SUPREME COURT OF INDIA

Air Customs Officer IGI New Delhi

Vs.

Pramod Kumar Dhamija

Crl.A.No.123 of 2016

(V.Gopala Gowda and Uday U.Lalit,JJ.)

15.02.2016

JUDGMENT

Uday U.Lalit, J.

(Arising out of the SLP(Crl.) No. 7767 of 2011)

1. Leave granted.

2. This appeal challenges the judgment and order dated 04.1.2011 passed by the High Court of Delhi at New Delhi in Crl. M.C. No.460 of 2009.

3. That the facts leading to the filing of this appeal are as under:-

> (A) On the basis of specific information, AIR Customs Officers (Preventive) at IGI Airport, New Delhi, on 09.07.1996 recovered and seized from meal trolleys of the aircraft of Lufthansa Airlines flight from Frankfurt to Delhi, 184 gold biscuits of ten tolas each, weighing 21454.400 grams valued at Rs.1,09,84,652/- concealed in the meal trolleys by two passengers, named Varyam Singh and Ranbir Singh. In their statements, Varyam Singh and Ranbeer Singh admitted the recovery and seizure of gold and named other persons involved in the incident. Varyam Singh, inter alia, disclosed the name of one Pramod Kumar i.e. the respondent herein who invested the money with him in the seized gold as well as the gold smuggled on earlier occasions.
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> (B) Varyam Singh further stated that on 6.07.1996, Ranbeer Singh and he went to Dubai where the respondent delivered two packets of gold; that they went to Frankfurt; that in the flight from Frankfurt to Delhi with the help of Ranbeer Singh, he put both the packets in dry ice trays and as per pre¬arrangement these packets were to be removed and delivered to him near Moti Bagh Gurudwara by the catering staff and that he had agreed to pay Rs. 50,000/- for this job to that person; that he had to hand over this gold to the respondent and in return he was to get Rs. 2,00,000/- out of the profit; that his share of investment in the gold seized on 9.7.1996 was Rs.Thirty

Two lacs and that the balance was invested by the respondent. He admitted that earlier he had gone to Frankfurt via Dubai and come back to Delhi on six occasions and brought gold in the same manner. The authorities recorded the statements of all the persons involved. However, the statement of the respondent could not be recorded as inspite of numerous summons, he did not cooperate with the investigating authorities and remained in hiding.

(C) The Commissioner of Customs, Delhi accorded sanction on 04.09.1996 for the prosecution of the respondent, Varyam Singh, Ranbeer Singh and four others and accordingly Complaint No. 66/1/96 was filed in the Court of ACMM, New Delhi. The respondent was declared "proclaimed offender" by the Ld. ACMM, New Delhi in the subject case.

(D) In the meantime adjudicating proceedings were initiated pursuant to the show cause notice to the respondent. Order in Original No. 66/99 dated 30.09.1999 was passed by the Additional Commissioner of Customs, IGI Airport, New Delhi imposing penalty of Rs.15 lacs on the respondent. Following observations in the said order are noteworthy:-

"In response to summons Shri Kanwar Bhan appeared before the Customs authorities and he in his further voluntary statement dated 30.8.1996 recorded under Section 108 of the Customs Act, 1962, stated that he was shown the record of details of call charges of Mobile phone number 9811028643 obtained from Essar Cell Phone mobile phone services, that on 21.04.1996 and 27.04.1996 telephone calls were made to telephone number 6914037; that he had been told that telephone number 6914037 belonged to Shri Varyam Singh and was his residence number and who had been arrested for smuggling of 184 gold biscuits. On being asked about that he stated that neither did he know any person by name of Shri Varyam Singh nor his telephone number on being asked about as to how telephone calls were made to telephone number 6914037 on 21.04.1996 three times and one time on 27.04.1996 from his mobile phone, he stated that he did not know the exact date but in the month of April, 1996, his younger brother Shri Pramod Kumar came to Delhi from Dubai as his mother was seriously ill, it might be possible that Shri Pramod Kumar had made four calls from his (Kanwar Bhan) mobile phone to telephone number 6914037 belonging to Shri Varyam Singh as he did not know Shri Varyam Singh and his telephone number."

(E) The aforesaid order dated 30.09.1999 was carried in appeal and the Commissioner of Customs (Appeal) vide his order dated 25.01.2008 set aside the penalty imposed on the respondent. The Appellate Authority was of the view that there were two persons having same name i.e. Pramod Kumar, one in Dubai and the second being the respondent and that beyond the statement of the co-accused there was no material on record. During the course of this order it was observed as under:-

"If the investment was made by Shri Pramod Kumar of Dubai, then it cannot be linked to the appellant. The department has not made Shri Pramod Kumar of Dubai a party in the case and nothing is on record to suggest that efforts were made to trace and identify Shri Pramod Kumar of Dubai and how the telephone number in Dubai i.e. 531228 is linked to the appellant. Thus there is only the lone statement of Shri Varyam Singh alleging the involvement of the appellant and is not corroborated by the statement of any other person or by any documentary evidence. On the other hand the claim of the appellant that he had left India on 06.09.1994 and since then he has not visited India again is corroborated by the statements of various persons tendered under Section 108 of the Customs Act 1962 and also by documentary evidence i.e. copies of his passports. No other person involved in the case has mentioned anything about the appellant. Thus the statement of Shri Varyam Singh who himself accepted as evidence whereas the claim of the appellant is supported by way of corroborative statements under Section 108 of the Customs Act 1962 and documentary evidence is acceptable as credible evidence in his favour. Moreover the appellant has not laid any claim on the impugned gold under seizure in this case. Keeping the above in view the finding of the Adjudicating Authority about the appellant are not fair, legal and based on facts and hence the penalty imposed on the appellant is hereby set aside."

(F) Based on the observations and findings rendered in the aforesaid order dated 25.01.2008, a petition under Section 482 of the Criminal Procedure Code being Crl. M.C. No. 460 of 2009 was filed on behalf of the respondent in the High Court of Delhi at New Delhi. It is relevant to note that in the petition itself two addresses of the respondent were given, one of Dubai and the other of Delhi. The affidavit in support of the petition was filed by none other than Shri Kanwar Bhan, the brother of the respondent. It was submitted on behalf of the Department that the respondent had not joined investigation and as such the instant petition did not deserve any consideration and that there were not two Pramod Kumars but only one person having two addresses. The High Court by its judgment and order under appeal, allowed the petition and quashed Complaint No.66/1/96 pending before the Additional Chief Metropolitan Magistrate, New Delhi. It was observed by the High Court as under:-

"The entire evidence sought to be relied upon by the respondent department against the petitioner is the same, that was before the Appellate Authority and since the Appellate Authority had considered the entire evidence and come to above conclusion, I consider that no useful purpose would be served by continuing with the prosecution against the petitioner before the trial court."

4. The exoneration of the respondent in the adjudication proceedings was the basis for petition under Section 482 Cr.P.C. and such exoneration certainly weighed with the High Court. In *Collector of Customs v. L.R. Melwani*[1], question Nos.1 & 2 posed before the Constitution Bench of this

Court were as under:-

"(i) Whether the prosecution from which these criminal revision petitions arose is barred under Article 20(2) of the Constitution as against accused 1 and 2 in that case by reason of the decision of the Collector of Customs in the proceedings under the Sea Customs Act?

(ii) Whether under any circumstance the finding of the Collector of Customs that the 1st and 2nd accused are not proved to be guilty operated as in issue estoppel in the criminal case against those accused?"

5. The observations of the court in respect of aforesaid questions were as under:-

"8 The rule laid down in that decision was adopted by this Court in *Pritam Singh v. State of Punjab, and again in N.R. Ghose v. State of W.B.* But before an accused can call into aid the above rule, he must establish that in a previous lawful trial before a competent court, he has secured a verdict of acquittal which verdict is binding on his prosecutor. In the instant case for the reasons already mentioned, we are unable to hold that the proceeding before the Collector of Customs is a criminal trial. From this it follows that the decision of the Collector does not amount to a verdict of acquittal in favour of accused 1 and 2."

6. A subsequent three-Judge Bench in *K.G. Premshankar v. Inspector of Police* [2] considered the effect of the decision of a civil court on criminal proceedings and it was concluded as under:-

"30.... What emerges from the aforesaid discussion is -(1) the previous judgment which is final can be relied upon as provided under Sections 40 to 43 of the Evidence Act; (2) in civil suits between the same parties, principle of res judicata may apply;

(3) in a criminal case, Section 300 Cr.P.C. makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein.

31. Further, the judgment, order or decree passed in a previous civil proceeding, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act then in each case, the court has to decide to what extent it is binding or conclusive with regard to the matter(s) decided therein..

32. In the present case, the decision rendered by the Constitution Bench in M.S. Sheriff case would be binding, wherein it has been specifically held that no hard-and-fast rule can be laid down and that possibility of conflicting decision in civil and

criminal courts is not a relevant consideration. The law envisages 'such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for limited purpose such as sentence or damages'".

7. The exoneration in related adjudication proceedings and the effect thereof on criminal proceedings again came up for consideration before a three-Judge Bench of this Court in Radheshyam Kejriwal v. State of West Bengal and Another3. In his dissenting opinion P. Sathasivam, J. (as the learned Chief Justice then was) concluded that there was nothing in Foreign Exchange Regulation Act, 1973 to indicate that a finding in adjudication is binding on a court in prosecution under Section 56 of Act or that the prosecution under Section 56 depended upon the result of the adjudication under the Act. C.K. Prasad J., speaking for the majority summed up as under:-

"38. The ratio which can be culled out from these decisions can broadly be stated as follows:-

(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;

(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding: If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

(viii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue the underlying principle being the higher standard of proof in criminal cases."

8. The majority judgment in *Radheyshyam Kejriwal v. State of West*[3] Bengal and Another4 is relied upon by the respondent in support of the submission that the exoneration in the present case being on merits, criminal prosecution on the same set of facts ought not to be allowed to

continue. Ms. Ranjana Narayan, learned Advocate appeared for the appellant while Mr. Naveen Malhotra, learned Advocate appeared for the respondent. We have considered rival submissions and gone through the record which brings out following crucial facets :-

> "(a) The order in original dated 30.09.1999 referred to the statement of Kanwar Bhan, the brother of the respondent, which clearly suggests that the respondent had come down to Delhi in April, 1996. This statement is not even referred to in the appellate order dated 30.09.1999 but a finding is rendered that the respondent had not visited India after September, 1994.
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> (b) The respondent was declared a proclaimed offender and had not participated in any of the proceedings personally. In the circumstances no weightage could be given to copies of the passport submitted in support of the assertion that he had not visited India after September 1994.
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> (c) The appellate order further discloses that the statement of Varyam Singh did allege the involvement of the respondent. In law, if such statement is otherwise admissible and reliable, conviction can lawfully rest on such material.
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> (d) The finding in the appellate order that there were two Pramod Kumars, is completely incorrect and unstateable. In the back drop of these facts it cannot be accepted that the exoneration of the respondent in the adjudication proceeding was on merits or that he was found completely innocent."

9. Considering the facts and circumstances of the case, we are of the view that the High Court was not right and justified in accepting the prayer for quashing of the proceedings. We, therefore, allow this appeal and set-aside the view taken by the High Court. Case No. 66/1/96, on the file of the ACMM, New Delhi, shall be proceeded with, in accordance with law.

Judgment Referred.

[1]*(1969) 2 SCR 0438*
[2]*(2002) 8 SCC 0087*
[3]*(2011) 3 SCC 0581*