

(2014) 09 MAD CK 0163

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 514 of 2006 and C.M.P. No. 1941 of 2006

Commissioner of Customs, Chennai

APPELLANT

Vs

Savier Poonolly

RESPONDENT

Date of Decision : 04-09-2014

Acts Referred:

Customs Act, 1962 — Section 113, 113(d), 114, 114(i), 2(22)(d)
Foreign Exchange Management Act, 1999 — Section 2(h)

Citation : (2014) 310 ELT 231 : (2015) 31 GSTR 226

Hon'ble Judges : R. Sudhakar, J;G.M. Akbar Ali, J

Bench : Division Bench

Judgement

R. Sudhakar, J.—The Revenue has filed the present Civil Miscellaneous Appeal against the order of the Tribunal allowing the confiscated currency to be redeemed on payment of fine of Rs. 2.00 lakhs and reducing the penalty imposed by the Adjudicating Commissioner from Rs. 5.00 lakhs to Rs. 1.00 lakh. The brief facts are as follows:

On 3-10-2001, Late Shri Savier Poonolly, a passenger bound for Bangkok via Singapore by Singapore Airlines flight SQ 409 on SQ ticket No. 618 3169 77877642 was intercepted by the Intelligence Officer of Customs attached to Air Intelligence Unit, Anna International Airport Chennai on specific information after he had cleared through the immigration and customs. On questioning in the presence of two independent witnesses as to whether he was in possession of any foreign currency, the passenger replied that he was carrying only 50 US dollars. Not satisfied with the reply, the person and baggage were checked in the presence of the independent witnesses, which resulted in the recovery of 55,500 US \$, 710 Singapore dollars and 7370 Thai Bhats. Statement was recorded from the passenger, since he did not declare the said currency nor was in possession of any valid documents to prove the legal export of the foreign currencies out of India. The foreign currencies, which attempted to export out of India totally equivalent to Indian Rs. 26,42,625/-, were seized under a mahazar for action

under the Customs Act, 1962 read with FEMA, 1999. The statement of the passenger was recorded on 3-10-2001. He explained that he had taken the money for the purpose of exploring the possibility of starting a new business, as he had already suffered great loss in India. He also stated that he procured the said amount from nine unknown brokers at Burma Bazaar and proceeded to go abroad taking the said currency without declaration. His house was also searched and statements were recorded. He was arrested on 4-10-2001 and remanded to judicial custody. On the request of the passenger, personal hearing was granted on 27-12-2001 and the case was adjudicated.

2. On hearing the submissions made by the passenger and also the records, the Commissioner came to hold that the foreign currency equivalent to Indian Rs. 26,42,625/, attempted to be exported out of India without any valid document and for which there was no proof of legal acquisition, was liable for confiscation under Section 113(d), (e) and (h) of the Customs Act, 1962 read with Foreign Exchange Management (Export & Import of Currency) Regulations, 2000, framed under Foreign Exchange Management Act, 1999 and also liable for penal action under Section 114(i) of the Customs Act, 1962. Accordingly, the Commissioner of Customs passed the following order:

"Considering all the facts and circumstances,

(1) I Confiscate absolutely, US \$ 55,500, Singapore \$ 710 and Thai Bhats 7370 totally valued at Rs. 26,42,625/- (Rupees Twenty Six Lakhs Forty Two Thousand Six Hundred and Twenty Five Only) under Section 113(d), (e) and (h) of the Customs Act, 1962 read with Foreign Exchange Management (Export & Import of Currency) Regulations 2000, framed under Foreign Exchange Management Act, 1999.

(2) I impose a penalty of Rs. 5,00,000/- (Rupees Five Lakhs only) under Section 114(i) of the Customs Act, 1962."

3. Aggrieved by the order of the Adjudicating Authority, an appeal was preferred before the Customs, Central Excise and Service Tax Appellate Tribunal. The Tribunal, by a brief order, dated 26-4-2005 set aside the order of absolute confiscation and allowed the redemption of foreign currencies on payment of a fine of Rs. 2.00 lakhs and also reduced the penalty. The Tribunal while disposing of the appeal, held as follows:

"4. We have perused the record and heard Id. DR who has emphasized that while the appellant may legally be entitled to make remittance for technology purchase purposes, the fact remains that, in the present case, currency was not being remitted through banking channel. Further the currency was not attained from legal channels. He has also pointed out that the appellant's denial that he was carrying the currency to the customs officers itself indicates illegal transaction.

5. Upon perusal of the records and the legal provisions on the subject, it is clear that an amount of US \$ 25,000 was permissible for any passenger to carry while

going abroad. Therefore, the objection, if at all, can be the only respect of the remaining amount. In any event, absolute confiscation and heavy were not called for.

6. In view of what has been stated above, we set aside the absolute confiscation and allow the redemption on payment of a fine of Rs. 2 lakh. The penalty is also reduced to Rs. 1 lakh. The appeal is disposed of in the above terms. The appellant shall be entitled for consequential relief, if any."

4. Aggrieved by the order of the Tribunal, the Revenue has preferred the present appeal before this Court.

5. Learned counsel appearing for the Revenue submits that the first respondent - passenger had misdeclared that he was carrying only 500 US dollars. Hence, for the misdeclaration, he was liable for action under Section 113 of the Customs Act, 1962. Further, the attempt to smuggle Foreign Currency out of Indian territory is against the provisions of the Customs Act and the FEMA and is therefore, liable for confiscation. He also submits that the first respondent - passenger had not produced any valid documents in support of his attempt to export foreign currencies. As per the provisions of FEMA, a passenger can legally carry only 2,000 US \$ at a time and subject to a maximum of 10,000 US \$ in a year. Hence, the Tribunal is incorrect in holding that foreign exchange upto 25,000 US \$ is permissible for a passenger to carry while going abroad. He further submits that 25,000 US \$ is permissible only when a person has obtained prior approval from the Reserve Bank of India. Here, the first respondent - passenger has not obtained prior approval from the Reserve Bank of India. Hence, the order of the Tribunal may be set aside.

6. Per contra, learned counsel appearing for the first respondent-passenger submits that the first respondent - passenger was a businessman and he was carrying the amount to procure technology for developing his business. At the relevant time, no clearance was required from the Reserve Bank of India. Hence, the Tribunal was correct in ordering redemption of the foreign currencies. He further submits that in the course of the proceedings, the first respondent-passenger died. Hence, the appeal may be dismissed.

7. Heard learned counsel appearing for the appellant and the learned counsel appearing for the first respondent and perused the materials placed before this Court.

8. The dispute raised in this case involves the following substantial questions of law:

"(i) Whether the Tribunal was justified in allowing the redemption of the foreign currency attempted to be exported in violation of the provisions of law?

(ii) Whether the Tribunal was justified in reducing the quantum of penalty?"

9. On facts, there appears to be no dispute that the foreign currency was

attempted to be exported by the first respondent - passenger (since deceased) without declaring the same to the Customs Department and therefore, it resulted in seizure.

10. Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 prohibits export and import of foreign currency without the general or special permission of the Reserve Bank of India. Regulation 7 deals with Export of foreign exchange and currency notes. It is relevant to extract both the Regulations, which are as follows:

5. "Prohibition on export and import of foreign currency.-

Except as otherwise provided in these regulations, no person shall, without the general or special permission of the Reserve Bank, export or send out of India, or import or bring into India, any foreign currency.

7. Export of foreign exchange and currency notes.-

(1) An authorized person may send out of India foreign currency acquired in normal course of business.

(2) any person may take or send out of India,-

(i) cheques drawn on foreign currency account maintained in accordance with Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2000;

(ii) foreign exchange obtained by him by drawal from an authorized person in accordance with the provisions of the Act or the rules or regulations or directions made or issued thereunder

11. Section 113 of the Customs Act imposes certain prohibition and it includes foreign exchange. In the present case, the jurisdiction Authority has invoked Section 113(d), (e) and (h) of the Customs Act together with Foreign Exchange Management (Export & Import of Currency) Regulations, 2000, framed under Foreign Exchange Management Act, 1999. Section 2(22)(d) of the Customs Act, defines "goods" to include currency and negotiable instruments, which is corresponding to Section 2(h) of the FEMA. Consequently, the foreign currency in question, attempted to be exported contrary to the prohibition without there being a special or general permission by the Reserve Bank of India was held to be liable for confiscation. The Department contends that the foreign currency which has been obtained by the passenger otherwise through an authorized person is liable for confiscation on that score also.

12. In view of the above, the Original Authority has ordered absolute confiscation. We find, in the present case, the passenger has concealed the currency of 55,500 US dollars and other currencies, attempted to be taken out of India without a special or general permission of the Reserve Bank of India and this is in violation of the Rules. The fact that it was procured from persons other than authorized person as specified under the FEMA, makes the goods liable for

confiscation in view of the above-said prohibition. Therefore, the Original Authority was justified in ordering absolute confiscation of the currency. The key word in Regulation 5 is prohibition of import and export of foreign currency. The exception is that special or general permission should be obtained from the Reserve Bank of India, which the passenger has not obtained and therefore, the order of absolute confiscation is justified in respect of goods prohibited for export, namely, foreign currency.

13. It is of no avail to plead that the foreign currency upto certain limit is permissible. The Tribunal has misguided itself in holding that upto 25,000 US \$ is permitted to be carried by a passenger while going abroad. This error arose from a misreading of Clause 8 of Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000. Rule 5 of the said Rules, speaks about prior approval of the Reserve Bank of India for transaction included in Schedule III. Clause 8 of Schedule III speaks about release of foreign exchange, exceeding US \$ 25,000 to a person irrespective of period of stay, for business travel, or attending a conference or specialized training or for maintenance expenses of a patient going abroad for medical treatment or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/check-up. We find that this provision is made under the Foreign Exchange Management (Current Account Transactions) Rules, 2000, which imposes prohibition in respect of Schedule I, restriction in Schedule II transaction, which are to be done on prior approval and Schedule III also come with the rider that prior approval of the Reserve Bank of India should be obtained. Assuming that a person is permitted to carry 25,000 US \$ for business purpose, the fact remains, that the said drawal of the foreign currency should be only from an authorized person in terms of Rule 2(b) of the Foreign Exchange Management (Current Account Transactions) Rules, 2000. The passenger, in this case, attempted to take the money out of India without a proper declaration and has not obtained from an authorized person, there by he has violated the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000. Therefore, the Department was justified in rightly invoking the said provision. The Tribunal, without advertng to the prohibition imposed under Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 has come to the erroneous conclusion that the amount not exceeding 25,000 US \$ may be freely taken out of India. If both the Rules and Regulations are properly applied to the facts of the present case, it will be evident that the first respondent - passenger in this case has clearly violated the provisions of the FEMA, more particularly Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 read with Section 113 of the Customs Act. Therefore, the Tribunal fell into error by setting aside the order of absolute confiscation. Accordingly, we answer the first question in favour of the Revenue.

14. In so far as the penalty imposed under Section 114(i) of the Customs Act is concerned, we find that the Original Authority imposed fine of Rs. 5.00 lakhs and

the Tribunal has thought it fit to reduce the same as Rs. 1.00 lakh. Section 114 of the Customs Act reads as follows:

"114. Penalty for attempt to export goods improperly/etc. - Any person who, in relation to any goods, does or omits to do any act or omission would render such goods liable to confiscation under Section 113, or abets the doing or omission of such an act, shall be liable,-

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act, whichever is greater.

(ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded or five thousand rupees, whichever is the greater;

(iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is greater."

15. At this juncture, when the appeal is taken up, we are informed that the first respondent had actually died and the appeal was pursued by the wife of the first respondent - widow. Therefore, while restoring the order of the Original Authority in respect of absolute confiscation, we set aside the order of the Tribunal insofar as allowing the redemption on payment of fine of Rs. 2.00 lakhs. Insofar as imposition of penalty is concerned, taking note of the plea made by the learned counsel appearing for the first respondent, we are not inclined to interfere with the order of the Tribunal insofar as reduction of penalty.

16. In the light of the foregoing discussion, we pass the following order:

(i) On the questions of law raised, we answer the first substantial question of law in favour of the appellant - Revenue and insofar as the second substantial question of law is concerned, we answer the same in favour of the first respondent-passenger.

(ii) Consequently, the order of the Tribunal setting aside the absolute confiscation is set aside and the absolute confiscation ordered by the Original Authority is restored;

(iii) the order of the Tribunal in respect of reducing the penalty amount stands confirmed.

In the result, this Civil Miscellaneous Appeal stands disposed of. No costs. Consequently, C.M.P. No. 1941 of 2006 is closed.