

(2014) 10 MAD CK 0296

In the Madras High Court

Case No : Writ Petition Nos. 22355 and 22700 of 2014 and M.P. No.1 and 1 of 2014

J. Shivakumar

APPELLANT

Vs

The Additional Director General

RESPONDENT

Date of Decision : 08-10-2014

Acts Referred:

Constitution of India, 1950 — Article 300A
Customs Act, 1962 — Section 108, 110, 110(2), 110A, 110A
Foreign Exchange Regulation Act, 1973 — Section 51

Citation : (2014) 10 MAD CK 0296

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Judgement

V. Ramasubramanian, J.—On 24.06.2014 at about 17.50 hours, the Officers of the Directorate of Revenue Intelligence intercepted a person by name Jayabal Shivakumar, who was about to board the Air Asia Flight AK012 at the Chennai International Airport. He was found to be in possession of Indian Currency of Rs.40,40,000/-, concealed in his clothings in the hand baggage. The Currency was seized under mahazar dated 24.6.2014.

2. On the basis of the statement allegedly given by Jayabal Shivakumar on 24.6.2014, the Officers of the Directorate of Revenue Intelligence searched the premises of a Travel Agent by name M/s.J.K.S. Air Travels at 59-A, Akbar Sahib Street, Triplicane, Chennai-600 005. In the course of the search, the Officers allegedly seized incriminating documents along with unaccounted Indian Currency of Rs.7,00,000/-, under mahazar proceedings dated 24.6.2014.

3. Subsequently, summons were served by the Department, both on Mr. Jayabal Shivakumar and on the Manager of the Travel Agency under Section 108 of the Customs Act, 1962, calling upon them to appear for an enquiry on 30.6.2014. Mr. Jayabal Shivakumar appeared for the enquiry and he is alleged to have given a statement.

4. Thereafter, the said Shivakumar gave a representation on 21.7.2014 requesting the Additional Director General of Revenue Intelligence to return the Currency seized from him. But, the said request was turned down by a communication dated 10.7.2014. Therefore, seeking a mandamus to direct the Respondents to return the amount of Rs.40,40,000/- seized from him, the passenger J.Shivakumar has come up with the writ petition W.P. No.22355 of 2014.

5. Similarly, the Travel Agency made representations for the return of the amount of Rs.7,00,000/- seized from their office premises. But, those representations did not evoke any response. Therefore, the Travel Agency namely M/s. J.K.S. Air Travels has come up with the second writ petition No. 22700 of 2014 seeking a mandamus to direct the Respondents to return the amount of Rs.7,00,000/-.

6. Since both the matters are interconnected, in the sense that the seizure of Indian Currency from the office premises of the Travel Agency was allegedly on the basis of the statement made by the passenger, I took both writ petitions together for hearing and disposal.

7. I have heard Mr.A.K. Jayaraj, learned counsel for the petitioner and Mr. Velayutham Pichaiah, learned Senior Counsel for Department of Revenue Intelligence.

8. The Respondents have filed counter affidavit in both the writ petitions. The contention of the Respondents is that on 04.9.2014, the Officers of Directorate of Revenue Intelligence seized cut-pieces of gold bars weighing 795 grams and valued at Rs.24,51,780/- from two passengers by name Madhu Sreekanth Reddy and Niasuddin Anwar, who arrived from Singapore and Malaysia respectively. According to the Respondents, the gold bars had been brought by those two passengers concealed in Tile Polishing Machines. Those passengers, according to the Respondents, confessed to the fact that the machine was handed over to them by two persons by name Jalal and Kamaal at Singapore and Malaysia with a direction to hand over the same to three persons by name Jayabal Nadesan, Nagoor Gani and Mohamed Rabi, waiting outside the Chennai Airport. It is claimed by the Respondents that Nagoor Gani and Mohamed Rabi identified Shri Jalaludeen of J.K.S. Air Travels as the person named as Jalal by the two passengers who brought gold. Based upon the information so given, the Respondents searched the residential premises of one Mohamed Rabi and got hold of an adjudication order passed on 01.01.2014 in respect of the seizure of 103 grams of Gold bits concealed inside a hair trimmer machine, brought by a passenger by name Mujibur Rahman who arrived from Kuala Lumpur. According to the Respondents, Mohamed Rabi confessed to the role of Jalaludeen. Therefore, the Respondents concluded that Jalaludeen of J.K.S. Air Travels had arranged, in collusion with his brother Kamaaludeen, to smuggle Gold from Singapore and Malaysia through Chennai Airport. The Respondents claim that the Gold so smuggled into Chennai, are sold by Jalaludeen and the sale proceeds in

Indian Currency is sent by Jalaludeen back to Kuala Lumpur and Singapore using carriers like Shivakumar (petitioner in the first writ petition).

9. In other words, the claim of the Respondents is that the Indian Currency seized from the petitioner in the first writ petition at the Chennai Airport and the Indian Currency seized at the office premises of the petitioner in the second writ petition, represent the sale proceeds of smuggled Gold sent from Malaysia and Singapore. Therefore, the Respondents claim that the Currency cannot be returned.

10. Apart from the above factual position, the Respondents state that as per the amended Regulation 3 of the Foreign Exchange Management (Export and Import of Currency) Regulations 2000, which came into effect from 04.06.2014, a person resident in India may take outside India, Indian Currency Notes only up to an amount of Rs.25,000/- per person. Therefore, the attempt made by the petitioner in the first writ petition to smuggle Indian Currency worth Rs.40,40,000/- was illegal and the Currency is liable for confiscation under Section 113(d) of the Customs Act read with the aforesaid Regulations.

11. Insofar as the Currency notes recovered from the Office Premises of the second Respondent is concerned, the Respondents claim that under Section 121 of the Customs Act 1962, the sale proceeds of any goods smuggled into India are also liable to confiscation. The Respondents further claim that under Section 110 of the Customs Act, the Respondents have a time limit of six months from the date of seizure to complete the investigation and issue of show cause notice. Therefore, they claim that the petitioners in both the writ petitions may have to wait for adjudication. The goods seized being Currency notes, cannot be ordered to be provisionally released, according to the Respondents.

12. I have carefully considered the above submissions. Though the genesis of both the cases on hand could be traced to a common act, both the cases have to be decided on different parameters, at least legally. Therefore, I shall take up the case of Shivakumar first.

W.P. No.22355 of 2014:

13. In this case there is no dispute about the fact that the petitioner was intercepted at the Airport while attempting to board the Flight to Singapore and Indian Currency to the tune of Rs.40,40,000/- was seized. The fact that the money was recovered from him and the fact that his act was in violation of Regulation 3 of Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, are neither in dispute nor in doubt.

14. The word goods is defined in Section 2(22) of the Customs Act, 1962 to include Currency and Negotiable Instruments. The power of seizure is conferred by Section 110 of the Customs Act, 1962. Under sub-section (1) of Section 110, the proper officer is entitled to seize any goods, which he has reason to believe to be liable to confiscation. Sub-section (2) of Section 110 prescribes that if no

notice is issued in terms of Section 124(a) within six months of the seizure of the goods, the seized goods are liable to be returned to the person from whose possession they were seized. The proviso to Sub-section (2) enables the Commissioner of Customs to extend the period of six months, by a further period of not exceeding six months, upon sufficient cause being shown.

15. Section 110-A of the Act empowers the adjudicating authority to release any goods seized under Section 110, to the owner on taking a bond in the proper form with such security and conditions as the adjudicating authority made require.

16. Section 111 of the Act gives a list of goods, which, if improperly brought from a place outside India, are liable to confiscation. We are not concerned with Section 111 of the Act as the goods do not involve the goods improperly imported into India. But Section 113 of the Act, which could be thought of to be a mirror image of Section 111 of the Act, gives a list of goods, which, if improperly exported, are liable to confiscation. The case on hand may come within the purview of Clause (d) or (e) of Section 113, which speak about the goods brought within the limits of any Customs area for the purpose of being exported contrary to any prohibition imposed under any other law for the time being in force. Section 114 of the Act speaks about the penalty for attempting to export goods improperly.

17. Section 121 of the Act makes even the sale proceeds of smuggled goods, liable to confiscation. The pre-conditions for invoking Section 121 of the Act are (i) that the sale proceeds should relate to the smuggled goods, and (ii) that the sale should have been made by a person having knowledge or reason to believe that the goods are smuggled goods.

18. Section 122 of the Act names the officers who are competent to adjudge confiscation and penalties under the Act. The procedure for such adjudication is prescribed in Section 122-A of the Act. Section 124 mandates the issue of a show cause notice before confiscation. Section 125 of the Act empowers the adjudicating authority to give an option to the person from whom the goods are sought to be confiscated, to pay fine in lieu of confiscation. The proviso to Sub-section (1) of Section 125 of the Act states that the fine shall not exceed the market price of the goods confiscated less the Duty chargeable in the case of imported goods. Section 125(1) of the Act is applicable to both importation and exportation. Section 125 reads as follows:-

"SECTION 125. Option to pay fine in lieu of confiscation. (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said

officer thinks fit :

Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods."

19. From a careful perusal of the above provision, it is clear that the Indian Currency of Rs.40,40,000/- seized from the petitioner at the Airport, may be liable to confiscation in view of Section 113(d) of the Act, as the Currency was brought within the limits of the Customs Area for the purpose of being exported contrary to a prohibition imposed by the Foreign Exchange Management (Import and Export of Currency) Regulations, 2000. The Currency may also be liable to confiscation under Section 121 of the Act, if the allegations made by the Respondents in the counter affidavit are true.

20. In *Commissioner of Customs v. Euro Asia Global* [2009 (236) E.L.T. 627 (SC)], the Supreme Court was concerned with a case where cash of Rs.23,90,000/- was recovered from the residential house of a person. The cash was suspected to represent the sale proceeds of smuggled goods. Therefore, the cash was seized under Section 110 of the Customs Act, 1962. The High Court directed the provisional release of the cash. When the matter was taken to the Supreme Court, the Supreme Court held as follows:-

"5. At this stage, it is suffice to state that the case involves seizure of Rs.23.90 lakhs, the main ground of the Department was that there was some hawala transaction going on and that the said amount appeared to have been acquired in such a transaction. Under Section 110, the competent officer is authorized to seize such goods in respect of which he has reason to believe that they are liable to confiscation. The word "goods" is defined under Section 2(22) to include currency. Under Section 122, adjudication in respect of confiscation is provided for. Section 124 provides for show cause notice before confiscation. Under Section 110A provisional release of goods seized, pending adjudication, is provided for. However, looking into the facts of the present case, we are of the view prima facie that before adjudication, in exercise of writ jurisdiction on the facts of this case, the High Court ought not to have granted unconditional release of the cash. In fact, we called upon the learned counsel for the respondent to give a bank guarantee. The respondent is not in a position to give a bank guarantee for the amount which he had already withdrawn."

21. In *S. Faisal Khan Vs. The Joint Commissioner of Customs (Air Port), The Additional Commissioner of Customs (Air Port), The Commissioner of Customs (Appeals) and Union of India (UOI)*, , this Court held that Indian Currency attempted to be exported illegally is liable for absolute confiscation. Therefore, if goods are liable for absolute confiscation, it is not possible to order their release.

22. Mr.A.K. Jayaraj, learned counsel for the petitioner relied upon the decision of the Supreme Court in Vinod Solanki Vs. Union of India (UOI) and Another, . But the said case arose out of a penalty imposed in an adjudication under Section 51 of the Foreign Exchange (Import and Export of Currency) Regulation Act, 1973. The case did not concern the scope of the provisions of the Customs Act.

23. In Century Knitters (India) Ltd. Vs. Union of India, , a Division Bench of the Punjab and Haryana High Court was concerned with the detention of two containers at the Inland Container Depot, New Delhi and the recovery of a sum of Rs.10 Crores from the petitioner. Upon finding that a show cause notice had been issued to the petitioner fastening the liability only to the extent of Rs.50 lakhs, the Division Bench of the High Court directed the Revenue to detain a sum of Rs.2 Crores and return Rs.8 Crores. But, in this case, such a situation does not arise. So far, no show cause notice has been issued. Therefore, it is not possible to work out any via media.

24. In Century Metal Recycling Pvt. Ltd. Vs. Union of India (UOI) and Others, , another Division Bench of Punjab and Haryana High Court was concerned with a claim for refund of money allegedly deposited by the petitioner under threat and coercion. But, it does not appear to be a case of seizure of sale proceeds of goods allegedly imported illegally into India. Therefore, the ratio laid down therein that the seized goods cannot be detained for a long time may not be applicable to cases where the statute prescribes a period of limitation under Section 110(2) of the Act.

25. Once it is found that the goods in question, namely Indian Currency are liable to confiscation under Section 113 and once it is found that a penalty in addition to confiscation is also possible under Section 114 of the Act, it may not be possible for this Court to order provisional release. After all, the petitioner is entitled to an opportunity in terms of Section 124 to show cause against confiscation. The adjudicating authority is obliged to give an option under Section 125(1) of the Act, to pay fine in lieu of confiscation. The Respondents have a time limit of six months under Section 110(2) of the Act to initiate the proceedings. A period of three months has nearly expired. Therefore, at this stage, I do not wish to order the release of the Currency. This is for the simple reason that it may not be possible for the Respondents to even recover the fine, if ultimately the adjudication goes against the petitioner. Hence, W.P. No.22355 of 2014 is dismissed. No costs. Consequently, M.P. No.1 of 2014 is closed.

W.P. No.22700 of 2014

26. This writ petition is filed by a travel agency, from the office premises of which, the Respondents allegedly seized incriminating documents and unaccounted Indian Currency of Rs.7,00,000/-. According to the Respondents, this money represents the sale proceeds of the gold smuggled into India by persons engaged by the travel agency. Therefore, according to the Respondents, this amount is also liable for confiscation and cannot be released even

provisionally.

27. But, this case stands on a slightly different footing than the first case. In the first case, there are two sets of allegations made against the petitioner Mr.J.Shivakumar. The first relates to his attempt to take out of India, Indian Currency notes exceeding Rs.25,000/-, in violation of Regulation 3 of the Foreign Exchange Management (Export and Import of Currency) Regulations 2000. The second is that the money represented sale proceeds of smuggled goods.

28. Insofar as the second writ petition is concerned, the currency notes were not seized at the Airport. They were seized only at the office premises of the writ petitioner. Therefore, there is no allegation against the petitioner in the second writ petition about the violation of the Foreign Exchange Management (Export and Import of Currency) Regulations 2000. The only allegation against the petitioner in the second writ petition is that the cash seized from the office premises of the petitioner represented the sale proceeds of goods smuggled into India.

29. But, unfortunately, the allegation against the petitioner in the second writ petition is based upon the statements made by persons who were earlier caught. It is not known as to what happened to the proceedings against those persons. The Respondents have not produced even a copy of the adjudication proceedings if any, already concluded against the other persons, on the basis of whose statements, the money seized from the office premises of the petitioner in the second writ petition is alleged to be the sale proceeds of smuggled goods.

30. To put it differently, the cash seized from the office premises of the petitioner in the second writ petition is on suspicion. Suspicion cannot take the place of proof, however, strong it may be. Therefore, refusing to order the provisional release of the cash seized from the premises of the petitioner in the second writ petition, may give a leverage or licence to the Respondents to stamp any item or cash seized from any office premises as the sale proceeds of smuggled goods. The scheme of Sections 113 read with Sections 121 to 124 do not appear to authorise such a course. As I have pointed out in para 17 above, two pre-conditions are to be satisfied for invoking Section 121 of the Act to order confiscation. There is no prima facie evidence to show that both these pre-conditions are satisfied in the second case on hand. The Constitutional guarantee with respect to the right to property under Article 300A cannot be allowed to be infringed at the drop of the hat, by allowing the officers to walk into any office and seize cash on the ground that they represent the sale proceeds of the smuggled goods. Therefore, I am of the view that the second writ petition deserves to be allowed.

31. In view of the above, W.P. No.22700 of 2014 is allowed directing the Respondents to return the amount of Rs.7,00,000/- of Indian currency seized from the office premises of the petitioner on 24.06.2014, within a period of two weeks from the date of receipt of a copy of this order, subject to their executing

a personal bond to deposit the amount, if an order of adjudication is passed against them. No costs. Consequently, M.P. No.1 of 2014 is closed.