
(2003) 12 BOM CK 0060
In the Bombay High Court
Case No : Writ Petition No. 1831 of 2003

Abdul Razak Haji Ismail

APPELLANT

Vs

Director of Enforcement and Others

RESPONDENT

Date of Decision : 16-12-2003

Acts Referred:

Constitution of India, 1950 — Article 300A

Foreign Exchange Regulation Act, 1973 — Section 8(1)

Citation : (2004) 4 BomCR 184 : (2005) 123 CompCas 219 : (2004) 113 ECR 732 : (2004) 165 ELT 495 : (2004) 2 MhLj 152 : (2004) 51 SCL 337

Hon'ble Judges : V.C. Daga, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : Madhu M. Patel, for the Appellant; Avil C. Singh, for the Respondent

Final Decision : Allowed

Judgement

V.C. Daga, J.—The petitioner, in this petition, is seeking directions in the nature of writ of mandamus against the respondents 2 to 4 to direct them to return the seized currency amounting to Rs. 4,13,600/-, which according to him, came to be released under Order dated 29-1-1999 passed by the Appellate Bench of Central Excise and Gold Appellate Tribunal, Mumbai (the CEGAT for short) with interest thereon @ 24% p.a. from 29-1-1999 till realisation thereof.

The Facts:

2. The facts, in nutshell, would reveal that search and seizure operation was conducted in the shop and residential premises of the petitioner on 18-9-1990. Foreign currency equivalent to Indian currency worth Rs. 44,447.50 along with Indian currency in the sum of Rs. 4,13,600/- was recovered and seized in the said search and seizure operation.

3. A show cause notice dated 13-3-1991 was served upon the petitioner calling upon him to show cause as to why said currencies/amounts should not be confiscated. The said show cause notice was replied by the petitioner. It came to

be adjudicated upon by the Additional Collector of Customs, (M and P Wing) vide its Order-in-Original No. 72/93/Cus dated 1-3-1993 wherein confiscation of the said currencies/amounts came to be ordered.

4. Aggrieved by the aforesaid order, the petitioner preferred an appeal before the Collector of Customs (Appeals), Bombay which came to be dismissed by an order in Appeal No. 34/94 BP; dated 18-3-1994.

5. Aggrieved by the aforesaid order, the petitioner went in appeal before the CEGAT, which came to be allowed by the order dated 29-1-1999.

6. It appears that on the basis of the certain observations made in the aforesaid order by the CEGAT in its Order dated 29-1-1999, the matter was referred to the Enforcement Directorate. By the order dated 22-10-2001, the Assistant Director, Enforcement Directorate after due investigation imposed penalty of Rs. 1 lac on the petitioner and inter alia; made observation on page (11) of the Order, which reads as under:

"In view of the above, Shri Abdul Razak Haji Ismail has conclusively contravened the provisions of Section 8(1) of FERA, 1973 I hold him guilty for the same and imposed a penalty of Rs. 1,00,000/- (Rupees one lakh only).

The seized Indian currency of Rs. 4,13,600/- which was a sales proceeds of the foreign exchange and proposed for confiscation u/s 63 of the FERA, 1973 is, therefore, liable to confiscation in view of the contravention of Section 8(1) as proved against him.

However, the customs department vide their letter No. CIU/11-40/90/1084 dated 20-8-2001 stated that the currency of Rs. 4,13,600/- was deposited in the Bank of India vide TR-6, Challan No. CIU/11/91 dated 10-12-1991 and therefore, they are not in a position to hand over the currency to this department for confiscation.

I, therefore, do not pass any order for confiscation"

7. In view of the aforesaid order, the learned counsel for the petitioner, entertaining belief that seized currency has not been confiscated, addressed a letter calling upon the Revenue to release the amount of Rs. 4,13,600/-, contending that though there are observations that money is liable to be confiscated but no actual order directing confiscation of the said amount has been passed finding that the moneys were deposited by the Customs Department with the Bank. In the circumstances, on 18-7-2002, the Deputy Commissioner of Customs (P) (Refund Section, M and P Wing) Mumbai wrote a letter to the Assistant Director (Admn.) Enforcement Directorate, seeking clarification that in view of the observations made in their order, whether or not the amount of Rs. 4,13,600/- has been confiscated. The Enforcement Directorate, vide its letter dated 7-10-2002, replied to the Dy. Commissioner of Customs (Refund section M and P Wing) that; as the Asstt. Director of Directorate of Enforcement has already ordered that the currency is liable for

confiscation, the request of the petitioner to release the seized currency should not be granted.

8. In the aforesaid backdrop, when the respondents refused to refund Rs. 4,13,600/-, the petitioner has filed this petition before this court under Article 226 of the Constitution claiming refund of the amount and seeking implementation of the order of CEGAT dated 29-1-1999.

The Arguments:

9. The learned counsel appearing for the petitioner brought to our notice the aforesaid extracted observations-cum-findings recorded by the Assistant Director of Enforcement and contended that so far as the seized currency is concerned, though the Asstt. Director was of the view that in view of the contravention of Section 8(1) of FERA 1973, having been proved against the petitioner the currency was liable to be confiscated but; actually refused to confiscate the same, may be on the erroneous belief that the amount having been deposited in the Bank, no specific order of confiscation needed to be passed. In his submission, power of confiscation has to be exercised specifically. No such power has been exercised by the Asstt. Director of Enforcement though he was entitled to exercise such power of confiscation. Learned counsel reiterated that the authorities having failed to exercise that power, the exercise of such power cannot be assumed or inferred. He submits that nobody can be deprived of his right to property without authority of law. The authorities bestowed with powers must exercise that power specifically. Since no such power has been exercised in the instant case, the petitioner is entitled to get back his property, namely; seized amount or currency in the sum of Rs. 4,13,600/-.

10. Per contra, the learned counsel appearing for the Revenue contended that there is a positive finding recorded in the impugned order that the currency was liable to confiscation in view of the contravention of Section 8(1) of FERA, 1973 which was proved against the petitioner; as such it would be reasonable to infer that the seized currency has been confiscated. He submits that the authority passing the order, was under the wrong impression that the amount having been deposited in the Bank and the same not being available for handing it over to the customs for confiscation, a specific order directing confiscation need not be passed. He, thus, submits that one has to see the intention behind the order, it needs to be understood in its proper perspective so as to reach to the logical conclusion that the amount has been confiscated. He, thus, submits that the seized currency cannot be released in favour of the petitioner.

11. In the rejoinder, the learned counsel appearing for the petitioner submitted that it is no doubt true that the order in question is not very clear but the fact remains that no actual order of confiscation has been passed. Alternatively, he submits that in the event of any ambiguity or vagueness in the order, the benefit of doubt should go in favour of the subject; namely; petitioner.

Interim Direction :

12. Having heard rival parties, this Court by order dated 25-8-2003, had directed the respondents to deposit sum of Rs. 4,13,600/- in this Court which were lying with the State Bank of India with accrued interest thereon within one week from the date of the order. In compliance with the said order, the respondents have deposited Rs. 4,13,600/- in this Court. The respondents with regard to the deposit of accrued interest have filed an affidavit stating therein; that no interest has accrued on the said amount as the said amount was in deposit in the Government Account. The amount was not in deposit with any Bank as was believed by this Court; while issuing interim directions. As such, according to the Revenue, since no interest has accrued on the sum of Rs. 4,13,600/-, the amount of interest could not be deposited. It was thus stated that with a view to comply with the order of this Court, only sum of Rs. 4,13,600/- were deposited in this Court. Learned counsel for the petitioner has made a statement that so far as the amount of penalty in the sum of Rs. 1 lakh is concerned, the same has already been deposited by the petitioner. Receipt evidencing deposit is taken on record.

The Issue :

13. In the aforesaid backdrop, the substantive issue which needs consideration, is : whether or not the petitioner is entitled to refund in the sum of Rs. 4,13,600/-?

Consideration:

14. Having heard rival parties, an answer to the above issue centers around the scope, interpretation and understanding of the observation made on page (11) of the Order, dated 22-10-2001; passed by the Assistant Director of Enforcement Directorate, Mumbai, the text of which is extracted in para 5 (supra), reading of which, no doubt, does suggests that a positive finding has been suffered by the petitioner that he has contravened the provision of Section 8(1) of F.E.R.A., 1973. He was held guilty for the same. The penalty of Rs. 1 lakh has been imposed on him. Further reading of the said para does suggests that the amount was held to be liable to confiscation for having committed contravention of Section 8(1) of FERA, 1973. However, order further does suggests in unequivocal terms that power to confiscate has not been actually exercised. No confiscation has been ordered may be on a wrong understanding or belief; but fact remains that confiscation has not been ordered. It is clear from the last sentence of the extracted portion of the order, which reads as : "I, therefore, do not pass any order of Confiscation". In this view of the matter, in our opinion, confiscation of the currency cannot be inferred.

15. It is trite of law that the order of confiscation being penal in nature has to be exercised specifically, and in clearest possible terms backed by cogent reasons. Confiscation of property cannot be inferred by implication. Confiscation of property cannot be assumed on the basis of assumptions or suppositions. It is no doubt true that there was no impediment in the way of the adjudicating authority

to confiscate the currency in question. There was an intention to confiscate but intention has not been translated into actual order of confiscation. It is, thus, difficult to hold that seized currency has been confiscated under the order in question.

16. Let us now turn to the understanding of the customs so far as this aspect of the matter is concerned. Had, the confiscation been clear, it was not necessary for the Deputy Commissioner of Customs (M and P Wing) to write a letter dated 18-7-2002 to the Assistant Director (Adm) Enforcement Directorate to seek clarification as to whether or not the currency has been confiscated by him. Thus, the customs Department was also not very sure about the confiscation of the amount. Had it been the understanding of the customs that the amount has been confiscated, in that event, the amount would have been treated as part of the general funds of the Union of India. It would have been treated as the property of the Union of India. The amount would not have remained in the account as "deposit". Thus, the conduct of customs is quite contrary to their submissions advanced to counter the submissions made on behalf of the petitioner.

17. It is no doubt true that the order is capable of more than one interpretation. The same is vague so far as confiscation of the currency is concerned. If that be so to whom benefit of doubt should go is the question. In our opinion, certainly, it cannot go in favour of the Revenue. No person can be deprived of his property saved by authority of law, is the mandate of Article 300A of the Constitution. Keeping this constitutional mandate and taking overall view of the matter, we are the opinion that the amount or currency seized in the search and seizure operations has not been confiscated in the order dated 22-10-2001 by the Assistant Director of Enforcement Directorate. The petitioner is, thus, entitled for refund of Rs. 4,13,600/-, however, without any interest as the deprivation of the amount has resulted due to vague order passed by the quasi-Judicial authority for which Revenue cannot be penalised. The Revenue is not at fault. Revenue did not earn any interest thereon.

18. In the result, petition is allowed in terms of this order. Rule is made absolute in terms of prayer Clause (c.1) excluding bracketed portion marked "A". Prayer Clause (c.1) thus reads :--

"That the respondents be directed to return the released seized currency amounting to Rs. 4,13,600/- to the petitioner by the Order dated 29th January, 1999 passed by the Appellate Bench of CEGAT, WRB, Mumbai. In Appeal No. C/207/94-Bom; [and further that the respondents also directed to pay the interest on the principal amount of Rs. 4,13,600/- at the rate of 24% per annum from 29th January, 1999 till filing of the petition and realization as claimed and stated in letter dated 18th December, 2002 (Exhibit "G") (Bracketed portion is marked as A).

The respondents are directed to refund/return Rs. 4,13,600/- within eight weeks

from the date of this order failing which Rs. 4,13,600/- shall carry interest thereon @ 12% p.a. from the date of this order till repayment in full and final No order as to costs.

Parties to act on the ordinary copy of this order duly authenticated by the Associate of this Court to be supplied to them.