IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION NO. 1370 OF 2004
TO
SPECIAL CRIMINAL APPLICATION NO. 1372 OF 2004
WITH
SPECIAL CRIMINAL APPLICATION NO. 1367 OF 2004
TO
SPECIAL CRIMINAL APPLICATION NO. 1369 OF 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.N.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

M/S.ADANI EXPORTS LIMITED A CO.INCORPORATED UNDER CO.ACT
Versus
UNION OF INDIA

Appearance:
In Special Criminal Application No. 1370 TO 1372 of 2004
MR KM THAKOR FOR M/S TRIVEDI & GUPTA for Petitioners.

CENTRAL GOVT. STANDING COUNSEL for respondent No. 1 to 4.
MR HL JANI APP for Respondent No. 5
In Special Criminal Application No. 1367 TO 1369 of 2004
MR P.R. NANAVATI for Petitioners.

CENTRAL GOVT. STANDING COUNSEL for respondent No. 1 to 4.
MRS ML SHAH APP for Respondent No. 5

CORAM : HON'BLE MR.JUSTICE D.N.PATEL

Date of decision: 24 /03/2005

C.A.V. JUDGEMENT

1. The present petition is filed under Article 226 of the Constitution of India as well as u/s 482 of the Code of Criminal Procedure, 1973 in connection with the complaint bearing Criminal Case No. 271/CW of 2004 in the Court of Chief Metropolitan Magistrate, Mumbai.

2. Heard the learned advocate for the petitioners, learned advocate for the respondents No.1 to 4 and learned A.G.P. for the respondent No. 5.

3. It is also submitted by the learned advocate for the petitioner that :

i The said goods were received at CFS, Adalaj, Ahnmedabad;

ii. The clearance of the goods also occurred in the State of Gujarat;

iii. Subsequently, the show cause notices were also issued by the Commissioner of Customs at Ahmedabad/Kandla;

iv. The adjudication of the show cause notices also took place in State of Gujarat by the Commissioner of Customs, Ahmedabad;

v. The order-in-original was also passed in the State of Gujarat;

vi. The petitioner in the present case resides within the State of Gujarat.

vii. The show cause notices and the orders are served to the petitioners in the State of Gujarat, and

viii. The sanction for initiating prosecution has also been given by the authority in the State of Gujarat and the impugned

summons is/are also served on the petitioners in Ahmedabad.

4. Learned advocate for the petitioner submitted that on the basis of the aforesaid facts, this Court has got jurisdiction to entertain the present writ petition for quashing of the complaint filed at Mumbai in view of the decision of the Hon'ble Apex Court in the case of Navinchandra N. Majithia Vs. State of Maharashtra and others, reported in (2000) 7 SCC 640, relevant paragraphs thereof read as under :

"para 22 - So far as the question of territorial jurisdiction with reference to a criminal offence is concerned the main factor to be considered is the place where the alleged offence was committed."

"para 27 - Tested in the light of the principles laid down in the cases noted above the judgment of the High Court under challenge is unsustainable. The High Court failed to consider all the relevant facts necessary to arrive at a proper decision on the question of maintainability of the writ petition, on the ground of lack of territorial jurisdiction. The Court based its decision on the sole consideration that the complainant had filed the complaint at Shilong in the State of Meghalaya and the petitioner had prayed for quashing the said complaint. The High Court did not also consider the alternative prayer made in the writ petition that a writ of mandamus be issued to the State of Meghalaya to transfer the investigation to Mumbai Police. The High Court also did not take note of the averments in the writ petition that filing of the complaint at Shilong was a mala fide move on the part of the complainant to harass and pressurise the petitioners to reverse the transaction for transfer of shares. The relief sought in the writ petition may be one of the relevant criteria for consideration of the question but cannot be the sole consideration in the matter. On the averments made in the writ petition gist of which has been noted earlier it cannot be said that no part of the cause of action for filing the writ petition arose within the territorial jurisdiction of the Bombay High Court."

"Para 43 - We make it clear that the mere fact

> that FIR was registered in a particular State is not the sole criterion to decide that no cause of action has arisen even partly within the territorial limits of jurisdiction of another State. Nor are we to be understood that any person can create a fake cause of action or even concoct one by simply jutting into the territorial limits of another State or by making a sojourn or even a permanent residence therein. The place of residence of the person moving a High Court is not the criterion to determine the contours of the cause of action in that particular writ petition. The High Court before which the writ petition is filed must ascertain whether any part of the cause of action has arisen within the territorial limits of its jurisdiction. It depends upon the facts in each case."

5. Thus. it is submitted by the learned advocate for the petitioners that part of cause of action has arisen within the territorial jurisdiction of this Court and therefore under Article 226 (2) of the Constitution of India, this Court has jurisdiction to try and entertain this petition.

6. Learned advocate for the petitioner submitted that the goods were imported at Ahmedabad and as per the Commissioner of Customs, Ahmedabad the allegation is that the present petitioner had facilitated for sale of the imported goods in domestic market, instead of being used in manufacturing export product violating the conditions of Notification No. 204/92 dated 19-5-1992, the Customs Act, 1962 and Export - Import Policy, 1992-97 and therefore show cause notice was issued by the Commissioner of Customs, Ahmedabad and the same was adjudicated at Ahmedabad and the order-in-original was also passed at Ahmedabad and subsequently the order was challenged before the Customs, Excise and Service Tax Appellate Tribunal, Mumbai (hereinafter referred to as "CESTAT"), as penalty was imposed by the Commissioner of Customs, Ahmedabad. He has also submitted that no other allegations were made against the present petitioner, so far as evasion of duty is concerned. Only the penalty was imposed by the Commissioner of Customs, Ahmedabad and against the said order, an appeal was preferred before the CESTAT, Mumbai. Upon adjudication of the said appeal, the order of the Commissioner of Customs, Ahmedabad was quashed and set aside by giving detailed reason and relevant paragraphs No.13, 14 and 15, 17 of the order passed by the CESTAT, Mumbai are as follow :

"Para 13 - Therefore up to the stage of import and clearance of the goods, nothing has been established against the appellants before us. In fact the Commissioner himself says the goods were cleared by duty free by the four firms (of Mansukhlal Desai) for use and manufacture of export products, and firms in spite of doing so these firms sold the goods in the open market.

"Para - 14 : The Commissioner goes on to find Gautam Adani and Company role to penalty in view of the agreement that the importing company. We have already dealt with this aspect. The Commissioner finds that no liability to Gautam Adani to penalty with regard to the sale of the goods. Penalty therefore could not be imposed on Gautam Adani or its company.

"Para - 15 : It is also difficult to conclude that by his act of introducing of Dhiren Shah to Desai, he was dealing with the goods in any of the manner specified in clause (b) of Section of the Act. Two decisions of the Tribunal cited by his advocate, are in his favour. On balance, therefore, we do not find any case for imposition of penalty on him.

Para - 17 : The appeals are accordingly allowed and the impugned order imposing penalties on the appellant side aside.

7. It is also contended by the learned advocate for the petitioner that the said order of the Commissioner of Customs, Ahmedabad, has become a basis for filing the complaint before the Chief Metropolitan Magistrate, Mumbai bearing No.271/CW of 2004. The said complaint does not refer the order dated 30-6-2003 passed by CESTAT, Mumbai. The complaint is filed on 20-10-2004. The basis upon which the complaint is filed, has already been quashed and set aside by the CESTAT, Mumbai much earlier in point of time i.e. approximately 18 months before.

8. It is also submitted by the learned advocate for the petitioner that the order passed by the CESTAT, Mumbai, has attained the finality as per Section 129-B(4) of the Customs Act, 1962 and the order passed by the CESTAT, Mumbai has not been challenged before any higher forum. There is no change, in fact, between the

order-in-original passed by the Commissioner of Customs. Ahmedabad and the main averments alleged in the complaint. Whatever was the basis for passing the order-in-original is also the basis for filing the complaint and therefore what is already quashed and set aside can never be a basis for filing the complaint that too after approximately 18 months from the order passed by the CESTAT, Mumbai

9. It is further submitted by the learned advocate for the petitioners that the whole criminal case is based upon the Order-In-Original passed by the Commissioner of Customs (Gujarat), Ahmedabad against the present petitioners as reference to in paragraph No.5.15 of the Order-in-Original passed by the Commissioner of Customs (Gujarat), Ahmedabad on 28-3-2002, which reads as under :

"50 (A) ..,
(i) to (v) .....
(B) (i) to (ii) ..

(iii) Having said that, however, I also find that it was M/s. Adani Exports that had rendered the services of Letter of Credit facility to M/s. GSIC for import of plastic raw material. In most of the cases, Shri Rajesh Desai had purchased goods from M/s GSIC. It is also significant to note here the terms of contract between M/s. GSIC and M/s. Adani Associates. As per their agreement, it is the second party i.e. M/s. Adani Associates which is responsible for (i) clearance of consignment at Customs, producing papers as required by Customs Authorities (ii) marketing of imported goods (iii) all liabilities whatsoever arising out of the import transactions. This clearly establishes the involvement of M/s. Adani Exports and M/s. Adani Associates in the import and post import clearance of goods in violation of the conditions of EXIM Policy and Exemption Notifications. The facts as stated above render Shri Gautam Adani and M/s. Adani Exports liable for penal action under Section 112 of the Customs Act, 1962.

(iv) ... Shri Saurin Shah has replied, that Mr. Desai has informed him only for the plastic material and not any such material which was covered under advance licence scheme. This denial is not acceptable, as all process of importation, clearance and sale of the same in domestic market was made by making necessary

arrangements by Shri Saurin Shah. Such acts of helping in illegal sale of duty free goods in open market ha rendered Shri Saurin Shah liable for penal action under Section 112 of the Customs Act, 1962."

10. It is submitted by the learned advocate for the petitioners that the aforesaid conclusion was arrived at by the Commissioner of Customs (Gujarat), Ahmedabad and the penalties were imposed. The said order, so far as the present petitioners are concerned, has been quashed and set aside by CESTAT.

11. The aforesaid base as held by the Commissioner of Customs (Gujarat), Ahmedabad has been accepted as base in the criminal complaint. Relevant part of paragraph No.31 of the complaint reads as under :

"The complainant states that from the forgoing facts, details, submissions made by various persons involved and the scrutiny of documents obtained in the course of the investigation it appears that :

(1) .....
(2) .....
(3) .....
(4) .....
(5) .....
(6) .....
(7) .....
(8) ..... Shri Gautam Adani and Shri Saureen Shah had a prior knowledge of the intention to violate actual user condition of the exemption notification under which the goods were to be cleared duty free, thereby they were aiding and actively abetting the customs duty evasion which render them liable to penal action under Section 112 of Customs Act, 1962."

"32. ..... Penalty of Rs.10.00 lakhs was imposed each on M/s. Adani Exports Ltd. and Saurin D. Shah. Penalty of Rs.5 lakhs was imposed on Gautam Adani and Rs.1 lakh on Dhiren Shah."

"36. The accused No. 3 and 4 are liable to be punished for their individual act of omission and commission and contravention of the provisions of the Customs Act, 1962, and the rules made thereunder, as described above. Accused No. 3 &

4 are responsible for the conduct of business of Accused No. 2, and as such are liable to be prosecuted and punished for the offences committed by Accused No.2, in view of the factual position and the provisions of Section 140 of the Customs Act, 1962 read with Section 132, 135 of the Customs Act, 1962 as all of them conspired to defraud the government and thereby committed offence under Section 132, 135 of the Customs Act, 1962 read with Section 120-B of the I.P.C."

12. Learned advocate for the petitioners submitted that looking to the aforesaid allegations referred to in the criminal complaint, the said allegations are same as that of the Order-in-Original passed by the Commissioner of Customs (Gujarat), Ahmedabad but the said order has been quashed and set aside by CESTAT, Mumbai and the penalties imposed upon the present petitioners were also quashed and set aside by coming to a conclusion that there was no knowledge that the goods were not permitted to be sold in the domestic tariff area with the present petitioners. The licences were, in fact, obtained at the behest of Mansukhlal C. Desai and his son Rajesh M. Desai as per the EXIM Policy and the licenses were utilized in order to clear the goods which were ordered by the Gujarat State Export Corporation or the Gujarat State Small Industrial Development Corporation. It is not in dispute that after the goods were purchased on the high seas and cleared through customs by its group of companies of Mansukhlal C. Desai and Rajesh M. Desai. This part of transaction has not been alleged to be contrary to law. The orders for supply of these goods were placed on the foreign supplier by Adani Associates. It has been observed by CESTAT that the Commissioner has not imposed penalty on the two corporation of government of Gujarat on whom notice has been issued. If the principal has been exonerated it would follow that Adani Exports and Adani Associates who acted as agents arranging finance and placing orders and supply would also be entitled to be exonerated. Mere introduction of Rajesh Desai with Dhiren Desai (who is broker) by one of the employees of Adani Associates for sale of the goods cannot fetch any penalty. In fact, at length CESTAT, Mumbai has discussed the facts of the case, evidence of the witnesses, law and judgment and has come to the conclusion that there was no knowledge on the part of the present petitioners that the goods imported were without payment of duty and were not permitted for sale. It is submitted by the learned advocate for the petitioners that these goods at the relevant time could be imported freely and it was on this belief that they responded to

the broker.

13. In support of his contentions learned advocate for the petitioners has relied upon the following judgments :

1) 1987 (32) ELT 511
2) 1994 (73) ELT 269
3) 1974 (74) ELT 240
4) 1999 (108) ELT 16 (SC)
5) 1999 (113) ELT 37
6) 2002 (139) ELT 498
7) 2003 (152) ELT 54
8) 2003 (21) ILD 757
9) 2004 (169) ELT 145
10) 2004 (170) ELT 402
11) 2004 (178) ELT 114
12) (2004) 2 SCC 271

14. In view of the aforesaid aspects of the matter, it is submitted by the learned advocate for the petitioners that basis of the criminal case has already been quashed and set aside by CESTAT, Mumbai while adjudicating the order of the Commissioner of Customs (Gujarat), Ahmedabad and in view of the aforesaid judgments the criminal case qua the present petitioners may kindly be quashed and set aside.

15. Learned Central Govt. Standing Counsel for the respondent No.1 to 4 mainly submitted that the present petitioners had sufficient knowledge of the fact that the goods imported were required to be utilized in manufacturing product which is to be exported so as to fulfil the obligations under Section 204 of 1992 dated 19-5-1992 and the Customs Act, 1962 to be read with Export and Import Policy, 1992-95. Even show cause notice was issued and adjudicated upon. The Commissioner of Customs (Gujarat), Ahmedabad has imposed penalty upon the petitioners and merely because CESTAT, Mumbai has quashed and set aside penalty, it cannot be mathematically stated that the criminal proceedings cannot be initiated against the present petitioners for the very same facts. Former one is civil proceeding and later one is criminal proceeding. On civil side CESTAT, Mumbai may have arrived at the conclusion that the order passed by the Commissioner of Custom (Gujarat), Ahmedabad imposing penalty upon the petitioners was bad in law. But that fact alone is not sufficient for quashing and setting aside the criminal complaint against the petitioners. Standard of proof in both the proceedings i.e. criminal and civil, are altogether different.

16. Having heard the learned advocates for the parties and looking to the facts and circumstances of the case, show cause notice was issued and in the present case the order passed by the Commissioner of Customs (Gujarat), Ahmedabad which is known as "Order-In-Original" as well as the order passed by CESTAT, Mumbai in statutory appeal u/s 129-A of the Customs Act, 1962 and keeping in mind the aforesaid judgments, it is clear from the record of the case that very basis of filing of the criminal complaint, is the facts stated in show cause notice and the Order-in-Original passed by the Commissioner of Customs (Gujarat), Ahmedabad (Most of the paragraphs of Order-in-Original and the complaint are the same, line-by-line and word-by-word). No new allegation is raised in criminal complaint. "Knowledge on the part of the petitioners that the goods imported were having export objection. And inspite of this knowledge, they facilitated disposal of the said goods, in domestic tariff area is violative of Section 111 (o) of the Customs Act, 1962 and therefore, penalty was imposed by the Commissioner of Customs (Gujarat), Ahmedabad u/s 112 of the Customs Act, 1962." This Fact is the basis for the criminal offence u/ss 132 and 135 of the Customs Act, 1962 but the very basis of issuance of the show cause-notice, very basis of passing of the Order-In-Original passed by the Commissioner of Customs (Gujarat) Ahmedabad has been up set by the Appellate Authority i.e. CESTAT, Mumbai while adjudicating appeal u/s 129-A of the Customs Act, 1962. The conclusion arrived at by the Commissioner of Customs (Gujarat), Ahmedabad and thereby penalty imposed upon the present petitioners u/s 112 of the Customs Act, 1962 has been quashed and set aside by CESTAT, Mumbai. Thus, the penal action under Section 112 of the Customs Act,1962 has been adjudicated by the CESTAT, Mumbai. It is not in dispute that the order passed by the CESTAT, Mumbai has not been challenged by the respondent authority i.e. Union of India and the order has been passed on 28-2-2003/27-6-2003. The order passed by the CESTAT, Mumbai has attained its finality as per provisions of Section 129-B (4) of the Customs Act, 1962. Criminal complaint has been filed on 28-10-2004 i.e. after much time after the order passed by the Appellate Authority namely CESTAT, Mumbai. The offences alleged against the present petitioners are punishable u/s 132, 135 and 140 of the Customs Act, 1962 to be read with Section 120-B of the I.P.Code. Thus, the whole basis of the criminal complaint is the knowledge on the part of the petitioners as to nature of the goods which were having export

obligation and therefore penalty u/s 112 of the Customs Act, 1962 was imposed. Very same section 112 of the Customs Act, 1962 is the basis for criminal complaint as held by the Hon'ble Supreme Court in the decision of the Supreme Court in the case of K.C. Builder and Another Vs. Assistant Commissioner of Income Tax, reported in (2004) 2 SCC 731, wherein it has been held by the Supreme Court that the Income-tax Appellate Tribunal's order not challenged became final. In such circumstances, it was held that no offence survived under the Income-tax Act, 1961 and hence the prosecution of the Assessee could not be maintainable. Relevant paragraphs of the decision said decision are paragraphs No. 23, 26, 28 and 29, which read as under :

"Para 23 : The above judgment squarely applies to the facts and circumstances of the case on hand. In this case also, similarly, the application was moved by the assessee before the Magistrate to drop the criminal proceedings which were dismissed by the Magistrate and the High Court also on a petition filed under Sections 397 and 401 of the Code of Criminal Procedure, 1973 to revise the order of the Additional Chief Metropolitan Magistrate has also dismissed the same and refused to refer to the order passed by the competent Tribunal. As held by this Court, the High Court is not justified in dismissing the criminal revision vide its judgment 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 Appellate Tribunal's order, no offence survives under the Income Tax Act and thus quashing of prosecution is automatic." (Emphasis supplied)

"para 26 : In view view, once the finding of concealment and subsequent levy of penalties under Section 27 (1) (c) of the Act has been struck down by the Tribunal, the assessing officer has no other alternative except to correct his order under Section 154 of the Act as per the directions of the Tribunal. As already noticed, the subject matter of the complaint before this Court is concealment of income arrived at on the basis of the finding of the assessing officer. If the Tribunal has set aside the order of concealment and penalties, there is no concealment in the eye of the law and,

therefore, the prosecution cannot be proceeded with by the complainant and further proceedings will be illegal and without jurisdiction. The Assistant Commissioner of Income-Tax cannot proceed with the prosecution even after the order of concealment has been set aside by the Tribunal. When the Tribunal has set aside the levy of penalty, the criminal proceedings against the appellants cannot survive for further consideration. In our view, the High Court has taken the view that the charges have been framed and the matter is in the stage of further cross-examination and, therefore, the prosecution may proceed with the trial. In our opinion, the view taken by the learned Magistrate and the High Court is fallacious. 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." (Emphasis supplied)

"para 29 : In a very recent judgment in the case of Hira Lal Hari Lal Bhagwati V. CBI, in which one of us (DR. AR Lakhmanan, J.) was a member, this Court while considering the scope of the immunity granted under the Kar Vivad Scheme whether criminal proceedings could be initiated in respect of declaration filed under the Scheme and accepted by the Excise Department can proceed further with the prosecution and criminal conspiracy and cheating against the appellants therein - allowing the appeals, held that since the alleged criminal liability stood compounded on settlement with respect of the civil issues, the FIR was erroneous and unwarranted and, therefore, the continuation of the proceedings would tantamount to double jeopardy. This Court further held that as the Collector of Customs had exonerated the appellants there was no warrant for any fresh investigation and prosecution on a matter which stood settled. Further, since no prima facie case of cheating and criminal conspiracy was made out the process issued is liable to be quashed. It is to be noticed that as per the Kar Vivad Samadhan Scheme, 1998 whoever is granted the benefit under the said Scheme is granted immunity from prosecution from

any offence under the Customs Act, 1962 including the offence of evasion of duty. In the circumstances, the complaint filed against the appellants is unsustainable. This Court further held that under the penal law, there is no concept of vicarious liability unless the said statute covers the same within its ambit. In that case, the appellants have been wholly discharged under the Customs Act, 1962 and GCS granted immunity from prosecution." (Emphasis supplied)

17. Similarly, the Hon'ble Supreme Court has decided in the decision in the case of G.L. Didwania Vs. Income Tax Officer, reported in 1999 (108) ELT 16 (SC) that the very basis of the criminal prosecution was decided by the Tribunal and therefore the petitioners in that case had preferred petition for quashing criminal prosecution u/s 482 of the Code of Criminal Procedure, relevant portion of the said judgment reads as under :

"Para 2 : After the Appellate Tribunal passed the order, allowing the appeal in favour of the appellant, he filed a petition before the magistrate to drop the criminal proceedings. The magistrate by his order dated September 2, 1979 dismissed the said application and held that the prosecution has got a right to lead evidence in support of his complaint and the court can come to the conclusion whether or not any criminal offence is made out. The learned magistrate also observed that the order of the Tribunal can be taken only as evidence. Aggrieved by the same, the appellant - assessee filed an application under Section 482, Criminal Procedure, before the High Court and the High Court dismissed it in limine. Hence, the present appeal." (Emphasis supplied)

"Para 4 : In the instant case, the crux of the matter is attracted and whether the prosecution can be sustained in view of the order passed by the Tribunal. As noted above, the assessing authority held that the appellant-assessee made a false statement in respect of income of Young India and Transport Company and that finding has been set aside by the Income-tax Appellate Tribunal. If that is the position then we are unable to see as to how criminal proceedings can be sustained." (Emphasis supplied)

"Para 5 : Mr. A. Raghuvir, learned Senior Counsel appearing for the department, submitted that the fact whether the firm is a genuine firm, still remains as a question to be resolved and, therefore, the proceedings cannot be quashed at this stage. We do not agree. The whole question is whether the appellant-assessee made a false statement regarding the income which according to the assessing authority has escaped assessment. So far as this issue is concerned, the finding of the Appellate Tribunal is conclusive. Therefore, held in Uttam Chand's case (1982) 133 ITR 909 (SC), the prosecution cannot be sustained. Accordingly, the proceedings are quashed and the appeal is allowed." (Emphasis supplied)

18. Similar view has been taken by various High Courts like the case decided in the decision in the case of S.G. Chandra (Dr.) Vs. Enforcement Officer, DTE,FERA, reported in 2004 (170) ELT 402 (Kar), relevant paragraph Nos. 8, 9 and 10 thereof read as under :

"Para 8 : From the material on record, it is seen that, according to the accused, he had preferred an appeal against the order of the Special Director, Enforcement Directorate, New Delhi before the Appellate Tribunal for Foreign Exchange and on 8-5-2003 an order has been passed by the Appellate Tribunal allowing the appeal and the order has been set aside. From the material on record, it is seen that the order of the Special Director on 30-3-1994 had been the basis for the complaint to file the complaint as seen from Para 15 of the Complaint. Patently, the said order has been set aside, subsequently, by the Appellate Tribunal for Foreign Exchange, a Special Tribunal constituted under the statute."

"Para 9 : It is seen from the decision of Bombay High Court rendered in the case of Kiran Shailen Jhaveri V. State of Maharashtra & Ors., reported in 2003 (85) ECC 600, wherein it is held that when the proceedings under Sections 18(2) and 18 of the FERA Act could be concluded, no complaint had been maintained against the accused and as such the proceedings had been quashed. It is also pertinent to mention the other decision of the Delhi High Court rendered in the case of Neon Fab V. Enforcement Directorate, reported in 2002 (83) ECC 296 (Del.) wherein it is held that once the Appellate Authority had stayed the order

under FERA Act no complaint could have been filed for violation of the said order. In the case on hand, the order, which had been passed by the complainant had been set aside by the competent authority."

"Para 10 : It is also from another decision of Delhi High Court rendered in the case of Ashok Manufacturing Company Private Limited V. C.K. Moorajani reported in 2003 (156) E.L.T. 184 (Del.), wherein it has been held that if assessee is exonerated in the Departmental proceedings on the same set of facts and charges, no criminal prosecution can be launched."

19. Similar view has been taken by the High Court of Delhi in the case of R.K. Goenka Vs. Collector of Customs, reported in 2003 (152) E.L.T. 54 (Del.). In this the Collector of Customs had issued the notices for violation of Section 111 of the Customs Act, 1962 as the importer has misdeclared goods and there was undervaluation. The importer ought to have valid licence under Clause 3 of Imports (Control) Order issued under Section 3 and 4A of the Imports and Exports (Control) Act, 1947. After adjudication, the order passed by the Collector of Customs, 28-12-1988 against which an appeal was preferred to SEGAT. The petitioner approached the Supreme Court by way of filing civil appeal and the matter was remanded to the Tribunal its fresh consideration. The matter was reconsidered by the Special Bench of the Tribunal and the order was passed on 10-5-1993 wherein it has been held as under :

"In the circumstances, we held that the department has failed to prove undervaluation of the goods in the instant case. We accordingly order that the value of the goods be accepted as declared by the appellant."

In the meantime on 28-4-1988, the Collector of Customs filed a complaint against the petitioners under Sections 132 and 135 (1) (a) of the Act."

In the present case also against the present petitioners criminal complaint is filed u/s 132 and 135 of the Customs Act, 1962. The High Court of Delhi has quashed and set aside criminal proceedings in exercise of the inherent powers u/s 482 of the Code of Criminal Procedure especially in para 6 thereof, which reads as under :

"In the case of P.S.Rajya V. State of Bihar 1996

S.C. Cases (Cri.) 897, the appellant an Income-Tax Officer was prosecuted by the CBI for being found in possession of the disproportionate assets. Later on the Central Vigilance Commission exonerated the appellant in the departmental proceedings and this was concurred by the UPSC. The appellant then filed a petition under Section 482 Cr. P.C. in the High Court for quashing prosecution but the High Court rejected the petition being of the view that issues had to be gone into in the final proceedings. The appellant then approached the Supreme Court. Apex Court allowed the appeal and hold that when on the same allegation appellant has been exonerated in the departmental inquiry there was no justification in continuing the prosecution. In the case of Uttam Chand V. Income Tax Officer, Central Circle, Amritsar Income Tax Reports Vol. 133 page 909 (S.C.), the income tax department had launched the prosecution against the petitioner for filing false return. In the departmental proceedings the Tribunal exonerated the petitioner. In the departmental proceedings the Tribunal exonerated the petitioner. Supreme Court held that after the petitioner has been exonerated by the department's Appellate Authority, he could not be prosecuted in a criminal Court on the same facts. Likewise, in the case of G.L. Didwania V. Income Tax Officer 1999 (108) E.L.T. Page 16 (S.C.), the petitioner was prosecuted by the Income Tax department for concealment of income under the Income Tax Act. But the Tribunal who is the final fact finding authority under the Act decided the question in favour of the assessee. The Supreme Court held that prosecution on the same charges cannot be continued. This High Court also took the same view in the case of Munnalal Khandelwal V. Director of Revenue Intelligence, Petition (Cri.) 952/99 decided by DB of this Court on 12-9-2002, Criminal Revision 420/1998, decided on 31-10-2000, 1987 (32) E.L.T. 511 (Del.) and 2002 (139) E.L.T. 498 (Mad.)."

20. Identical view has been taken by the High Court of Karnataka at Bangalore in the case of D. Munnalal V. Collector of Central Excise, Belgaum, reported in 1999 (113) E.L.T. 37 (Kar.), wherein it has been held by the High Court of Karnataka that as the last fact finding authority having held that the gold articles do not constitute primary gold, the prosecution cannot be

continued and it was also held that it was not proper to continue prosecution.

21. Similar view has been taken by the High Court of Karnataka in the case of Chiramith Precision (India) V. Deputy Commr. of Cus. (P). Mangalore, reported in 2004 (169) E.L.T. 145 (Kar.) wherein it has been held at paragraphs No.17, 18 and 19 thereof, as under :

"Para 17 : ... The cumulative effect of all these decisions is that whenever there has been a clean chit given to the accused by the tribunal, which is the final fact finding authority, the criminal prosecution of the accused is impermissible. In the case on hand also, the tribunal as a final fact finding authority did come to a conclusion as stated and exonerated from payment of duty and penalty and also set aside the order of confiscations." (Emphasis supplied)

"Para 18 : In view of the facts and circumstances of the case, in the opinion of this court, the ratio down in the said decision would come to the assistance of the petitioner.

"Para 19 : At this stage, it is also necessary to mention another decision of the Apex Court, reported in AIR 1992 SC 1815, wherein it has been held that the "

"Judicial process should not be an instrument of oppression or needless harassment. The Court should be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of private complaint as vendetta to harass the persons needlessly. Therefore, in case of default in repayment of bank loan, when the debt became time-barred and the bank has adjusted the debt from the FDRs in its possession which were deposited by the guarantor by way of security, after the maturity, and a complaint was laid by the guarantor impleading the Chairman, Managing Director of the Bank and a host of officials on the charges under Sections 109, 114 and 409 of Indian Penal Code, it would be the responsibility and duty of the Magistrate to find whether the concerned accused were legally responsible for the offences charged for, before

issuing the process. Thus the complaint on the basis of which the process was issued was filed as vendetta to harass the persons needlessly, the complaint was quashed."

"Para 20 : It is settled principle of law that this court has been empowered to exercise the inherent powers, if the petitioner is able to make out any one of the grounds as enshrined in the statute that having regard to the facts and circumstances of the case, in the opinion of this Court and the said law, the continuance of criminal proceedings against the accused would amount to abuse of process of law and it would be in the ends of justice, if this Court were to exercise inherent powers and allow the petition, as prayed."

22. Learned Central Govt. Standing Counsel for the respondents No.1 to 4 has taken plea that this Court has no power, jurisdiction and authority for quashing and setting aside the criminal complaint filed before the Metropolitan Magistrate, Mumbai. For this plea of the respondents, the provision of Article 226 (2) of the Constitution of India, is a direct answer. It reads as under :

"226 (2) : The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories."

23. Thus, if the cause of action wholly or in part arises within the territorial jurisdiction of this Court as per Article 226 (2) of the Constitution of India, this Court has power, jurisdiction and authority to decide the issue in question. In the present case, the goods in question were received at C.F.S., Adalaj, Ahmedabad and clearance of the goods has also taken place within the State of Gujarat. Show cause notices were also issued by the Commissioner of Customs (Gujarat), Ahmedabad. The Order-in-Original has also been passed within the State of Gujarat. Sanction for initiating prosecution has also been given by the authority situated in the State of Gujarat namely the Commissioner of Customs (Gujarat),

Ahmedabad and as per the judgment delivered by the Hon'ble Supreme Court in the case of Navinchandra N. Majithia V. State of Maharashtra, reported in (2000) 7 SCC 640 and at paragraphs 22, 27 and 43 thereof the Supreme Court has narrated that if the cause of action has arisen partly within the territorial limits of particular High Court, such High Court has jurisdiction to deal with the dispute. In view of the facts that as the goods were and received at C.F.S., Adalaj, Ahmedabad an the goods were also cleared within the State of Gujarat, the part of cause of action is said to have arisen within the State of Gujarat and therefore in view of the judicial pronouncements and in view of provisions of Article 226 (2) of the Constitution of India, I am of the opinion that this Court has jurisdiction to deal with the dispute in question.

24. Looking to the the show cause notice issued by the Commissioner of Customs (Gujarat), Ahmedabad and the Order-in-Original passed by the Commissioner of Customs (Gujarat), Ahmedabad, they are the gist of the criminal complaint. As per the show cause notice and the Order-in-Original, there was knowledge on the part of the petitioners that the goods imported were bearing the burden of export obligations. Having this knowledge, petitioners being facilitated, the sale of goods within the domestic tariff area is violative of Section 111 (o) of the Customs Act, 1962 and therefor penalty was imposed by the Commissioner of Customs (Gujarat), Ahmedabad u/s 112 of the Customs Act, 1962 and therefore the petitioners have committed offences u/ss 132 and 135 of the Customs Act, 1962. If we read closely Section 132 and 135 of the Customs Act, 1962, both are having the clauses pertaining to the knowledge or reason to believe on the part of the offender. It is also narrated in the aforesaid judgments of the Hon'ble Supreme Court as well as various High Courts, that the CESTAT who is final fact finding authority u/s 129-B (4) of the Customs Act, 1962. It was held that there was no knowledge on the part of the petitioners that the goods imported were having export obligation and therefore the petitioners have not committed the breach of Section 112 of the Customs Act, 1962 and therefore the order u/s 112 of the Customs Act imposing penalty for illegal import of the goods u/s 111 (o) of the Customs Act, 1962 was quashed and set aside. Meaning thereby that the order of the Commissioner of Customs (Gujarat), Ahmedabad, imposing penalty upon the petitioners for illegal import of the goods as per Section 111 (o) of the Customs Act has already been turned down by the CESTAT, Mumbai vide its order dated 30-6-2003. The order passed by the CESTAT has already

attained its finality as per Section 129(B) (4) of the Customs Act, 1962. No appeal or writ has been preferred by the department against the order of CESTAT. Thus, the order passed by the CESTAT, Mumbai has been accepted by the department. The very same knowledge which has been referred in the show cause notice as well as in the Order-in-Original passed by the Commissioner of Customs (Gujarat), Ahmedabad has once again became a basis for filing the criminal complaint in view of Sections 132 and 135 of the Customs Act, 1962. Both sections 132 and 135 of the Customs Act, 1962 presupposes the knowledge on the part of the present petitioners or reasonable belief that the goods imported were having export obligation. Thus, the basis of the criminal complaint has already been quashed and set aside as per CESTAT, Mumbai and therefore in view of the aforesaid judicial pronouncements in exercise of inherent powers u/s 482 of the Code of Criminal Procedure, 1973, I hereby quash the Criminal Case No.271/C/W as well as process/summons issued by the Chief Metropolitan Magistrate, Mumbai so far as they relate to the present petitioners. The continuation thereof in the face of the order of CESTAT, Mumbai "which has attained its finality" u/s 129 (B) of the Customs Act, 1962 and the department has accepted the aforesaid order passed by the CESTAT, Mumbai and as no appeal has been preferred against the said order, will tantamount to abuse of process of the Court.

25. Special Criminal Application No. 1371 of 2004

Similar are contentions and averments in this petition and therefore Criminal Case No.272/C/W filed by the Chief Metropolitan Magistrate, Mumbai and the summons/process issued by the said Court in so far as they relate to the present petitioners are hereby quashed and set aside.

6. Special Criminal Application No. 1367 of 2004

Paragraphs No.16 of the order passed by the CESTAT, Mumbai reads as under :

"Para 16 : While the Commissioner emphasises the fact thtat Dhiren Shah did not insist on valid document for the goods which he sold and on cash terms and he was acting on instruction of Gautam Adani and Sauren Shah. Dhiren Shah was a broker in goods. No doubt he did not insist on illegal document. But by that itself cannot lead to the conclusion that he was aware of the illegal

nature and contrary to customs law. Nor is it correct to say that he was acting on instruction of Gautam Adani and Sauren Shah. As we have noted, Sauren Shah merely introduced Rajesh Desai to him and no further role is attributed to him in the order. Dhiren Shah in his statement on 18-11-97 says that he was asked by Gautam Adani to contact Sauren Shah and take instructions and in his further statement thereafter the sale of the goods he would send the proceeds either to Rajesh Desai and sometimes to Adani Exports. He also said that he sold material other than that imported by Chaganlal & Co. also. There is not a word in his statement as to his possessing knowledge that the goods were not permitted to be sold. The mere fact of the goods having been sold does not justify the conclusion that he was aware.

"Para 17 : The appeals are accordingly allowed and the impugned order imposing penalties on the appellants set aside."

27. In view of the facts and circumstances of case and judicial pronouncements of the various High Courts as stated hereinabove, for the present petitioners also the criminal complaint is having the same basis, as that of the show cause notice issued by the Commissioner of Customs (Gujarat), Ahmedabad and the Order-in-Original passed by the Commissioner of Customs Gujarat), Ahmedabad, the knowledge on the part of the petitioners that the goods were not permitted to be sold in the domestic tariff areas as they were having expert obligation. The said show cause notice and the Order-in-Original were challenged upon CESTAT, Mumbai and the CESTAT, Mumbai has observed as stated hereinabove. The said order has been accepted by the department and no appeal or writ petition has been preferred by the department against the said order of CESTAT, Mumbai. U/s 129-B (4) of the Customs Act, 1962. The order passed by the CESTAT, Mumbai has attained its finality and after several months i.e. more than 14 months very same knowledge has once again became a basis of the criminal complaint. As observed and stated hereinabove, in the main Special Civil Application along with judicial pronouncements of the various High Courts and the Supreme Court the criminal complaint and summons/process issued by the Chief Metropolitan Magistrate, Mumbai, against the present petitioners deserves to be quashed and set aside.

28. Looking to the facts and circumstances of the

case, order passed by the Commissioner of Customs (Gujarat), Ahmedabad and the order passed by the CESTAT, Mumbai as well as in view of the judicial pronouncements of the various High Courts and the Supreme Court, (i) In Special Criminal Application No. 1370 of 2004, Criminal Case being Case No.271/CW of 2004 filed by the Chief Metropolitan Magistrate, Mumbai and the summons/process dated 28-10-2004 issued by the said Court, so far as as the present petitioners are concerned, (ii) In Special Criminal Application No. 1371 of 2004, Criminal Case being Case No.272/CW of 2004 filed by the Chief Metropolitan Magistrate, Mumbai and the summons/process dated 27-10-2004 issued by the said Court so far as the present petitioners are concerned, (iii) In Special Criminal Application No. 1372 of 2004, Criminal Case being Case No.270/CW of 2004 filed by the Chief Metropolitan Magistrate, Mumbai and the summons/process dated 26-10-2004 issued by the said Court so far as the present petitioners are concerned, (iv) In Special Criminal Application No. 1367 of 2004, Criminal Case being Case No.270/CW of 2004 filed by the Chief Metropolitan Magistrate, Mumbai and the summons/process dated 26-10-2004 issued by the said Court so far as the present petitioners are concerned, (v) In Special Criminal Application No. 1368 of 2004, Criminal Case being Case No.271/CW of 2004 filed by the Chief Metropolitan Magistrate, Mumbai and the summons/process dated 28-10-2004 issued by the said Court so far as the present petitioners are concerned and (vi) In Special Criminal Application No. 1369 of 2004, Criminal Case being Case No.272/CW of 2004 filed by the Chief Metropolitan Magistrate, Mumbai and the summons/process dated 27-10-2004 issued by the said Court so far as the present petitioners are concerned, are hereby quashed and set aside. In aforesaid all petitions, Rule is made absolute to the aforesaid extent.

(D.N. Patel, J.)

_/\/Satwara/