
(2014) 12 MAD CK 0341

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 1694 of 2007

K.V. Rajagopal

APPELLANT

Vs

The Commissioner of Customs Trichy

RESPONDENT

Date of Decision : 11-12-2014

Acts Referred:

Customs Act, 1962 — Section 10(c), 111, 111(d), 111(p), 112
Foreign Exchange Regulation Act, 1973 — Section 13(1)

Citation : (2015) 318 ELT 48 : (2015) 33 GSTR 73

Hon'ble Judges : R. Sudhakar, J; R. Karuppiyah, J

Bench : Division Bench

Judgement

R. Karuppiyah, J.

1. This Civil Miscellaneous Appeal is filed against the final order passed by the Customs, Excise and Service Tax Appellate Tribunal in C. Appeal No. 559 of 2000 and made in Order No. 149 of 2007 dated 20.02.2007.

2. The appeal has been admitted on the following substantial questions of law:-

""1. Whether the judgment of acquittal passed by the Criminal Court on merits, on the same set of facts and evidence, would require the adjudicating authority to exonerate the appellant such that there could not be an imposition of penalty in the adjudicating proceedings?

2. Is the Hon'ble Tribunal after accepting the above proposition of law right in taking upon itself the jurisdiction to consider the reasoning of the Ld. Magistrate in rendering the judgment of acquittal and come to the conclusion that the Tribunal would not follow the decision of the Criminal Court, as in the opinion of the Tribunal the Criminal Court has not gone into the question of mens rea and therefore, the judgment of acquittal would not be accepted by the Tribunal ?

3. Is there a notification under Section 11B of the Customs Act requiring that any trader possessing non- imported silver must also give intimation about the

possession of the silver to the Customs Authorities ?""

3. The learned counsel appearing for the appellants is not pressing the third substantial question of law and therefore, there is no need to discuss about the third substantial question of law.

4. The deceased 1st appellant namely, K.V.Rajagopal filed the Civil Miscellaneous Appeal and during the pendency of the appeal, the 1st appellant died and his legal heirs were brought on record as the other appellants. For the sake of convenience, the deceased 1st appellant is referred to as the appellant hereafter.

5. Brief facts, in a nutshell, are that on 10.11.1992, 35 gold bars weighing 3421.390 gms. valued at Rs. 14,13,034/- and 111 silver bars weighing 855.126 kgs. valued at Rs. 58,96,093/- were recovered and seized by the Customs Authorities from the appellant's premises. The above said gold bars were found to be bearing foreign markings, but the silver bars did not have any such markings. The appellant disowned the gold bars but, claimed silver bars. After investigation, the 1st respondent issued show cause notice proposing confiscation of the above said seized goods under Section 111(d) of the Customs Act and imposition of penalty on the appellant under Section 112 of the above said Act. The above said show cause notice was resisted by the appellant in respect of both confiscation and penalty. At the time of personal hearing before the 1st respondent and also in the written submissions, the appellant has not claimed for the gold bars, but in respect of silver bars, the appellant claimed that they are not of foreign origin or smuggled. But, the adjudicating authority by order dated 22.01.1995, ordered confiscation of the above said goods absolutely and imposed penalty of Rs. 7,50,000/- on the appellant.

6. Aggrieved by the above said order passed by the adjudicating authority, the appellant preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal. The Tribunal has passed an order in No. 76 of 2000 dated 11.01.2000, in which the Tribunal remitted the proceedings to the Adjudicating Authority for fresh disposal with the following observations:-

""a) The appellant was entitled to the benefit of doubt regarding whether the silver bars were of foreign origin; b) the confiscation of the said goods was justifiable as the same was a notified item; c) but an option was available to the claimant for redemption of the goods; d) instead of a consolidated penalty in relation to both gold and silver, separate penalties required to be imposed on the party, e) as the party had not contested the seizure of gold bars, absolute confiscation of the item by the adjudicating authority was sustainable"".

7. The Adjudicating Authority / Commissioner of Customs considered the direction of the Tribunal and after affording an opportunity of personal hearing, passed a fresh Order-in-Original on 19.05.2000 as follows:-:

""1. I order absolute confiscation of 35 gold bars weighing 3421.390 gms. valued at Rs. 14,13,034/- under Section 111(d) of the Customs Act, 1962.

2. I order confiscation of 111 silver bars, weighing 855.126 kgs. valued at Rs. 58,96,093/- under Section 111(p) of the Customs Act, 1962. I, however, give an option to redeem the silver on payment of fine of Rs. 6.50 lakhs(Rupees Six Lakhs and Fifty Thousand only) under Section 125 of the Customs Act, 1962.

3. I impose a penalty of Rs. 7.5 lakhs(Rupees Seven Lakhs and fifty Thousand only) under Section 112(b) of the Customs Act insofar as gold is concerned.

4. I impose a penalty of Rs. 1.5 Lakhs(Rupees One Lakh and Fifty Thousand only) under Section 112(a) of the Customs Act, 1962, so far as silver is concerned.'''

8. Aggrieved by the above said findings of the Adjudicating Authority, the appellant again preferred an appeal before the Tribunal. It is also stated that silver bars under seizure were released to the appellant by the office of the 1st respondent during the pendency of the appeal.

9. The main contention of the appellant before the Tribunal is that the appellant has been acquitted by the Judicial Magistrate in the criminal proceedings initiated against the appellant by the Customs Authorities under Section 135(1)(b)(i) of the Act and in the above said judgment, the Judicial Magistrate has held that there was no evidence as to how and by whom these gold and silver bars have been smuggled into India from foreign country. In view of the above said acquittal of the appellant in the criminal court proceedings, the penalty of Rs. 7,50,000/- imposed on the appellant by the Adjudicating Authority in respect of the gold bars and also the penalty of Rs. 1,50,000/- imposed by the Adjudicating Authority on the appellant in respect of the silver bars are liable to be set aside, since the silver bars had not been smuggled by the appellant. Further, the learned counsel appearing for the appellant also pleaded to reduce the fine amount in respect of silver bars. On the side of the Department, it was mainly contended before the Tribunal that the department had established the fact that the appellant had illicitly acquired possession of the silver bars and concealed the same beneath the ground without giving such intimation to the department, as required under Section 10(c) of the Customs Act and therefore, there is no need to interfere with the above said order and question of taking a lenient view on the fine and penalties does not arise.

10. The Tribunal has considered the contention raised by both sides, and finally rejected the contention of the appellant. For better clarity, the relevant portion of the order passed by the Tribunal in paras 8 to 11 is extracted as follows:-

''8. We are unable to hold that learned Judicial Magistrate had acquitted the appellant under Section 135(1)(b)(i) of the Customs Act on the same set of facts and evidence as that considered by the Commissioner in the adjudication proceedings. The complexion of evidence considered by the Judicial Magistrate is different from the one examined by the Commissioner. As already noted, the crucial aspect of mens rea was not even adverted to by learned Judicial Magistrate even after having found that the gold and silver bars had been

physically found kept concealed in the premises of the appellant without intimation to the department. We, therefore, are of the view that the appellant is not entitled to the benefit of the Judicial Magistrate's judgment against the penalty imposed on him by the Commissioner in connection with absolute confiscation of the gold bars.

9. The silver bars were admittedly an item notified under Section 11B, a fact conclusively found against the appellant by this Tribunal in the earlier round of litigation. What remained to be examined by the Commissioner was whether the statutory intimation under Section 11C of the Customs Act had been given of possession of the silver bars by the appellant to the department. The appellant has admitted that no such intimation had been given. In the circumstances, learned Commissioner rightly ordered confiscation of the goods under Section 111(p) of the Customs Act. The redemption fine imposed in lieu of this confiscation [Rs.6.50 lakhs] cannot be considered to be excessive, having regard to the value of the goods [nearly Rs. 59.00 lakhs].

10. Coming to the quanta of penalties, however, the appellant seems to have a good case inasmuch as the total of these penalties (Rs.9.00 lakhs) is much higher than the composite penalty (Rs.7.50 lakhs) imposed earlier. In the facts and circumstances of the case, we reduce the penalties under Section 112(b) and Section 112(a) to Rs. 6,50,000/-(Rupees Six Lakhs Fifty Thousand only) and Rs. 1,00,000/-(Rupees One Lakh only) respectively.

11. The impugned order is sustained with modification of the quanta of penalties as above and the appeal is dismissed on merits.""

11. Aggrieved by the above said findings of the Tribunal, this Appeal has been filed by the appellant.

12. Heard Mr.B.Sathishsundar, learned counsel appearing on behalf of Mr.R.Loganathan, for the appellant and Mr.P.Mahadevan learned counsel appearing for the 1st respondent.

13. The learned counsel appearing for the appellant mainly contended before us that on the same set of facts and circumstances, the Judicial Magistrate acquitted the appellant in the criminal court proceedings initiated under Section 135(1)(b) (i) of the Customs Act, read with Section 13(1) of the Foreign Exchange Regulation Act, 1973 in C.C.No. 54 of 2002 and therefore, there cannot be any imposition of penalty in the adjudicating proceedings of the Customs Authorities. The learned counsel appearing for the appellant further pointed out that the Judicial Magistrate has considered the evidence adduced in the above said criminal case and finally came to the conclusion that though there is sufficient evidence, as to the recovery of properties from the appellant, there is no evidence as to how and in what manner they had been smuggled from foreign country. Further, the Judicial Magistrate has held that several material witnesses have not been examined by the Customs Department and sanction for prosecution is also not in proper form. On this premise, the criminal court

acquitted the appellant by stating that the complainant has not proved the charge against the appellant beyond any reasonable doubt. According to the appellant, in view of the above said findings in the criminal court proceedings, there cannot be any imposition of penalty in the adjudicating proceedings of the Customs Authorities.

14. Per contra, the learned counsel appearing for the Customs Authority would submit that the criminal court judgment does not disclose that any enquiry was made into the crucial question whether the appellant had kept the goods concealed with knowledge or belief that the goods were liable to confiscation under Section 111 of the Act, and this question is necessarily to be looked into in terms of Section 135(1)(b)(i) of the Customs Act. The learned counsel further pointed out that the complexion of evidence considered by the Judicial Magistrate is different from the material that was examined by the Commissioner. The learned counsel further submitted that the above said gold and silver bars had been physically found kept concealed in the premises of the appellant without intimation to the Department and therefore, the appellant is not entitled to the benefits of findings of the Judicial Magistrate against the penalty imposed by the Commissioner. The learned counsel further pointed out that the adjudication under the Act and prosecution are two independent proceedings and hence, the possibility of different conclusions being reached by two different authorities under the same Act cannot be ruled out and therefore, the factum of acquittal in prosecution proceedings cannot affect findings of fact reached by the adjudicating authority.

15. Admittedly, 35 gold bars and 111 silver bars recovered and seized from the appellant premises on 10.11.1992 and show cause notice was issued on 3.04.1993 for seizure. The Adjudicating Authority has passed an order on 22.01.1995 confiscating the gold and silver and also imposing penalty of Rs. 7.5 lakhs. Thereafter, the appellant went on appeal and the appellate authority remitted the matter to the adjudicating authority for re-adjudication with regard to confiscation of silver and determination of redemption fine. Since the appellant has not claimed the gold the Adjudicating Authority upheld the order of confiscation of gold. But, the above said gold was recovered along with silver from the appellant and therefore, the appellant is liable to penalty under the provisions of Customs Act. The appellant has not challenged the order of confiscation regarding gold bars, but, only challenged the penalty imposed by the adjudicating authority and it was confirmed by the Tribunal.

16. Admittedly, for recovery and seizure of gold and silver from the appellant's premises, separate criminal proceedings were also initiated against the appellant and in the above said criminal proceedings in C.C.No. 54 of 2002, Judicial Magistrate has passed an order of acquittal from the criminal proceedings mainly on the grounds that the prosecution has failed to prove the validity of the order of sanction for prosecution since it does not contain the office seal, date etc., and that the authorities failed to examine several material witnesses to prove the

charges against the appellant. Therefore, the Judicial Magistrate court has given a finding that the prosecution has not proved the charge against the appellant beyond reasonable doubt and hence, acquitted the appellant.

17. In the above said circumstances, the main contention of the appellant is that the Judicial Magistrate acquitted the appellant in the criminal proceedings initiated on the same set of facts and it is binding on the Departmental Authorities, who adjudicated the question of confiscation. Per contra, the learned counsel appearing for the respondent would submit that under the Customs Act, adjudication and prosecution are two independent proceedings and hence, it is permissible on the same set of facts and there is also possibility of different conclusions being reached by two different authorities under the same Act, since the degree of proof differs in two proceedings and therefore, the orders passed by the respondents are valid in law and no need to interfere with the above said findings.

18. From the above said contentions, two main questions to be decided in this appeal are (i) Whether the plea of the appellant that in view of the acquittal of the appellant in the criminal proceedings, there could not be any imposition of penalty in the adjudicating proceedings is correct ? and (ii) Whether the contention of the respondent that the criminal court has not gone into the question of mens rea and in such circumstances, the judgment of acquittal would not affect the finding of the Tribunal is correct ?

19. A perusal of criminal court judgment reveals that the Judicial Magistrate has acquitted the appellant mainly on the grounds that the sanction for prosecution has not been proved by the prosecution and several material witnesses, particularly the Commissioner, who had filed the criminal case has not been examined as witness and also the other important witness one Ganesan, employee of the Customs Department, who prepared the recovery mahazar has not been examined. Therefore, the criminal court has acquitted the appellant, only on doubting the genuineness of the sanction order for prosecution and non-examination of material witnesses before the criminal court. In the above said circumstances, the issue to be considered is whether mere acquittal by Judicial Magistrate in the criminal case would nullify the order of confiscation and imposition of penalty passed by the Customs Authorities, as contended by the appellant.

20. In a decision reported in *Gopaldas Udhavdas Ahuja and Another Vs. Union of India (UOI) and Others*, , Hon"ble Supreme Court has held in para 21 as under:-

""21. We may clarify that our above observation should not be taken to mean that there is no difference between departmental proceedings under section 71(1) and prosecution for illegal possession under section 85(1). A combined reading of sections 8(1), 71(1) and 85 of the 1968 Act made it clear that the legislature intended to provide for two separate proceedings before two different forums and there is no conflict of jurisdictions between the Authorised Officer

acting under section 71(1) to direct confiscation on being satisfied that an offence has been committed and the magistrate making an order on conviction of an accused under section 85(1) and that mere acquittal in the trial before the Magistrate, in every case, cannot result in setting aside, ipso facto, of the orders of confiscation passed by the competent authority under the Act. That merely because there was acquittal in the trial before the Magistrate, due to paucity of evidence or otherwise, would not entail nullification of the order of confiscation of the seized articles in every case. (See Divl. Forest Officer v. G.V.Sudhakar Rao). In any event, on a plain reading of sections 8(1) and 71(1) it is clear that the Authorised Officer was required to be satisfied that an offence under the Act had been committed. That the confiscation proceedings were separate and distinct from prosecution under the Act. However, that difference did not entitle the Authorised Officer to proceed arbitrarily in making an order for confiscation."''

21. In another decision of this Court relied on by the learned counsel appearing for the first respondent reported in N. Jayathilakan Vs. Additional Secretary, , it was held as under:-

""6. As pointed out by the learned counsel for the petitioner, this judgment directly supports the case. However, the learned counsel for the Revenue has brought to my notice the judgment of the Division Bench and also the decision of another learned single Judge wherein they have taken the view that proceedings under Section 112 of the Act are different from proceedings under Section 135 of the Act. The Division Bench in W.A. 106 of 1977, Kanniah Lal Jethaji v. Central Board of Excise and Customs, judgment dated 30-6-1977 has expressed the view in the following words :-

"The appellant has raised a point which has emphasised the incongruity that would result if the confiscation of goods and imposition of penalty under Section 112(b) of the Customs Act is permitted to stand when for the same act a prosecution under Section 135(b) has resulted in an acquittal by virtue of the judgment of this Court in CA-389 of 1973. Counsel emphasised that the working of Section 112(b) and 135(b) are identical and that, therefore, the ingredients of the offence, if the misconduct or the act of the appellant can be termed as such, are the same and if it is not established for one purpose, namely, under Section 135(b), it cannot be said to be established for the other purpose under Section 112(b). The argument is certainly interesting and somewhat attractive. But we have to bear in mind that the Act contemplates two separate proceedings for the same act or omission and it is not contended that these two cannot be taken simultaneously, and there is no question of double jeopardy involved. The degree of proof in the case of imposition of punishment by way of imprisonment apparently had been taken to be that required for the establishment of a criminal offence under the criminal law. That we think is the basis of the judgment of acquittal in C.A. 389 of 1973. The same view we need not necessarily take in regard to a matter falling under Section 112(b). The Board apparently relied on the statement given by the appellant in the first instance and there can be little

doubt, if the appellant is bound by the statement, he has confessed to the guilt. The fact that he has retracted from the confession will weigh with a criminal court but will not deter the authorities under the statute from imposing penalties under Section 112(b)."

22. From the above said law laid down by the Hon''ble Supreme Court and finding of this Court, we are of the view that the Act contemplates two separate proceedings for the same act or omission and therefore, there is no question of double jeopardy involved, as rightly pointed out by the learned counsel appearing for the first respondent. The Hon''ble Supreme Court also considered various provisions of the Act and finally held that mere acquittal in the criminal proceedings before Magistrate court in every case cannot result in setting aside, ipso facto, the orders of the confiscation passed by the competent authority under the Act. Therefore, the contention of the appellant that the judgment of the Judicial Magistrate acquitting the appellant was binding on the Departmental Authorities, adjudicating the question of confiscation is not correct. As rightly pointed out by the learned counsel appearing for the first respondent, the fact of seizure of gold and silver bars recovered from the appellant's residence is not in dispute. In the criminal proceedings, it is the duty of the prosecution to prove the case beyond any reasonable doubt and also to prove the mens rea for the above said criminal act by adducing reliable evidence. In the instant case, the respondents have discussed in detail about the seizure of gold and silver bars from the residence of the appellant and the above said fact was not disputed by the appellant. Therefore, the appellant cannot be exonerated from adjudication proceedings.

23. For the foregoing reasons, we are of the considered view that only on the ground of acquittal in the criminal proceedings, the respondents need not exonerate the appellant from the adjudication proceedings regarding imposition of penalty and therefore, the final order passed by the Customs, Excise and Service Tax Appellate Tribunal is valid in law. The two substantial questions of law are answered in favour of the Department and against the appellant accordingly.

In the result, the Civil Miscellaneous Appeal is dismissed. No order as to costs.