
(2003) 10 CAL CK 0009
In the Calcutta High Court
Case No : Custa No. 15 of 2001

Commissioner of Customs (Preventive)	APPELLANT
Vs	
Amit Kumar Saha and Another	RESPONDENT

Date of Decision : 29-10-2003

Acts Referred:

Customs Act, 1962 — Section 108, 111, 112, 113, 130A
Foreign Exchange Regulation Act, 1973 — Section 8(1), 8(2)

Citation : (2004) 2 CHN 32 : (2005) 118 ECR 13 : (2004) 174 ELT 158

Hon'ble Judges : Altamas Kabir, J;Alok Kumar Basu, J

Bench : Division Bench

Advocate : Debal Kumar Banerjee and B. Samaddar, for the Appellant;J.K. Srivastava and Arun Kumar Chowdhury, for the Respondent

Judgement

Altamas Kabir, J.—This reference arises out of an application filed by the Commissioner of Customs (Preventive), West Bengal, u/s 130A of the Customs Act, 1962, on which a Rule had been issued on 25th June, 2002, directing the Customs, Excise and Gold (Control), Appellate Tribunal, to draw up a Statement of Case and to refer to this Court the following questions of law:--

1. Whether having regard to the evidence on record, the findings and orders of the learned Tribunal are perverse?
2. Whether having regard to the state of evidence adduced by the Revenue, the learned Tribunal was justified in setting aside the order of confiscation of the currency seized from Shri Amit Kumar Saha, particularly when neither did he claim ownership thereof nor could the actual owner be identified and no one had come forward to claim ownership of the same?
2. This matter had been argued at great length when the application u/s 130A of the Customs Act was initially heard which has, in fact, made out task simpler than it might have been in the given facts.
3. According to the case made out by the Directorate of Revenue Intelligence,

Calcutta Zonal Unit, Calcutta hereinafter referred to as "DRI", Officers of the said Directorate intercepted the respondent, Amit Kumar Saha, "riding a scooter, bearing registration No. WB-01/H1473, in from of N.R.S. Medical College and Hospital at A.J.C. Bose Road, Calcutta, on 5th January, 1998. On conducting a search, the said officers recovered and seized U.S.\$ 100000 from the front dicky of the scooter. Subsequently, in response to the summons issued u/s 108 of the Customs Act, Shri Amit Kumar Saha stated, inter alia, that he had received the said currency from an unknown person at a petrol pump at Park Circus Crossing with instructions to deliver the same to a person named Raju at Airport Gate No. 2. Shri Saha is said to have stated further that on earlier occasions also he had carried U.S. currency which had been illegally procured and were meant to be exported to Bangladesh. According to Shri Saha he had agreed to carry the said currency for a monetary consideration of 2 paise per Dollar.

4. On the basis of the above materials a show cause notice was issued to Shri Saha on 29th April, 1998, and the case was adjudicated by the Commissioner of Customs (Preventive), West Bengal, by his order dated 31st July, 1998. Shri Sahapreferred an appeal against the said order before the Customs Excise and Gold (Control) Appellate Tribunal hereinafter referred to as "CEGAT" which allowed the appeal by an order dated 17th February, 1999, and directed the matter to be adjudicated de novo. Pursuant to the order of "CEGAT" the matter was reconsidered and a fresh order was passed by the Commissioner of Customs (Preventive), West Bengal, being order No. 03/2000 CCP dated 3rd February, 2000 to the following effect:--

1. I order absolute confiscation of 1,00,000, U.S. \$ equivalent to I/C Rs. 39,00,000/- mentioned as at Sl. No. 1 of the search list dated 5.1.98 u/s 111(d) and Section 113(d) of the Customs Act, 1962.

2. I order confiscation of the seized scooter bearing Regn. No. WB-01/H1473 valued at Rs. 15,000/- u/s 115(2) of the Customs Act, 1962. I, however, give an option to the notice to redeem the said confiscated scooter on payment of redemption fine of Rs. 3000A (Rupees three thousand) only.

3. I order absolute confiscation of seized English newspaper and black polybags used for wrapping and covering the foreign currency u/s 118(b) of the Customs Act, 1962.

4. I impose personal penalty of Rs. 1,00,000/- (Rupees one lakh) only on Shri Amit Kumar Saha under Sections 112(b) and 114(1) of the Customs Act, 1962. The penalty amount should be deposited in the Customs House Treasury forthwith."

5. An appeal preferred by Shri Saha before "CEGAT" Calcutta against the said order dated 3rd February, 2000 was allowed and the learned Tribunal by its order dated 15th February, 2001, set aside the adjudication order passed by the Commissioner of Customs (Preventive).

6. It is in respect of the said order of "CEGAT" that the Commissioner of Customs (Preventive), West Bengal filed an application u/s 130A of the Customs Act, 1962, on which the present rule was issued.

7. Mr. J.K. Srivastava, learned Advocate, who had also appeared on behalf of Shri Saha at the time when the reference application was being considered, repeated and reiterated his submission that since foreign currency was not an item notified u/s 113 of the Customs Act, 1962, mere possession of such currency would not be sufficient to indicate that the currency had been illegally procured for the purpose of improper export. Mr. Srivastava submitted that the burden of proving that the seized currency attracted the provisions of Section 113 of the aforesaid Act rested on the department and since the currency had been recovered from Shri Saha's scooter from a central location in the city itself and there being no evidence to establish that an attempt was being made to improperly export the seized currency the provision relating to confiscation under the aforesaid Act would not be attracted.

8. Mr. Srivastava urged that even in his statement in response to the summons served on him u/s 108 of the Customs Act, Shri Saha has mentioned that he was merely required to carry the foreign currency from one point in Calcutta to another point within the same city for delivery to an unknown person, Mr. Srivastava reiterated his earlier stand that mere carrying of foreign currency, even though the source of procurement whereof was doubtful and no authenticated document was available to show that Shri Saha was lawfully entitled to possess the said currency, is not an offence under the Customs Act, though it may entail action under any other enactment.

9. Mr. Srivastava submitted that it had been well established by judicial precedent that when there was no evidence on record to establish that the foreign currency had been illegally procured, the person from whose possession the same was seized was liable to receive back the same and was also entitled to complete exoneration from all charges under the Customs Act. Mr. Srivastava submitted that since the seized foreign currency was not liable to confiscation u/s 113 of the Customs Act, 1962, the provisions of Section 112 thereof would also not be applicable in the instant case.

10. In support of his aforesaid submission Mr. Srivastava referred to a Single Bench decision of this Court passed in writ jurisdiction in the case of Kantilal Somchand and Anr. v. Collector of Customs and Central Excise West Bengal and Anr., reported in 1982 CLT 902 (Calcutta), wherein as a proposition of law it was held that if confiscation was improper and void, the goods seized were returnable to the owner in view of the provisions of Section 110(2) of the Customs Act, 1962.

11. Mr. Srivastava submitted that as soon as it was established that no offence under the Customs Act had been committed in respect of the goods which had been seized, the same were liable to be returned to the person from whose

custody the same had been seized.

12. Mr. Srivastava also relied on a decision of the Tribunal in the case of Commissioner of Customs, Kandla v. Deluxe Exports, reported in 2001 (137) ELT 1336, where the same principle was reiterated following the decision in the Calcutta case. In fact, the Tribunal went one step further in holding that the duty of the adjudicating authority was confined only to decide the question of confiscation and not to investigate and decide regarding the ownership of the goods seized. Where the confiscation was wrongful the person from whom the goods were seized were entitled to its return.

13. Mr. Srivastava then urged that in the instant case there was absolutely no evidence whatsoever that there was any intention on Shri Saha's part to smuggle the seized currency to any foreign country so as to constitute an offence u/s 113 of the Customs Act, 1962.

14. Mr. Srivastava submitted that although the Court was not sitting in appeal over the order passed by "CEGAT" on 15th February, 2001, the facts as revealed merely showed Shri Saha to be in possession of a certain amount of foreign currency which had been entrusted to him and in respect of which he did not claim any ownership. Mr. Srivastava urged that unless there was a conscious intention of Shri Saha's part to unlawfully export the foreign currency in his custody to any other country, the elements of Section 113 of the Customs Act, 1962 were not attracted and Shri Saha was entitled to receive back the foreign currency seized from him.

15. Mr. Srivastava submitted that as had been held by the Tribunal in the case of Karnataka Trading Company v. Collector of Customs (Preventive), reported in 1940 (47) ELT 568, the essential feature of the test to determine whether an attempt or preparation to export is made, is whether the act of the concerned party was towards the actual physical movement of the goods with an intention to take them out of India. Mr. Srivastava submitted that in the instant case the seizure was made nowhere near the Customs area but in the heart of the city which by no means could be said to be an attempt on Shri Saha's part to unlawfully export the seized currency to a foreign country. Mr. Srivastava submitted that even if the story regarding delivery of the currency to a person named Raju at Airport Gate No. 2 was to be accepted, even then the said location was well outside the Customs area.

16. Various other decisions, where the same principle has been explained, have been cited by Mr. Srivastava and would merely amount to repetition.

17. Mr. Srivastava also urged that there was no scope in the instant proceedings to reappraise the evidence on record and the question of law referred to in the instant proceedings was not a question of law arising out of the order of the Appellate Tribunal. Repeating the submissions made by him at the initial state and once again relying on the majority judgment in the case of Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., , Mr. Srivastava

submitted that the Hon"ble Supreme Court had observed that when a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of the order, notwithstanding the fact that it may arise out of the finding given by it.

18. Mr. Srivastava submitted that the question of law now being sought to be raised on behalf of the Revenue clearly attracted the aforesaid observation of the Hon"ble Supreme Court and could not, therefore, be raised in the instant proceedings.

19. In conclusion, Mr. Srivastava submitted that since Shri Saha had been found guilty under Sections 8(1) and 8(2) of the Foreign Exchange Regulation Act, 1973, he could not be penalised once again under the Customs Act for the same incident, particularly when no evidence had at all been adduced under the relevant provisions of the Customs Act so as to attract the provisions of Sections 112 and 113 of the Customs Act, 1962.

20. Mr. Srivastava submitted that the answer to the first question referred to by the learned Tribunal must be in the negative as the findings and orders of the learned Tribunal were based on a correct appraisal of the evidence on record and the law applicable thereto. Consequently, according to Mr. Srivastava, having regard to the various judicial pronouncements, the answer to the second question must be in the affirmative.

21. Appearing for the Revenue, Mr. Debal Banerjee submitted that the statements made by Shri Saha before the officials of the "DRI" clearly indicated that the seized currency was meant for illegal exportation to Bangladesh and that Shri Saha was also familiar with the identities of the persons who were to receive the same in Bangladesh.

22. Mr. Banerjee submitted that in the absence of any specific and direct evidence about the improper importation and/or exportation or the ownership of the foreign currency the person from whose possession the seized currency was recovered could be charged only as a carrier thereof. Since Shri Saha did not claim ownership of the seized currency and was unable to provide the identity of the actual owner thereof, the Adjudicating Officer had very correctly held that Shri Saha could be charged only as a carrier of such foreign currency.

23. Mr. Banerjee submitted that as had been explained by the Hon"ble Supreme Court in different cases, it was not always possible for the department to prove all cases with mathematical precision and that the department had to base its findings on the basis of preponderance of probability in which it could be reasonably inferred that a clandestine operation had been planned.

24. Mr. Banerjee submitted that apart from the proposition that non-consideration of a relevant factor and/or a mixed question of fact and law gives rise to a question of law, it had also been held that a conclusion drawn from the facts may also constitute a question of law as in the instant case. Mr. Banerjee

urged that in the instant case the learned Tribunal had merely extracted an observation from the order of the Adjudicating Authority in adopting a different conclusion without considering the reasons which weighed with the subordinate authority and without recording any reason for taking a different view. Mr. Banerjee urged that this gave rise to a question of law which required consideration in the instant proceedings u/s 130A of the Customs Act, 1962.

25. Reacting to Mr. Srivastava's submissions relating to the difference between an attempt to commit an offence and the actual commission of an offence and as to what constitutes such attempt, Mr. Banerjee submitted that when a culprit takes deliberate overt steps to commit an offence, one would not have to wait until the commission of the penultimate act. In other words, if a clear intention to commit an offence could be established from the materials available that would be sufficient to constitute an attempt. In cases involving revenue related smuggling activities, the Court should not give a narrow interpretation to the expression "attempt" and the measure of proximity is not in relation to time and occasion but in relation to intention as had been observed by Chinnappa Reddy J. (as His Lordship then was) in his concurring decision in the case of State of Maharashtra Vs. Mohd. Yakub and Others, . Mr. Banerjee urged that any strict interpretation of the provisions of Section 111 and/or 113 of the Customs Act, 1962, would result in miscarriage of justice, particularly in regard to the return of the seized currency in respect of which Shri Saha did not claim ownership and in respect whereof the ownership remained unknown. Mr. Banerjee submitted that the answer to the first question in the reference must be in the affirmative and the second question is required to be answered in the negative.

26. From the statement of the case and the submissions made on behalf of the respective parties it is evident that we are called upon to answer a question which at first glance is apparently simple and straightforward, but which at second glance poses a problem which merits serious consideration.

27. It has been argued that mere possession of foreign currency does not attract the provisions of either Section 111 or Section 113 of the Customs Act, 1962 and that the same having been improperly seized was liable to be returned to the person from whose custody it had been seized without going into the question of ownership thereof. In respect of his submission reliance has been placed by Mr. Srivastava on the decision of this Court in Kantilal Somchand case (supra) and that of the Tribunal in Deluxe Exports" case (supra).

28. In our view, both the cases are distinguishable on facts as far as the present case is concerned and the principle decided therein cannot be applied in the facts of this case.

29. In the first of the two cases, in the absence of notice mandatorily required to be given u/s 124 of the Customs Act, 1962, the seizure was held to be bad and the confiscation effected on the basis of such seizure was declared to be void without any adjudication. Consequently, the seized goods were directed to be

returned to the person from whom the same had been seized. As will appear from the facts of the said case there was no dispute as to the ownership of the goods which had been seized from the business premises of the registered partnership business and the question of deciding the ownership was not relevant in the facts of the case. Relying on the said decision, the Tribunal in the second case upon holding that the department had failed to make out a strong case regarding the impartibility of the goods without payment of duty and upon holding further that the merits of the High Seas Sale was a secondary aspect as long as it was not established that the goods could not be imported without payment of duty, decided not to interfere with the order under appeal and directed that the goods be released to the person from whose possession they had been seized as witnessed in the Panchanama.

30. As will be seen from the second case also no one came forward to dispute the ownership of the goods or to raise any dispute regarding the direction for return of the seized goods either to the rightful owners or the person from whose possession they were seized.

31. As will be noticed in the instant case, Shri Saha not only did not claim ownership of the seized currency, but he could not also identify the actual owner thereof, nor was any claim made with regard to the ownership of the same. It will also be noticed from the materials on record that Shri Saha had been found guilty under Sections 8(1) and 8(2) of the Foreign Exchange Regulation Act, 1973, and that in the absence of any specific and direct evidence about the improper importation and/or exportation of the seized currency, Shri Saha had only been charged as a carrier of the foreign currency.

32. Admittedly, Shri Saha was found to be only a carrier in the proceedings commenced under the Foreign Exchange Regulation Act, 1973, and neither had any attempt been made by the person or persons who had entrusted the seized currency to Shri Saha nor has the person to whom it was to be delivered come forward to establish that the same had been lawfully acquired and was entitled to return of the same. In such a scenario, the direction to return the seized currency to Shri Saha, who was not lawfully entitled to possess the same, would defeat the very *raison d'être* for Sections 111 and 113 of the Customs Act, 1962, and Section 8(1) of the Foreign Exchange Regulation Act, 1973. Technically speaking, Shri Saha's action of being in possession of foreign currency may not attract the provisions of either Sections 111 or 113 of the Customs Act, but that, in our view, would not render the order of confiscation of the said currency bad and/or entitle him to receive back the same, since he was not lawfully entitled to be in possession thereof. In the peculiar facts of the case we are of the view that certain presumptions are required to be drawn regarding the manner in which such a large sum of foreign currency came to be in Shri Saha's possession and the manner in which the same was to be utilised and in the face of such presumption we are convinced that the learned Tribunal was wrong in setting aside the order of confiscation and directing that the seized currency be returned

to Shri Saha.

33. We make it clear that our aforesaid finding is confined to the seized currency only.

34. Since our aforesaid view effectively answers the second question in the reference, we do not think it necessary to go into the first question which would entail a fresh look at the factual aspect of the matter and which is, in any event, no longer relevant.

35. We, therefore, refrain from answering the first question. The second question in the reference is, however, answered in the negative and we hold that the learned Tribunal was not justified in setting aside the order of confiscation of the currency seized from Shri Saha.

36. Let a copy of our judgment be sent to "CEGAT" in terms of Section 130D of the Customs Act, 1962, and the learned Tribunal is directed to dispose of the matter in conformity therewith.

37. All parties to act on a signed copy of the operative portion of this judgment on the usual undertaking.

Alok Kumar Basu, J.