IN THE HIGH COURT FOR THE STATE OF TELANGANA
AT: HYDERABAD
CORAM:
*** THE HON'BLE SRI JUSTICE B. VIJAYSEN REDDY**

+ CRIMINAL PETITION No.655 of 2007

% Delivered on: 10-06-2021

Between:

M/s. Deccan Tobacco Processors Limited & another ... Petitioners

Vs.

$ Union of India, rep. by
Commissioner (Prosecution)
Custom and Central Excise, Hyderabad & another ... Respondents

! For Petitioners : Mr. PRATAP NARAYAN SANDHI

^ For Respondents : M V J KUMAR (SR SC FOR CEC-SER TAX)
B NARASIMHA SARMA
KODURU RAVINDER REDDI
NAMAVARAPU RAJESHWAR RAO(ASSGI)

< Gist :

> Head Note :

? Cases Referred :

1. (2004) 2 SCC 731
2. 2011 AIR SCW 1479
3. (2013) 11 SCC 673

THE HON'BLE SRI JUSTICE B. VIJAYSEN REDDY

CRIMINAL PETITION No.655 of 2007

ORDER:

This criminal petition is filed by the petitioners/accused to quash the proceedings in CC.No.170 of 2005 on the file of the Special Judge for Economic Offences Court, Hyderabad.

2. The aforesaid case has been registered against the petitioners/accused on a complaint filed by the respondent No.2 to prosecute the petitioners for the offences under Sections 9, 9(10(b), 9(1)(bb), and 9AA of the Central Excise Act, 1944 (for short 'the Act') read with Section 120B of the Indian Penal Code.

3. The petitioner No.1 is a company incorporated under the provisions of the Companies Act and the petitioner No.2 was the Managing Director of the petitioner No.1-company at the relevant point of time.

4. The petitioner No.1-company, at the relevant point of time, was manufacturer of cut tobacco which is excisable good as per the schedule incorporated under the provisions of the Act. The case of the prosecution is that on a surprise check on 15.06.1995 at the premises of one M/s. Tirupati Cigarettes Limited, Varanasi, Uttar Pradesh, it was found that 115 bags of cut tobacco accounted for 3,910 KGs was clandestinely cleared without separate documents and payment of excise duty. The documents seized from the custody of the accused reflected that the documents required to be used only once were repeatedly reused mainly for payment of excise duty. It is the further case of the prosecution that on 15.06.1995, they have intercepted another vehicle which was carrying 230 bags of cut tobacco accounted

for 7,820 KGs, without paying excise duty. The prosecution further asserted that it has seized 60 empty bags which, according to them, were from cut tobacco, which was sold to M/s. Tirupati Cigarettes Limited. Thus, on the claim that M/s. Tirupati Cigarettes Limited has evaded excise duty, at the instance of A1 company and on the instructions of A2, prosecution was launched against the petitioners.

5. It is the case of the petitioners that departmental proceedings were initiated by issuing a show cause notice vide proceedings No.OR.490/95 dated 05.12.1995 wherein similar allegations were made against the petitioners based on same evidences including statements recorded by the respondent department during the course of investigation, were relied upon in the show cause notice. The petitioners gave a detailed reply to the show cause notice. After considering the entire evidence including the defence of the petitioners, the competent authority viz. Commissioner (Adjudication), by order dated 08.06.2001 held against the accused. The following are the conclusions of the competent authority:

> "**47**. In view of the above findings, I : -
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> (i) confirm the demand of Rs.25,03,044.75 against DTPL being the Central Excise Duty payable @ 225% Adv. On 34495 Kgs. Cut tobacco valued at Rs.11,12,465.25 removed clandestinely without payment of duty and order immediate recovery of the duty of Rs.25,03,044.75 under Rule 9(2) of Central Excise Rules 1944 read with Section11A of Central Excise Act 1944.
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> (ii) Order confiscation of 11730 Kgs. (345 bags) of cut tobacco valued at Rs.378294 under Rule 173Q of Central Excise Rules, 1944. As these goods have already been released provisionally on execution of B-11 Bond of the value of 380248/- and furnishing of cash security in the form of STDR of Rs.1,00,000/- and thus re not available for confiscation, I impose R.F. of Rs.1,00,000/- and appropriate the said STDR towards Adjustment/payment of the said R.F.]

(iii) Order confiscation of the remaining 22765 Kgs. (690 bags) of cut tobacco valued at Rs.734171.25 under Rule 173 Q of Central Excise Rules 1944. However, I give option to redeem the same on payment of R.F. of Rs.2,00,000/-. Central Excise duty leviable on them will also be payable.

...

...

(xi) Order confiscation of the vehicle bearing No. UP-65H-0167 seized by the Department under Section115 of the Customs Act, 1962 as applicable to the Central Excise cases. As this vehicle has already been released provisionally on execution of B-11 Bond of the value of Rs.4,00,000/- and furnishing of cash security in the form of NSC of Rs.10,000/- and is thus not available for confiscation. I, therefore, impose R.F. of Rs.20,000/- and order appropriation of the said cash security towards Adjustment/payment of the said R.F.

(xii) Order confiscation of the vehicle bearing No. UP-65H-0167 seized by the Department under Section115 of the Customs Act, 1962 as applicable to the Central Excise cases. As this vehicle has already been released provisionally on execution of B-11 Bond of the value of Rs.5.50 lakhs and furnishing of cash security in the form of NSC of Rs.10,000/- and is thus not available for confiscation. I, therefore, impose R.F. of Rs.20,000/- and order appropriation of the said cash security towards Adjustment/payment of the said R.F.

This, however, does not preclude the Department from initiating any further proceedings under the Law for the time being in force.

6. The accused filed an appeal before the Customs, Excise and Service Tax Tribunal (CESTAT), South Zonal Branch, Bangalore, challenging the order dated 08.06.2001 passed by the Commissioner (Adjudication). The appellate authority, vide order dated 26.12.2003 in Final Stay Order No.1728 & 1729 of 2003, observed as under:

"**6.** We find that the main allegation of the department is that the goods covered by the 9 AR3As under which the cut tobacco was cleared from the factory of M/s. DTPL, Hyderabad was

diverted and another consignment was being received at the factory of M/s. TCL, Varanasi on the same documents. We find that during the relevant period, the cigarette factory was in physical control and the cut tobacco was being transported in AR3As procedure after execution of bonds for due to arrival of the cut tobacco at the destination by following Chapter X procedure. We find from the panchanama drawn for seizure of 115 bags of cut tobacco on 15-6-95, the marks and numbers as shown in the AR3As covering this consignment are also as shown in the panchanama. Therefore, it cannot be said that these goods are substitute. The only different is that the vehicle number shown in the clearance documents at the factory of M/s. DTPL, Hyderabad is different from the vehicle from which these goods were unloaded at Varanasi. In the other two cases of seizure at Varanasi, the panchanama drawn at the time of seizure does now show any marks and numbers which were found on the bags. No subsequent panchanama was also drawn for any marks and numbers found on the bags. Only in the show cause notice, it was alleged that the marks and numbers were different on the bags shown in the AR3As. This allegation is without any evidence and such allegations cannot be sustained. The enquiry made at Hyderabad and the statement of the transporter, Sri M.L. Juneja recorded on 15-9-95 shows that after clearance of the cut tobacco from M/s. DTPL, Hyderabad, they (transporter) kept these goods at their godown at Secunderabad and from there, the goods were transported to Varanasi via Nagpur, Jabalpur depending upon the availability of trucks. Therefore, when the transporter has given the explanation for different truck numbers than recorded in the documents, it was necessary for the investigating officer to check the veracity of the claim of the transporter. This has not been done and no investigation has been done to ascertain as to what happened to the cut tobacco covered by AR3As, if the seized cut tobacco was a substitute or being transported again.

7. Rule 173N of the Central Excise Rules, 1944 gives the time of 90 days to produce the proof of re-warehousing. No endorsement of any re-warehousing was found on any of the 9 AR3As before seizure. Therefore, the claim of the appellants that the goods covered by these 9 AR3As are the goods which has been seized cannot be rejected. The conclusions drawn by the adjudicating authority that marks and numbers were not

> tallied is without any evidence a there was no panchanama showing marks and numbers found on the bags and the marks and numbers mentioned in the AR3As documents. No case has been established that the goods covered by AR3As were cleared without payment of duty. Hence demanding duty, taking the goods as cleared without payment of duty is contrary to law. We do not find the reasons given by the lower authority convincing in the absence of any evidence.
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> **8**. In view of our above findings, we allow both the appeals."

7. The petitioners, thus, contend that the CESTAT, which discharged judicial duties, having adjudicated the matter on merits, opined that there is absolutely no evidence to establish the guilt of the petitioners regarding evasion of excise duty or clandestine removal of goods. Thus, the respondent No.2 could not have proceeded to prosecute the petitioners, which amounted to violation of the fundamental rights guaranteed to the accused. Since on the same set of allegations and evidence, the CESTAT opined that there is no offence committed by the petitioners, filing of the complaint by the respondent No.2 based on the orders passed by the Commissioner (Adjudication), virtually runs contrary to the orders passed by the CESTAT and thus, the impugned proceedings are arbitrary and amount to double jeopardy. The standard of proof in criminal proceedings is much higher than in departmental proceedings. In the instant case, when the department failed to establish the guilt of the accused in the departmental proceedings, it would not be possible to establish the same in criminal case. Hence, initiation of criminal proceedings is illegal and arbitrary.

8. It is further contended that, in the complaint, the respondent No.2 did not mention any additional evidence other than the evidence relied upon by the CESTAT. Thus, the whole exercise of the respondent No.2 is arbitrary and violative of Article 20(2) of the Constitution of

India. The CESTAT allowed the appeal as long back as on 26.11.2003 whereas the complaint was filed by the respondent No.2 on 29.09.2005 almost after two years from the orders passed by the CESTAT and there is no explanation for the delay. The respondent No.2 did not take into consideration the findings given by the CESTAT. The allegations against the accused relate back to June 1995 i.e. almost 11 years back. Thus, the complaint is barred by limitation and suffers from delay and latches. The CESTAT acquitted A1 company and M/s. Tirupati Cigarettes Limited, which is alleged to have colluded with A1 company. Interestingly, no proceeding or complaint has been filed against M/s. Tirupati Cigarettes Limited and complaint is filed only against the petitioners, which clearly indicates malafide and arbitrary exercise of power

9. It is also alleged that the Economic Offences Court does not have the jurisdiction to try the case since even according to the complainant the offences were committed at Varanasi, Uttar Pradesh, which is beyond the jurisdiction of Hyderabad.

10. Mr. B. Narasimha Sarma, learned Senior Central Government Standing Counsel, submitted that the prosecution was launched against the petitioner No.1, who clandestinely cleared the cut tobacco from the factory situated at Kukatpally, Hyderabad. The cut tobacco was cleared without maintaining statutory record and thereby, evaded payment of excise tax on the said goods. The Central Excise Officials have seized the goods i.e. cut tobacco in two vehicles. The statements of the witnesses were recorded under Section 14 of the Central Excise Act and they reveal that cut tobacco was discharged from the factory of A1 company and the same was transported to Varanasi. The investigation reveals that 34495.00 KGs of cut tobacco was

clandestinely removed without payment of excise duty. Thus, basing on the material and documents collected during investigation, the case was adjudicated. Since there was complicity of many people spread all over India, the Commissioner at Delhi was nominated to adjudicate the case and the same was adjudicated on 08.06.2001 following due process of laws. The decision to launch prosecution was taken after due approval of Chief Commissioner and the same was launched on 23.07.2003. The department has challenged the orders of CESTAT dated 26.12.2003 in Appeal vide C.E.A.No.33 of 2004 before the High Court. Thus, the orders of CESTAT have not become final and the same is pending.

11. Learned Senior Central Government Standing Counsel further submitted that there is sufficient material to prove the guilt of the accused. The accused cannot take advantage of the orders of the CESTAT as the same are under appeal before the High Court. The statements of the witnesses recorded under Section 14 of the Central Excise Act constitute substantial evidence and the statements are corroborated by documents and other evidence. The cut tobacco was clandestinely cleared from the premises of petitioner No.1/A1 at Hyderabad, which is within the jurisdiction of Hyderabad IV Commissionerate and investigation further revealed that complicity of the petitioner No.2. In view of the same, the Special Judge for Economic Offences has jurisdiction to entertain the complaint. The adjudication and prosecution are two different limbs. As per the provisions under Section 9(c) of the Central Excise Act, a presumption can be drawn with regard to culpable mental state. Thus, criminal case cannot be quashed on the threshold of prosecution, particularly, when the same requires detailed consideration.

12. Mr. Pratap Narayan Sanghi, learned counsel for the petitioners, relied upon two decisions of the Supreme Court viz. **K.C. BUILDERS v. ASSISTANT COMMISSIONER OF INCOME TAX**[1] and **RADHESHAYAM KEJRIWAL v. STATE OF WEST BENGAL**[2]

In **K.C. BUILDERS'**s case (1 supra), the following questions of law arose for consideration before the Supreme Court:

> **8**. On the above pleadings and facts and circumstances of the case, the following questions of law arise for consideration by this Court:
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> (a) Whether a penalty imposed under Section 271(1)(c) of the Income Tax Act and prosecution under Section 276-C of the Income Tax Act are simultaneous?
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> (b) Whether the criminal prosecution gets quashed automatically when the Income Tax Appellate Tribunal which is the final court on the facts comes to the conclusion that there is no concealment of income, since no offence survives under the Income Tax Act thereafter?
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> (c) Whether the High Court was justified in dismissing the criminal revision petition vide its impugned order ignoring the settled law as laid down by this Court that the finding of the Appellate Tribunal was conclusive and the prosecution cannot be sustained since the penalty after having been cancelled by the complainant following the Income Tax Appellate Tribunal's order no offence survives under the Income Tax Act and thus the quashing of the prosecution is automatic?
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> (d) Whether the finding of the Income Tax Appellate Tribunal is binding upon the criminal court in view of the fact that the Chief Commissioner and the assessing officer who initiated the prosecution under Section 276-C(1) had no right to overrule the order of the Income Tax Appellate Tribunal? More so when the Income Tax Officer giving the effect to the order cancelled the penalty levied under Section 271(1)(c)?
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> (e) Whether the High Court's order is liable to be set aside in view of the errors apparent on record?

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[1] (2004) 2 SCC 731
[2] 2011 AIR SCW 1479

In similar circumstances, the Supreme Court in the decision supra observed that, in view of the Income Tax Tribunal adjudicating the matter in favour of the appellant, launching of criminal prosecution on the same set of facts cannot be sustained. It was held as follows:

> "**25**. In our opinion, the appellants cannot be made to suffer and face the rigours of criminal trial when the same cannot be sustained in the eye of the law because the entire prosecution in view of a conclusive finding of the Income Tax Tribunal that there is no concealment of income becomes devoid of jurisdiction and under Section 254 of the Act, a finding of the Appellate Tribunal supersedes the order of the assessing officer under Section 143(3) more so when the assessing officer cancelled the penalty levied.
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> **26**. … In our view, if the trial is allowed to proceed further after the order of the Tribunal and the consequent cancellation of penalty, it will be an idle and empty formality to require the appellants to have the order of the Tribunal exhibited as a defence document inasmuch as the passing of the order as aforementioned is unsustainable and unquestionable.
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> …
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> **31**. It is a well-established principle that the matter which has been adjudicated and settled by the Tribunal need not be dragged into the criminal courts unless and until the act of the appellants could have been described as culpable."

In **RADHESHAYAM KEJRIWAL'**s case (2 supra), while considering several decisions, the Supreme Court culled out the raio as follows:

> "**19**. We find substance in the submission of Mr. Sharan. There may appear to be some conflict between the views in Standard Chartered Bank (AIR 2006 SC 1301 : 2006 AIR SCW 1196) (supra) and L.R. Melwani (AIR 1970 SC 962) (supra) holding that adjudication proceedings and criminal proceeding are two independent proceedings and both can go on simultaneously and finding in the adjudication proceedings is not binding on the criminal proceeding and the judgments of this Court in Uttam Chand (1982) 2 SCC 543 : 1982 SCC (Tax) 150] , G.L. Didwania [1995 Supp (2) SCC 724] and K.C. Builders [(2004) 2 SCC 731 : 2004 SCC (Cri) 1092]

wherein this Court had taken a view that when there is categorical finding in the adjudication proceedings exonerating the person which is binding and conclusive, the prosecution cannot be allowed to stand. The judgments of this Court are not to be read as a statute and when viewed from that angle there does not seem any conflict between the two sets of decisions. It will not make any difference on principle that latter judgments pertain to cases under the Income Tax Act. 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

(vii) 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.

In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the

adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."

13. Having heard both the learned counsel, it was enquired with the learned counsel about the status of the pending appeal. The learned Special Standing Counsel fairly submitted that the appeal CEA.No.33 of 2004 has been dismissed as withdrawn by order dated 29.10.2018. It is not denied by the respondent No.2 that the allegations leveled against the petitioners in the criminal proceedings are entirely based on the proceedings initiated against the petitioners pursuant to the show cause notice. In fact, it is clearly stated in the complaint that adjudication authority has passed an order against the accused by confiscating the contraband, cut tobacco and vehicles apart from imposing penalty.

14. On a perusal of the complaint, it is to be noted that the averments therein are verbatim repetition of the averments in the show cause notice dated 05.12.1995. There cannot be any doubt that departmental proceedings and criminal prosecution can be initiated simultaneously. It is settled law that there cannot be any hard and fast rule as to whether the criminal proceedings have to be quashed after departmental proceedings are concluded in favour of the accused. It depends upon the fact situation arising in each case. The appeal has been allowed vide order dated 26.12.2013 by the CESTAT giving a clean chit to the accused. As narrated above, it was categorically held that the lower authority has not given any reasons to impose penalty on the accused and there is no evidence to that effect. The order of the appellate authority has attained finality. Thus, continuance of prosecution against the petitioners under self-same allegations contained in the departmental proceedings is an exercise in futility.

15. As seen from the contents of the complaint, the prosecution is launched, in view of the fact that the Commissioner (Adjudication), directed the department to initiate further proceedings in law for time being in force, as the accused company was found to have evaded payment of duty under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11-A of the Act and confiscation was ordered and penalty was levied under the relevant Rules.

16. It is settled law that the standard of proof in criminal proceedings is higher than the standard of proof in civil/departmental proceedings. In a reverse case, where criminal proceedings ended in acquittal but simultaneous departmental proceedings continued, the result of the criminal proceedings will not have any bearing on the departmental proceedings, as judgment of the criminal Court is not binding in civil or departmental proceedings. However, in the instant case, when the departmental proceedings ended in favour of the accused and moreover, when the prosecution launched is on the same set of facts and allegations, the continuance of prosecution would be gross abuse of process of law. In the instant case, as pointed out above, complaint was filed pursuant to the observation made by the Commissioner (Adjudication), that the department is not precluded from initiating further action in law for the time being in force. The order of the Commissioner (Adjudication) merged with the order of CESTAT wherein the appeal was allowed reversing the order of the original authority. Further appeal filed by the department before the High Court came to be withdrawn.

In view of the above observations, the criminal petition is allowed and the proceedings in CC.No.170 of 2005 on the file of the

Special Judge for Economic Offences Court, Hyderabad, against the petitioners/accused, are hereby quashed.

Pending miscellaneous petitions, if any, shall stand closed.

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B. VIJAYSEN REDDY, J

June 10, 2021
DSK