attorney. However, the Adjudicating Authority has observed that this much is not enough to saddle him with a penalty and by referring to the entire transaction, the Tribunal has turned down the pleas of the department, then, I do not see how the Petitioner can be compelled to face the criminal prosecution.

13. For the reasons that are assigned in the order of the Appellate Authority, I am of the opinion that allowing the Criminal Prosecution to continue against the Petitioner would be an undue harassment and abuse of process of the Court. For securing the ends of justice, this criminal prosecution must be quashed as against the Petitioner and he should be discharged therefrom.

14. Accordingly, the Petition succeeds. Rule is made absolute in terms of prayer Clause (b).

15. At this stage, Mr. Salvi prays for eight weeks'' time to challenge this order in the higher Court. In the criminal prosecution, the charges are yet to be framed and therefore, Mr. Mundargi opposes this request and submits that the Petitioner cannot be compelled to appear when the proceedings are quashed. Taking into account the details of the transaction and the peculiar facts and circumstances, the prayer for stay is refused. Certified Copy is expedited.

