(2010) 03 KAR CK 0038

In the Karnataka High Court

Case No : C.S.TA. No. 22 of 2005

H.S. Ramakrishna APPELLANT

Vs

Commissioner of Customs RESPONDENT

Date of Decision : 19-03-2010

Acts Referred:
Customs Act, 1962 — Section 108

Citation : (2010) 259 ELT 17

Hon'ble Judges : K.L. Manjunath, J;H.S. Kempanna, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

K.L. Manjunath, J. 1. Though the matter is listed for final hearing, we have noticed that the appeal has not yet been admitted and only a notice was issued on 21-11-2005. Therefore, at the request of the counsel for the Appellant, we frame the following substantial questions of law for consideration of this Court in this appeal:

(i) Whether the Commissioner has committed an error in levying penalty without affording an opportunity to cross-examine Seizing Officer and the Duty Officer station?

(ii) Whether levy of penalty without conducting an identification parade is fatal to the case of the revenue?

(iii) Whether the order of the Tribunal in confirming the penalty is based on perverse finding?

2. We have heard the learned Counsel for the parties.

3. The facts leading to this case are as hereunder:

The Appellant was a Customs officer. He was working in Bangalore Air-Port for a period of three years and later on he was transferred to Mangalore. Based on a credible Information received by the revenue that the employees of Lufthansa Cargo International Flight are involved in smuggling of contraband gold bearing foreign markings, the revenue kept a vigil on the cargo flight on 19-6-1997. After the cargo flight of Lufthansa Cargo reached HAL Airport, Bangalore, the parcels were unloaded from cargo and were transported through a tractor-trolley to the MSIL warehouse. When the tractor-trolley reached the Indian oil Corporation Bunker gate, one of the loader''s Vasanth Kumar was about to load two boxes into a Maruthi Car (blue colour) without taking those boxes to the warehouse of MSIL as required. The person who was waiting near the Maruthi Car having observed the officials of the revenue, ran away with this car, as a result of which two boxes which were about to be transported into the blue Maruthi Car, lying near the gate of Indian Oil Corporation Bunker. Immediately, one Mr. CM. Uthappa, Manager of Lufthansa Cargo was summoned to the spot and was identified that two boxes are from Lufthansa Cargo and he also agreed that he had only instructed Vasanth Kumar, a loader to unload the boxes near blue colour Maruthi Car which had parked opposite to Indian Oil Corporation Bunker Gate. As the officers of the revenue suspected that the package may contain contraband goods detained the same under a spot Mahazar dated 19-6-1997 in the presence of independent witnesses for detailed examination at safe place and packages were taken to headquarters Customs Office at Queen''s Road, along with C.M. Uthappa and Vasanth Kumar and witnesses also accompanied them. On opening the packages it was found that it had contained 4 Video Cameras of National Panasonic and in between the first two video cameras two packets wrapped in black coloured plastic carry bags bearing markings "ARY TRADERS" Jewellery and International Exchange house, ARY house, were kept. On examination of the plastic carry bags, it revealed that each carry bag contained 50 gold biscuits of foreign origin wrapped in Arabic newspaper. The gold biscuits found in one of the plastic bag of black colour were bearing the markings of "SWISS BANK CORPORATION 10 Tolas 999.0 MP ESSA YEAR". In the other black colour bag biscuits had marking "PAMP SWISSE, 10 Tolas 999.0, Pamp ESSAYEUR" and on the back of the gold biscuits there were no marking. The total value of the gold biscuits was at Rs. 1,48,75,243/-. In all 270 foreign gold biscuits seized along with four video cameras. The consignee''s address was shown as Sheik Abdullah, 2nd Main, 3rd Cross, Vasanth Nagar, Bangalore, which was a fictious address.

4. It was the specific information that these gold biscuits and four video cameras and other accessories were meant to a person by name, Nasir Therma, who was staying at No. 19/6, ground floor, 5th Main, 5th Cross, S.K. Garden, Benson Town, Bangalore - 46. The Customs Preventive Officer visited the said premises and searched the same under mahazar dt. 19-6-1997. Nasir was not present in the premises, but two persons by name Yahya Shabadri and Abdul Hafeez were present. During the course of search, a sum of Rs. 53,600/- of Indian currency, certain packing materials such as cardboard carton, cut pieces, etc. were found and they were used to carry certain goods to Bangalore by Lufthansa Cargo and those card board boxes were bearing Airway Bill Nos. of Lufthansa Cargo and all

the packing materials and card board boxes found therein was of a Video Cassette player. Similarly, a search was also conducted on the premises of Lufthansa Cargo office, where C.M. Uthappa was employed as Operational Manager. A mahazar was drawn on 19-6-1997. A sum of Rs. 3,61,000/- currency was found in the premises and the same was seized on the belief that the said Airway bills were incriminating documents pertaining clandestine/illicit earlier removals of contraband previously imported and the said currency was reasonably believed to be the sale proceeds of gold. The details of the seized materials are shown in the mahazar drawn on that day. In response to the summons issued u/s 108 of the Customs Act, Uthappa appeared before the Superintendent of Customs and gave a voluntary statement on 19-6-1997 and he admitted that he was looking after the documentation of both export and import of goods and he had attended to the Lufthansa Cargo Flight No. LH-8908 which arrive at 06.20 hrs on 19-6-97. After unloading all the cargo from the main deck of Air Cargo he got opened a small hold from which two parcels were removed, on his instructions loader Vasanth Kumar put them on a trolley which was attached to a tractor. He Instructed Vasanth Kumar to unload two packages near blue colour Maruthi car parked opposite to Indian Oil Corporation bunker gate, where the parcels covered with plastic sack was lying on the road and he identified the said parcel as the same which was unloaded by Vasanth Kumar at that spot on his instruction. He also accepted that the cargo was examined in detail in the presence of two independent witness and that 4 video cameras with connected items and 270 foreign marked gold biscuits were found in the said parcel. He further admitted that he had received telephone call on 18-6-97 at 7.30 p.m. from Ramakrishna requesting him to off load the packages under Air way Bill No. 020-1959-1471 and to arrange to deliver the same to him near Indian Oil Corporation Bunker gate where he would be waiting in his blue colour maruthi car and that the packages was bulk. Therefore, he had instructed Vasanth Kumar to deliver the package to the person in the maruthi car which was parked near I.O.C. bunker gate by stopping the tractor trolley for a minute near the maruthi car. He further stated that Ramakrishna is also from Coorg and had requested to clear the parcels of his friend, without Customs clearances at some place between Airport gate and MSIL. bonding area and that he would receive the same. Accordingly, he delivered first parcel to Ramakrishna in January, 96 with the help of Vasanth Kumar, for which he had received a sum of Rs. 2,000/- and again the month of March 96, he had cleared a similar parcel by receiving Rs. 5,000/- and thus by gaining confidence, he had cleared about 45 parcels in the same manner in the area between the Airport gate and the MISIL with the assistance of loaders Vasantha Kumar and Desh Kumar and for each delivery he was getting Rs. 5,000/- from Ramakrishna till August 96 and from August 96 onwards, the Appellant used to pay Rs. 8,500/- for each delivery and that Ramakrishna at times used to take delivery of the parcel personally and Ramakrishna used to pay him personally near the gate outside the Airport or near Chandrika Hotel on Cunningham Road. He has stated that he was not knowing the contents of the packages and that he believed that only cameras and video cameras, battery packs were in the packages as told by Ramakrishna. He further stated that Rama-krishna never told him that gold was concealed in the packages and requested for a lenient action.

5. Based on the statement of Uthappa, it was identified that H.S. Rama-krishna, the Appellant who had worked in Baggage section of Air Cargo, three years back and who used to travel in blue Maruthi car and who speaks Coorgi language as the person in the blue Maruti car who sped away after pushing the package containing the contraband on to the road. Thereafter search was conducted on the residential premises of the Appellant in the presence of two Mahazar witnesses. During the course of search, documents relating to the ownership of the Maruthi car bearing Registration No. KA- M-04-9081 was found which was blue Maruthi car which was used for transporting the contraband foreign marked gold biscuits and electronic goods. The vehicle was found in the premises. The documents such as pass book, check book of SBM, Driving license, personal telephone diary, RC book of the Car were seized under a Mahazar and one of the documents namely, telephone directory seized had contained the phone number of Nasir Therma and CM. Uthappa in alphabetical order respectively.

6. The voluntary statement of the Loader Vasanth Kumar of Lufthansa Cargo was also recorded. In the statement recorded u/s 108 of the Customs Act, he stated that he was working as a Loader in Lufthansa Cargo since 21/2 years and that on 19-6-1997, he had handed over one parcel to a person who was standing near a blue Maruthi car which was parked near the Export Cargo Gage opposite to IOC gage on the directions of C.M. Uthappa, his Manager to deliver the package in HDPE bag. When he came out of the Export Gage, he saw a blue Maruthi car and a person standing near the car. When the trolley in which he was carrying two parcel came near the car, he pulled the big parcel and dropped it on the ground and the parson sitting in the blue coloured Maruthi car came out and asked his help to lift and load the package into the car and accordingly, he and the person in the car lifted the parcel and loaded it in the car and after loading into the car, he ran and got into the trolley and went to MSIL Complex. He further states that the person who took delivery of the parcel had introduced himself on 12-6-1997 as cousin of Uthappa, Manager and on 10-6-1997 (or 19-6-1997), when he was near the aircraft at 5.30 a.m., Uthappa, Operations Manager had instructed him to push similar parcel near the IOC gate and to deliver the parcel to the person who was standing with blue coloured Maruthi car near IOC gate and he did not know the name and address of the person who took delivery and that he would identify the person if produced before him. He further states that he himself with the assistance of Desh Kumar offloaded the said parcel together with empty val bags, some spare belts and one dangerous goods package which had arrived as bulk cargo and both of them had loaded the parcels into the trolley.

7. Similarly, another Loader Desh Kumar in his voluntary statement given before the Superintendent of Customs on 19-6-1997 has stated that he was working as a Cargo Assistant in Lufthansa Cargo since 1994 and for the first time, about six

months back in December 1996, Uthappa, Operation Manager of Lufthansa Cargo took him to the Lufthansa Cargo Flight and showed him one box and told him to load the same on the trolley and to take the same outside and put it in a blue colored Maruthi car which was standing outside and he took the box from the aircraft in the trolley outside through the Export gate and kept in the blue colored Maruthi Car standing outside and that he pushed the package to the ground and got down from the trolley and put the package in the car and then went back to aircraft. Two days later, Uthappa called him and paid him Rs. 500/- and that he has delivered such parcels on two other occasions and that he did not know the name of the driver of the tractor trolley and that he would recognise the person in blue Maruthi car and that he was paid Rs. 1,500/- and Rs. 2,500/- on the second and third occasions by Uthappa. Hs suspected something wrong was happening but he continued to do so for fear of losing his job. The weight of package he had delivered to the blue Maruthi car was around 25 to 30 kgs in the first instance and on the second and third time, the weight was more than the first one and that might have weighed 35 to 40 kgs and that the contents of the said parcel was not known to him.

8. Similarly, one Yahya Shabandri in his second statement given on 20-6-1997 u/s 108 of the Customs Act, has stated that he wanted to give true facts which he had not given in his earlier statement. According to him Mr. Nasir and H.S. Ramakrishna had some business dealings. Ramakrishna arranged to get the consignment from Lufthansa Cargo without the knowledge of the customs authorities with the help of Lufthansa Cargo persons and that the cargo was to be brought near Chandrika Hotel on Cunningham Road by Ramakrishna and it was to be collected either by him or by Nasir. The consignment was to be taken to the residence of Nasir at Benson Town the separate the gold consignment and video cameras for easy deliveries and that the gold was delivered to Ramesh Jain/ Rajesh Jain, Mohan Lal Jain arid Ravi @ Madhukar Shet. The video camera was taken by Nasir to Bombay for disposal there and he thought that the gold was sent by Mr. Hifzur Rehman who was a partner of Nasir, from Dubai through Lufthansa Cargo and that he was paid Rs. 15,000/- per month by Nasir for carrying and distributing the gold.

9. On 19-6-1997, two card board cartons were seized from the premises of Nasir/ Yahya at # 19/6, Ground Floor, 5th Main, 5th Cross, S.K. Garden, Benson Town, Bangalore and were opened in the presence of independent witnesses along with Uthappa in the Customs Headquarters Office on 20-6-1997, the packing material bearing the Airway Bill numbers of Lufthansa Cargo were shown to Uthappa and were identified by Uthappa as the cartons which were used on earlier occasions to illicitly import contraband/gold which were delivered to Ramakrishna in the manner similar to the one as detailed earlier.

10. On 20-6-1997, the premises of M/s. Mahaveer Refinery of Rajesh Jain at # 83, Shop # 5, 1st Floor, Parthasarathy Complex, C.T. Street, Bangalore 2 was searched which resulted in recovery of incriminating documents such as fax

messages sent from his accomplices of Dubai and a plastic carry bag having markings ''Swiss Gold Jewelry Co.'' the details of which were given in the mahazar along with Indian currency of Rs. 1,32,300/-, on the belief that the said Indian currency was the sale proceeds of the contraband gold seized and other incriminating documents were also seized.

11. On 20-6-1997, Uthappa has stated that an amount of Rs. 3,61,000/-seized from his house was paid by H.S. Ramakrishna to him for removing the packages containing gold and contraband goods without customs formalities and handling over the same to H.S. Ramakrishna. He further states that he used to get around Rs. 40,000/- per month in this way. Further, he states that 40 Airway Bills were recovered from his house on 19-6-1997 under mahazar pertaining to the consignment removed by him without following customs procedure as mentioned in his earlier statement.

12. The Appellant Ramakrishna appeared before the Assistant Commissioner, Customs on 20-6-1997 in response to a notice issued u/s 108 of the Customs Act. He has given a voluntary statement stating that he had come to know about the search of his residence on 19-6-1997 as a follow up action consequent to the seizure of foreign marked gold at the Airport.

13. According to him, on the morning of 19-6-1997, he left his house at 5.30 a.m. and went and parked the car opposite Indian Oil Corporation bunker gate near the Bangalore International Airport. He parked the car in ready to leave condition by keeping the dicky open and faced it towards the Airport Exit Road. The Lufthansa Cargo aircraft arrived late at about 6.20 a.m. and within 25 or 30 minutes a trolley tractor came out of the airport through the export side exit gate and as the trolley approached his car, it slowed down and a package covered with plastic sack black in color was pushed down to road by a loader by name Vasanth Kumar, as arranged by one Uthappa, Manager - Operations of Lufthansa Cargo and he tried to lift the said package and put it into his Maruti Car and since the package we heavy he found it difficult to lift and seeing this Vasanth Kumar got down from the trolley and helped him in lifting an putting the said package at the back of his car bearing No. KA 04 M 9081. He noticed the Inspector of Customs and two other persons rushing towards his car and he got scared and pushed the said package from the back of car to the ground and sped away towards his home. He went to a STD booth and rang up to phone No. 3338677 and contacted Yahya Shabandri and informed him about the incident that happened near the Bangalore International Airport. Later he received a phone call from Nasir from Bhatkal around 9.00 a.m. and he narrated the facts to him and he went to his native place and stayed in his sisters house and after receiving the message from his wife at bout 23.00 hours, he came to the office at 15.30 hours on 20-6-1997 with an intention of explaining the facts to the senior officers that, he came in contact with Yahya Shabandri while he was working in Air Cargo Complex during 1994. During 1996, Yahya suggested to have adjustment for bringing video cameras and clearing them without payment of duty. That arrangement means

removal of cargo in transit from Airport Tarmac to the MSIL bonding area and he agreed for the suggestion and from that day onwards, he has removed about 20 packages and delivered them near Chandrika Hotel on Cunningham road. He was aware that Nasir resides at # 19/6, S.K. Garden, Benson Town, Bangalore and that Nasir was coming to Air Cargo Complex for clearance of T.R. Baggage and that he had delivered the package on each occasion to Yahya Shabandri or Nasir at Chandrika Hotel and Nasir used to come in bus to take delivery of the package and sometimes Yayha Shabandri was coming in his father in law''s car and that both Nasir and Yahya were living in the same house and he had not opened any of the packages delivered so far and they had informed him that the packages contained only video camera and he was not aware of the contents of the package received on 19-6-1997 or on earlier occasions. He used to get Rs. 10,000/- either from Yahya Shabandri or Nair out of which he was paying Rs. 5,000/- to Uthappa and that he came in contact with Uthappa for the first time in a Hockey Match.

14. Similarly, the statement of Rajesh Jain and others were recorded. Vasanth Kumar, Uthappa, Desh Kumar, Rajesh Jain and Yahya Shabandri have identified the Appellant Ramakrishna since they knew him.

15. After giving statement u/s 108 of the Customs Act, a retractory statement was also given by the Appellant from jail which has not been accepted by the Commissioner on the ground that the Appellant Ramakrishna was the Customs officer and he was aware of the consequences of giving a statement u/s 108 of the Customs Act and his subsequent statement of retraction was only an after thought. After considering the entire case, relying upon the statement given by the various witnesses u/s 108 of the Act, the Commissioner has levied penalty of Rs. 10 lakhs on the Appellant.

16. Being aggrieved by the same, the Appellant filed an appeal before the CESTAT. The CESTAT, after examining the entire facts, came to the conclusion that the Commissioner was justified in levying penalty as the penalty levied by him is less than 10% of the value of the goods seized by the authorities. Accordingly, the appeal was dismissed. Being aggrieved by the concurrent findings of the authorities below, the present appeal is filed.

17. The main contention of the Appellant before us are two fold, that there was no direct evidence to come to the conclusion that the Appellant had involved in lifting packages without clearing from the customs and that the involvement of the Appellant has not been proved either conducting an identification parade or giving an opportunity for the Appellant to cross-examine Uthappa and others. On the ground that no identification parade was conducted and that the retraction statement by the Appellant has not been Considered properly, the Appellant requests the court to allow the appeal by setting aside the order levying penalty by the Commissioner and also the order passed by the Tribunal as perverse.

18. We are unable to accept both the contentions urged by the Appellant for the

following reasons.

Admittedly, the Appellant was working as a Customs Officer in Bangalore International Airport in the Cargo Division three years prior to the incident. Later on, he was transferred to Mangalore. The Appellant has not denied his contact with Uthappa. Uthappa was working as Manager in Lufthansa Cargo Division. Uthappa and the Appellant are from Coorg. The witnesses namely Loaders Vasanth Kumar and Desh Kumar have clearly stated that they would identify the person who was taking the consignment in blue color maruthi car. It is also not in dispute that the car owned by the wife of the Appellant in a blue maruthi car. The wife of the Appellant has stated that her husband (Appellant herein) was using her maruthi car but she was not aware that he was using vehicle for smuggling activities. On showing the photo of the Appellant to the witnesses viz., Vasanth Kumar, Desh Kumar, Rajesh Jain and Yahya Shabandri, they have identified the Appellant as the person who was taking delivery from the Bangalore International Airport. Therefore, we are of the view that there was no necessity for the Department to conduct identification parade since the Appellant himself was working in the same place for more than three years and as the witnesses were acquainted with the Appellant and that they have identified his photo. In the circumstances, we have to reject the contention urged by the Appellant.

19. So far as the rejection of the retraction statement is concerned, we are of the view that the Commissioner as well as the Tribunal were justified for the following reasons.

Admittedly, the Appellant was working as a Customs Officer even on the date of the incident and on earlier occasion, he was working in the Bangalore International Airport only. He knew the provisions of the Customs Act and the procedure in conducting an inquiry. It is also within his knowledge the effect of giving a statement u/s 108 of the Customs Act. When he has given a statement u/s 108 of the Customs Act on 20-6-1997, if he has submitted an application to retract from his statement from the Jail subsequently long after, as rightly held by the Commissioner, it was only an after thought and therefore, we cannot accept the ground urged by the Appellant As a matter of fact penalty was levied against more than fifteen persons. Except the Appellant and his wife and Uthappa of Lufthansa Air Cargo, others have not filed any appeal. They have accepted the penalty levied and in view of the acceptance penalty levied against Rajesh Jain and Yahya Shabandri, we are of the view that the involvement of the Appellant in smuggling contra band articles cannot be doubted since the beneficiaries Yahya Shabandri, Rajesh Jain and others against whom penalty is also levied and have paid the same. Therefore, we do not see any merit in this appeal.

20. Accordingly, the questions of law raised by the Appellant are answered against him. Appeal is dismissed.