

(2008) 05 CAL CK 0003**Calcutta High Court****Case No:** C.R.R. No. 2149 of 2005

Additional Director General,
Directorate of Revenue
Intelligence

APPELLANT**Vs**

Nabo Kumar Jha and Others

RESPONDENT**Date of Decision:** May 15, 2008**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 167, 167(1), 167(2), 167(5), 173
- Customs Act, 1962 - Section 100, 101, 104, 104(1), 104(2)
- Economic Offences (Inapplicability of Limitation) Act, 1974 - Section 2

Citation: (2008) 4 CHN 765**Hon'ble Judges:** Partha Sakha Datta, J**Bench:** Single Bench**Advocate:** S.K. Kapoor and M. Goswami, for the Appellant; Sekhar Basu and A. Sinha, for the Respondent**Final Decision:** Allowed**Judgement**

Partha Sakha Datta, J.

By this application dated 27.7.2005 u/s 401/482, prayer has been made by the Additional Director General, Directorate of Revenue Intelligence of the Government of India for setting aside the order dated 29.6.2005 passed by the learned Chief Metropolitan Magistrate, Calcutta in Customs Case No. D.R.I-60-Kol/2004 u/s 135/132 of the Customs Act. The O.Ps. herein are four accused persons of the case.

2. Certain facts of the case in brief will not be out of place. An intelligence was received by the Directorate of Revenue Intelligence that some Kolkata based export oriented units including Kuil Trading (P) Limited and Hazel Traders Private Limited were indulging in fake exports to Bangladesh through Ghojadanga Land Customs Station. They were importing duty free goods and fraudulently diverted the same in

the local market and instead of utilising the imported duty free goods in the manufacture of export goods they were making false and fabricated documents showing fake exports purporting to show fulfillment of corresponding export obligations and thereby evading a huge amount of customs duty. Search was conducted on 28.7.2004 at various places including the office premises of one Godhan Infotech (Pvt.) Limited and a substantial number of incriminating documents were recovered and seized. The O.P. No. 2, Manu Kapoor was examined and he had admitted that duty free goods were procured from Special Economic Zone were exported from the godown of Kuil Trading Private Limited and Hazel Traders Private Limited and he had despatched the goods on the basis of challans provided to him by the O.P. No 3. The copies of the bills of export bearing the identical numbers collected from Ghojadanga LCS revealed that those bills of export pertained to completely different export consignments of different exporters. Similarly, the O.P. No. 3 was examined and it was found that all the export documents were false and fabricated. Examination of the O.P. No. 4 also revealed the same thing. According to the Directorate of Revenue Intelligence, total amount of Customs duty evaded by the accused persons was to the tune of Rs. 76 crores. The accused persons were arrested and were granted bail. Since the Director of Revenue Intelligence had to carry out enquiry/investigation at various stages with various persons it could be a protracted one and time consuming and such enquiry/investigation were still in progress. On 15.6.2005, the O.P. No. 3 filed an application praying for stopping of all proceedings. According to the complainant the Limitation Act has got no manner of application to offences under the Customs Act which are economic offences included in the schedule referred to in Clause (1) of Section 2 of the Economic Offence (Inapplicability of Limitation) Act, 1974. There is no fixed period of limitation for filing the complaint in respect of the offences punishable under the Customs Act, 1962. The learned Magistrate by the order impugned stopped further investigation and discharged the accused persons illegally without due regard to the provisions of the law.

3. I have gone through the order dated 29.6.2005 passed by the learned Chief Metropolitan Magistrate. I have heard Mr. S. K. Kapoor, learned Senior Advocate appearing for the petitioner and Mr. Sokhar Basu, learned Senior Advocate appearing for the O.Ps.

4. The offences were alleged to have been committed u/s 135/132 of the Customs Act. Sub-section (1) of Section 135 of the Customs Act provides for imprisonment which may extend to seven years and with fine provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court such imprisonment shall not be for less than 4 years and in any other case with imprisonment for a term which may extend to 3 years or with fine both. Sub-section (2) of Section 135 provides for imprisonment for a term extending to seven years and with fine in case a person convicted u/s 136(1) is again convicted. What are not special or adequate reasons for awarding a sentence or imprisonment

for a term of less than one year have been provided for in Sub-section (3) of Section 135 of the Act. Section 132 deals with false declaration, statement or document in the transaction on any business relating to the statements knowing the same to be false and the penalty u/s 135 of the Act is two years of imprisonment at the maximum. The allegation of facts *prima facie* revealed that it was a case of fraudulent evasion of duty chargeable on the goods. Whether complaint will be filed u/s 135(1) or u/s 135(2) cannot be foretold because it is not known to the learned Magistrate as to what material would transpire upon enquiry or investigation. Now the learned Magistrate by the impugned order dealt with three points, namely, 1) whether the proceeding conducted by Directorate of Revenue Intelligence is an investigation or enquiry, (2) what is the nature of the offence alleged in the instant case, (3) whether provision of Section 167(5) of the Cr. PC applies to the case.

5. As to the first point the learned Magistrate observed that the proceeding conducted by the DRI was investigation and accordingly the provision of Section 167(5) of the Cr. PC would apply. In this respect, the learned Magistrate relied on the decision in Directorate of Enforcement v. Deepak Mahajan and Anr. 1994 SCC (Cri) 785. According to the learned Magistrate, given the ratio of the decision, the Directorate of Revenue Intelligence was really conducting an investigation for collection of evidence and furthermore in the various paragraphs of the remand applications filed by the DRI authorities they used the word "investigation" and accordingly it cannot be said that the complainant was conducting an enquiry. It is the submission of Mr. Kapoor, learned Senior Counsel appearing for the complainant that the decision in the Deepak Mahajan, does, nowhere say in absolute terms that the matter of collection of material for the purpose of filing a complaint within the meaning of Section 2(d) of the Cr. PC the authorities is under the FERA or under the Customs Act are necessarily conducting the investigation in the same sense in which a police conducts investigation within the meaning of Clause (h) of Section 2 of the Cr. PC. According to Mr. Kapoor the learned Magistrate has committed wrong in equating investigation made by the police in a cognizable offence with the so-called investigation made by the Enforcement Directorate or Directorate of Revenue Intelligence for the purpose of filing a complaint within the meaning of Section 2(d) of the Cr. PC. According to Mr. Kapoor the materials collected u/s 173(5) of the Cr. PC are the outcome of investigation and the prosecution case is based on those materials that transpire during investigation u/s 173 of the Cr. PC. In a case instituted on a police report the prosecuting agency cannot travel beyond what transpire in 173 Cr. PC papers, but this is not the case in a case instituted on a complaint because in a complaint case there is no necessity of examining witnesses and recording their statements and no copy of any such statements of witnesses is required to be supplied to the accused and no chargesheet is filed. Mr. Sekhar Basu, learned Senior Counsel appearing for the O.Ps. submitted that investigation and enquiry did not materially differ and in Deepak Mahajan's case Their Lordships of the Hon'ble Supreme Court have held

that the word "investigation" may not be restricted to the investigation carried out by the police and it can be enlarged to the cases under the FERA or the Customs Act. Now unlike the Foreign Regulation Act where the word "investigation" is used in a number of sections of the said law the provision of the Customs Act unquestionably do not use the expression investigation. At paragraph 119 of the judgment Their Lordships held that the word investigation, though is not shown in any of the sections of the Customs Act, certain powers enjoyed by the police officer during the investigation are vested on the specified officer of Customs as indicated in the table given in paragraph 114 of the judgment. In the table furnished in paragraph 114 of the judgment Sections 100, 101 and 105 have been referred to in respect of which, according to Their Lordships, the power of investigation as is enjoyed by the police officer can be exercised by a specified officer of the Customs. At paragraph 116 of the judgment it has been held that the word "investigation" cannot be limited only to police investigation and can be made flexible so as to include the investigation carried on by any agency besides the police machinery. The Hon"ble Supreme Court refers to the decision in N.H. Dave, Inspector of Customs v. Md. Akhtar which has been referred to in paragraph 116 of the judgment itself with approval and in the said decision Gujarat High Court held that investigation means search for material and facts in order to find whether or not an offence has been committed and it does not matter whether it is made by the police officer or a custom officer who enjoins to lodge a complaint. Now the question whether the Customs Authority are investigating the case or enquiring the case so as to find out whether an offence has been committed or not is purely an academic one and consideration of this question is really not necessary for the purpose of determining the question whether the learned Magistrate was right in applying the provision of Section 167(5) of the Cr. PC. In essence, the decision of the Hon"ble Supreme Court is to the effect that the powers of investigation vested upon a police can be exercised for the purpose of searching out a material by any other agency other than the police and so far as the offences under the Customs Act are concerned, according to Their Lordships in Deepak Mahajan"s case, in relation to Sections 100, 101 and 105 the officers of the Customs Department have the power of investigation.

6. As to the question as to under which provision of the Customs Act the proposed complaint will be filed, it cannot be said prematurely that offence would be one u/s 135(1)(ii) of the Customs Act. As said earlier, it is for the complainant to decide as to whether u/s 135(1)(i) or u/s 135(1)(ii) complaint would be filed but then it is clear that in case prosecution is launched u/s 135(1)(i) punishment is for a term which may extend to seven years and with fine and in respect of the offences u/s 135(1)(ii) punishment may extend to three years or with fine or with both. Now the learned Magistrate in support of his reasoning that provision of Section 167(5) of the Cr. PC would be applicable to the prosecution u/s 135(1)(ii) under the Customs Act referred to Section 138 of the Customs Act read with Section 262 of the Cr. PC and held that the prosecution u/s 135(1)(ii) of the Customs Act is a prosecution triable through

summons procedure. In my opinion the reasoning of the learned Magistrate is fallacious. According to Section 2(w) and Section 2(x) summons case means a case relating to an offence not being a warrant case, while warrant case means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Thus when an offence is punishable with imprisonment for a term not exceeding two years it becomes a summons case and when offence is punishable with imprisonment exceeding two years it becomes a warrant case. A plain reading of the penal provisions of Section 135 of the Customs Act make it abundantly clear that the offences either u/s 135(1)(i) or u/s 135(1)(ii) is warrant case because in both the cases punishment extends to imprisonment extending two years and to the maximum period of seven years. There is a provision in Section 138 which provides that an offence under Chapter XVI of the Customs Act other than an offence punishable under Clause (i) of Section 135 or under Sub-section (2) of that section may be tried by a Magistrate summarily. That is to say Section 138 of the Customs Act leaves the scope for the Trial Court to try a case under Clause (ii) of Sub-section (1) of Section 135 summarily and according to the learned Judge since the procedure for summarily becomes a summons case. To my understanding this is a wrong conclusion. Summary trial is the same as in the trial for summons case, the case tried summary trial is not the determining factor to judge whether a case would be a summons case or a warrant case. In many special acts, say the instant Customs Act or under the Essential Commodities Act offences can be tried summarily but punishment extends to a period exceeding two years. Therefore the learned Magistrate was wrong in holding that since the offence can be tried summarily it becomes a summons case and as it becomes a summons case provisions of Section 167(5) of the Cr. PC would be applicable. This appears to be a wrong approach to the provision of the law. u/s 262(2) when a Magistrate tries the case summarily cannot pass an order of imprisonment for a term exceeding three months and taking a cue from Sub-section (2) of Section 262 of the Cr. PC learned Magistrate observed that since punishment given only for three months the case becomes a summons case and thus, he can apply the provision of Section 167(5) of the Cr. PC. It must not be forgotten that a case u/s 135(1)(i) or u/s 135(1)(ii) is a warrant case and the Court may award maximum term of imprisonment as is provided in the law. The Court may not try the case summarily having regard to the gravity of the offence. Therefore, it cannot be said that simply because there is an enabling provision in Section 138 of the Customs Act for trial of a case summarily u/s 135(1)(ii) the case shall be tried summarily and the Court shall not award imprisonment not exceeding three months. It has to be said again that we cannot say as to under which provision of Section 135 a complaint is likely to be filed nowhere the complainant has hinted that a complaint is likely to be filed u/s 135(1)(ii) of the Customs Act. Therefore, the position appears to be this that the offences u/s 135 of the Customs Act are not summons cases but they are warrant cases.

7. Therefore, provision of Sub-section (5) of Section 167 of the Cr. PC has no manner of application in the instant case. Mr. Sekhar. Basu read out extensively the decision in Deepak Mahajan's case to buttress his point that provisions of the Section 167 of the Cr. PC in its relation to West Bengal Amendment which came into being 1988 by West Bengal Act 24 of 1988 will be applicable to a case u/s 135 of the Customs Act. Having read the decision in Deepak Mahajan, it appears to me that the ratio of the decision relates to applicability of Sub-sections (1) and (2) of Section 167 of the Cr. PC. The discussion on the question whether customs officer can investigate the case was in connection with the determination of the question whether provision of Sections 167(1) and (2) are applicable mutatis mutandis to the Customs Act or the FERA. According to Their Lordships Sub-sections (1) and (2) of Section 167 are squarely applicable with regard to the production and detention of a person arrested under the provision of Section 135 of the FERA and u/s 104 of the Customs Act and the Magistrate has jurisdiction u/s 167(2) to authorise detention of a person arrested by any authorised officer under the FERA when taken to the Magistrate in compliance with the provision of that Act. This decision does not dwell on the question whether provision of Section 167 of the Cr. PC will at all apply to an enquiry or investigation u/s 167 of the Cr. PC. There is no decision at all on this point in the Deepak Mahajan's case and it cannot be said that simply because of the fact that provisions of Sub-section (1) and Sub-section (2) of Section 167 are applicable to a person arrested u/s 135 of the FERA and Section 104 of the Customs Act the provision of Section 167 will automatically apply in a complaint case. In fact, Section 104(2) of the Customs Act is a substitute for Section 167(1) of the Cr. PC and the legal requirement in Sub-sections (1) and (2) of the Section 167 Cr. PC have been incorporated in Section 104 of the Customs Act so much so much so that an arrestee under Customs Act has to be taken to the Magistrate after his arrest under Sub-section (1) of Section 104 of the Customs Act without unnecessary delay. Furthermore, Sub-section (3) of Section 104 clearly spells out that where an officer of custom has arrested any person under Sub-section (1) he shall for the purpose of releasing such a person on bail or otherwise have the same powers and be subject to the same provisions in charge of the police station has and is subject to under the Cr. PC. Therefore, there is, in fact no legal requirement to adhere to the provision of Section 167 of the Cr. PC in case of a person arrested u/s 104 of the Customs Act which provides its own procedure to deal with an arrested person under that Act. Therefore, it is clear that provision of Section 167(5) of the Cr. PC has no manner of application in the instant case. Furthermore, in Nirmal Kanti Roy Vs. State of West Bengal, it has been held by three Judges Bench of the Hon'ble Supreme Court that, the order stopping further investigation into the offence and consequential order of discharge are not intended to be automatic. In Nirmal Kanti Roy the Hon'ble Supreme Court observed that the Court can take cognizance of offence on the basis of materials so far collected during the statutory period. It has been rightly questioned by Mr. Kapoor as to how the Court can take cognizance of offence without complaint being filed on the basis of the materials which in a complaint case

cannot be conceived of as existing and the Court is duty bound to take cognizance of offence when complaint is filed unless it is otherwise barred by law.

8. Situated thus, I am to hold that the learned Magistrate was not justified in applying the provision of Section 167(5) of the Cr. PC in discharging the accused or stopping further investigation.

9. The revisional application is allowed. The order dated 29.6.2005 passed by the learned Chief Metropolitan Magistrate, Calcutta is set aside.

10. Urgent xerox certified copy, if applied for, shall be provided.

11. All interim orders are vacated.