

Accused absent.
E.P allowed.

ORDERS ON APPLICATION U/S.309 OF CR.P.C.,

1. This is an application u/s.309 of Cr.P.C., filed by accused with a prayer to stay the framing of charge and prosecution of the instant case till the disposal of Appeal No.E/2882/2012/DB pending before the CESTAT, Bangalore on the ground that this case is based on the order-in-original No.16/2012 dated:31.07.2012 passed by the complainant, they have challenged this order before the CESTAT in Appeal No.E/2882/2012-DB & the matter is stated in E/Stay/2078/2012 as per the order dated:13.10.2014 on condition that the accused should deposit Rs.1 crore which they have duly complied, they have very good case on merits and are likely to get the Appeal in their favour, the very basis of the complainant filing the instant prosecution will no longer exist. In other words, the accused states that in the appeal it is held that the accused has not clandestinely removed goods & there is no under valuation, there is no offence made out and no criminal proceedings can continue against them. In other words, if the demand is dropped, then consequentially there is no mens rea on the part of the accused as alleged in the complaint, then the prosecution launched cannot be sustained.
2. Thus, it would be imperative to await the decision of the CESTAT before proceeding with framing of charge. In other words, if the CESTAT holds infavour of the accused, the accused would have a right to apply for discharge once again and would not have to undergo

the harassment of facing charges for trial which would affect principles of justice and equity. On the other hand, if this court proceed to frame charges and try the accused without awaiting the decision of the CESTAT, the same were render great injustice and irreparable hardship to the accused and it would be against the settled principles of law. With this prays to allow application.

3. Other side filed objections contending that it is incorrect to state that the order-in-original was only base for filing this complaint. The investigation report is submitted by the Assistant Commissioner to the Commissioner of Central Excise, who on applying his mind to the report and upon the orders of the DG of DGCEI issued sanction cum authorization to the Assistant Commissioner to file the prosecution case. In the order of stay, the CESTAT has given a clear finding that there has been clandestine removal of goods without payment of duty to the tune of Rs.1,65,00,000/- by the accused and has upheld this finding by the Commissioner of Central Excise in the order-in-original No.16/2012 dated:31.07.2012. At paragraph No.3 of the stay order of CESTAT findings as to clandestine removal by the accused is given and this clearly exposes the falsity of the averments in I.A. The accused has in fact and in law have no case before the CESTAT in their Appeal No.E/2882/2012-DB and have deliberately filed an application with false and frivolous contentions and to mislead this court to stall the criminal proceedings indefinitely, the findings given by

the Tribunal are corroborative material evidence against the accused in the prosecution case.

4. The ruling cited by the accused in Paragraph No.5 are with facts and circumstances. The mere pendency of the proceedings of assessment of Central Excise Duty evaded or re-assessment proceedings under the Act before another authority & apprehension of succeeding in the proceedings will not come in the way of launching prosecution case and there is no hindrance to proceed with the criminal case. The Criminal Case is independent of the assessment proceedings, the duty liability may vary, but not the criminal liability and the law is that the prosecution is not required to prove the extent of duty to its mathematical precision. With this prays to dismiss the application.
5. Heard, perused.
6. The points that arise for my consideration are:

Point No.1: Whether the application is fit to be allowed.?

Point No.2: What order. ?

7. My answers to the above said points are as under:

Point No.1: In the Affirmative,

Point No.2: As per the following reasons:

REASONS

8. Point No.1: It is not in dispute that this case is out come of order-in-original No.16/2012 dated:31.07.2012. It is also not in dispute that the

said order is challenged before CESTAT in Appeal No.E/2882/2012-DB & stay is in force. The accused has enclosed a receipt for the Central Excise Tax payment showing deposited Rs.1 crore as ordered by the CESTAT. The actual point which is for consideration before this court is whether the proceedings of this case can be stayed till disposal of the Appeal No.E/2882/2012-DB.

9. The learned counsel for the complainant has relied upon two Judgements reported in (2011) 3 Supreme Court Case, Page No.581 & AIR 2016 Supreme Court, Page No.934 in support of his argument that the proceedings before CESTAT and this court are different and have to be tried independently.

10. I have perused, in the Judgement reported in (2011) 3 Supreme Court Case, Page No.581 in a case between Radheshyam Kejriwal Vs. State of West Bengal & another at Head Note-C it is held as follows:

“C. Debt, Financial & Monetary Laws – Foreign Exchange Regulation Act, 1973 Ss.51, 50 & 56 – Adjudication proceedings & prosecution – Interrelation, if any, between – Held (per curiam), both the said proceedings are independent of each other and finding in adjudication is not binding in prosecution proceedings – Both proceedings can continue simultaneously – Moreover, prosecution can even precede conclusion of adjudication proceedings (Ed.:But see point of difference between majority view and minority view in short note:B) – Foreign Exchange Regulation Act, 1957, S.23-D)

Per majority (Per Prasad, J., for Bedi, J. and himself held as follows:

Certainly the proceedings u/s.51 and 56 of the Act are independent of each other and the finding in the proceeding for prosecution under Section.56 of the Act and both can go hand in hand. Further, the prosecution can be launched even before conclusion of adjudication proceedings u/s.51 of the Act.

11.This Judgement is related to the question whether the prosecution case survive pending adjudication proceedings. But, in this case the accused has not sought for quashing of the proceedings, but he has sought only for stay of the proceedings. At Para No.88 & 89 it is held that:

“Para No.88: There is nothing in the present Act to indicate that a finding in adjudication is binding on the court in a prosecution u/s.56 of the Act or that the prosecution u/s.56 depends upon the result of adjudication u/s.51 of the Act. It is reiterated that the two proceedings are independent and irrespective of the outcome of the decision u/s.50, there cannot be any bar in initiating prosecution u/s.56. The scheme of the Act makes it clear that the adjudication by the authorities concerned and the prosecution are distinct and separate. No doubt, the conclusion of the adjudication in the case on hand, the decision of the Special Director dated:18.11.1996, may be a point for the appellant and it is for him to put forth the same before the Magistrate.

Para No.89: Inasmuch as FERA Contains certain provisions and features which cannot be equated with the provisions of the Income Tax Act or the Customs Act and in the light of the mandate of Sec.56 of FERA, it is the duty of the criminal court to discharge its function vested with it and give effect to the legislative intention, particularly, in the context of the scope and object of FERA which was enacted for the economic development of the Country and augmentation of revenue. Though the Act has since been repealed and not available at present, those provisions cannot be lightly interpreted taking note of the object of the Act.”

12.The words ‘inasmuch as FERA Contains certain provisions and features which cannot be equated with the provisions of the Income Tax Act or the Customs Act’ makes it clear that the provisions of FERA cannot be equated with the Customs Act & Income Tax Act. The present application is under Central Excise Act. Moreover, at Para No.88, the words ‘no doubt, the conclusion of the adjudication in the

case on hand, the decision of the Special Director dated:18.11.1996, may be a point for the appellant and it is for him to put forth the same before the Magistrate' shows there is no bar to use the decision of the adjudication order as a point to be placed before the Magistrate Court. Here in this case, the accused counsel is seeking stay of this case till disposal of appeal before the CESTAT & of course, he has contended that if the case before the CESTAT is infavour of accused, this prosecution do not survive, but this cannot be accepted as rightly argued by the Spl.Prosector that this case & the adjudication proceedings are independent. However, as held in the above said Judgement, the accused can only use the orders of adjudication proceedings in appeal as point in support of their case. Anyhow, this application is filed for stay of the proceedings till disposal of the appeal before the CESTAT. The Judgement is in connection to point whether the prosecution would survive during the pendency of the adjudication proceedings. Thus, with great respect to the Hon'ble Supreme Court, I hold that the above said Judgement is not applicable to the case on hand.

13. The learned counsel for the complainant has also relied upon the case law reported in AIR 2016 Supreme Court Page No.934 in a case between AIR Customs Officers IGI, New Delhi Vs. Pramod Kumar Dhamija, wherein it is held as follows:

"Criminal P.C. (2 of 1974), S.482 – Customs Act (52 of 1962), Ss.132, 135 – Quashing of complaint – Seizure of gold smuggled – complaint filed against respondent

alleging offences under Ss.132 and 135 of Customs Act for false declaration and evasion of duty – Penalty imposed on respondent in adjudication proceedings on basis of statement of co-accused regarding involvement of respondent and that there were no two different persons of having same name as of respondent – Appellate authority setting aside penalty without considering such facts – It cannot be said that exoneration of respondent in the adjudication proceeding was on merits or that he was found completely innocent – Complaint cannot be quashed.”

14. This Judgement is also in connection to point whether the prosecution can be quashed because of the adjudication proceedings is pending. But this application is not for quashing, but only for stay of the proceedings till disposal of the appeal before the CESTAT.
15. As I have already said above, though the result of the appeal in favour of accused before the CESTAT do not make this prosecution case fail, the accused can use the orders of the CESTAT as a point to defend his case in prosecution.
16. On the other hand, in the Judgement reported in AIR 1984 Supreme Court 1693, in a case between P.Jayappan Vs. S.K.Perumal, the Hon'ble Supreme Court has held as follows:

“Income Tax Act (43 of 1961) Ss.276C, 277 & 147 – Penal Code (45 of 1860), Ss.193 & 196 – Reassessment proceedings pending – Department instituting prosecution against assessee u/s.276C & 277 & under Ss.193 & 196 Penal Code – Prosecutions are maintainable and cannot be quashed. (1978) 112 ITR 384 (Cal) Overruled. (Criminal P.C. (2 of 1974) Sections. 309, 482).

It is also held at Para.6 that – “it may be that in an appropriate case the criminal court may adjourn or postpone the hearing of a criminal case in exercise of its discretionary power under section.309 of Cr.P.C., if the disposal of any proceeding under the Act which has a bearing on the proceedings before it is imminent so that it may take also into consideration the order to be passed

therein. Even here the discretion should be exercised judicially and in such a way as not to frustrate the object of the criminal proceedings. There is no rigid rule which makes it necessary for a criminal court to adjourn or postpone the hearing of a case before it indefinitely or for an unduly long period only because some proceeding which may have some bearing on it is pending elsewhere. But this, however, has no relevance to the question of maintainability of the prosecution. The prosecution in those circumstances cannot be quashed on the ground that it is a premature one.”

17. As same, in the Judgement reported in AIR 2001 Supreme Court 1096, it is held as follows:

“Criminal Proceedings – Pendency of appeal before appellate authority under Income Tax Act – Stay of criminal prosecution – Till appeals are finally decided – No impediment.

Income – Tax Act (43 of 1962), S.254 Criminal P.C.(2 of 1974), S.482.

The prosecution in criminal law and proceedings arising under the Income – Tax Act are undoubtedly independent proceedings and, therefore, there is no impediment in law for the criminal proceedings to proceed even during the pendency of the proceedings under the Act. However, when appeal is preferred by accused before Income – Tax Authorities and when the conclusions arrived at by the appellate authorities have a relevance and bearing upon the conclusions to be reached in the case necessarily one authority will have to await the outcome of the other authority and to avoid conflicting decisions interim order staying proceedings in criminal case is proper.”

18. From this, it is clear that the proceedings before Adjudication Authority/Tribunals are independent than the prosecution proceedings, they have to be tried independently & hence, the prosecution complaint's cannot be quashed. However, where the issue before Adjudication Authority/Tribunal and the prosecution in Criminal Courts are similar and identical, the proceedings in prosecution can be adjourned/stayed. Here in this case, the issue before the CESTAT is

that whether clandestinely removed the goods with an intention to evade payment of Excise duty by mischievously availing exemption under the exemption notification which they were not entitle. Admittedly, the issue before the prosecution is also similar and identical that whether the complainant proves beyond reasonable doubt that the accused have clandestinely removed the goods with an intention to evade payment of Excise duty. Admittedly, the issue before the CESTAT and the prosecution are similar and identical, if before the CESTAT it is held that the accused are entitle for benefit under the above said notification, the said order can be used as point for defend by the accused in this prosecution proceedings. Thus, I hold that adjourning/ stay of this case till disposal of appeals before CESTAT would meet the ends of justice. With this, I answer Point No.1 in the affirmative holding that the application is fit to be allowed.

19. Point No.2: In view of my findings on Point No.1, I proceed to pass the following:-

ORDER

The application U/s.309 of Cr.P.C filed by the accused is hereby allowed.

The case is adjourned till disposal of Appeal before CESTAT.

Call on awaiting orders of CESTAT – 08.11. 2016.

PRESIDING OFFICER.