(1992) 07 MP CK 0029

In the Madhya Pradesh High Court

Case No : M.P. No. 549/90

Mukesh Jain Agarwal APPELLANT

Vs

Collector of Central Excise RESPONDENT

Date of Decision : 20-07-1992

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 108, 110(2), 123, 123(2), 124

Citation : (1992) 40 ECC 5 : (1992) 42 ECR 638 : (1992) 62 ELT 295

Hon'ble Judges : S.D. Jha, J;A.G. Qureshi, J

Bench : Division Bench

Advocate : Kulshreshtha, for the Appellant; B.G. Neema, for the Respondent

Final Decision : Allowed

Judgement

A.G. Qureshi, J.—This is a petition under Article 226 of the Constitution of India against the respondents claiming quashment of the order of Collector, Central Excise and Customs for seizure of goods pertaining to 30.130 Kgs. of silver and currency notes in the sum of Rs. 1,45,000/-, and quashment of further proceedings for the confiscation of the aforesaid goods and award of exemplary costs to the respondents.

2. The facts leading to this petition, in short, are that petitioner No. 1 Mukesh Jain deals in the business of silver in the name and style of Suhel Metal Industries at Indore. The main business of the petitioner being melting of silver and silver ornaments to make silver slabs of a definite percentage. The petitioner No. 1 has also a shop at Bada Sarafa Indore. He is also engaged in buying and selling silver on commission basis. The father of petitioner No. 1 is petitioner No. 2 and he also deals in the business separately, Petitioner No. 9 is the son of petitioner No. 2 and is engaged in business at Agar in the name of Rajat Jewellers, Petitioner Nos. 3, 4 and 5 are agriculturists, who purchase silver through petitioner No. 9, petitioner Nos. 6,7 and 8 are also agriculturists who, according to them had given their silver ornaments for melting them and

converting them into silver slabs of definite percentage.

3. According to the petitioners on 3-4-1989, one Ramkumar Agarwal was nabbed by the personnel of the Central Excise and Customs Department and it is alleged that 52 gold biscuits bearing foreign marking were seized from his possession. In his statement Ramkumar Agarwal stated about some role of petitioners Nos. 1 and 2 and that statement was later on retracted. As a result of the statement of Ramkumar Agarwal the premises of petitioner No. 1 were raided both residential and commercial and according to the petitioners as a result of the raid nothing has been recovered by which any contravention of any of the provisions of law could be inferred, but the respondent No. 1, vide seizure memo dated 3-4-1989 seized silver slabs weighing 30.130 Kgs. and also currency notes worth Rs. 1,45,000/- along with certain documents. The search was conducted in the absence of petitioner No. 1. The petitioner No. 2 who was present at the time was interrogated at the time of the search and he had explained the presence of the silver. The further averments are pertaining to the arrest of Petitioner No. 2 under the preventive provisions of law and his subsequent release. However, in the present petition the prayer is confined to the quashing of the order of seizure of the goods and restraining the respondents from confiscation of the aforesaid silver and currency.

4. The petition has been resisted by the respondents on the ground that on receipt of information that Dhanya Kumar Jain and his son Mukesh Jain had received foreign marked gold biscuits and silver slabs of foreign origin and had agreed to deliver the foreign marked gold biscuits to one Ram Kumar Agarwal on 3-4-1989 and had delivered silver slabs to Kamal Chand Jain and Rajendra Jain, Mahesh Nagar, Indore, therefore, kept surveillance and as a result intercepted the car carrying contraband gold which was driven by Ram Kumar Agarwal. As a result of the search contraband gold was recovered and statement of Ramkumar Agarwal was recorded u/s 108 of the Customs Act, 1962. In follow up action the premises of Dhanya Kumar Jain was searched and statement of Dhanya Kumar Jain was also recorded in which he admitted to have instructed his son Mukesh Jain to cause delivery to Ramkumar Agarwal 52 gold biscuits. During the investigation search of residential premises of Dhanya Kumar Jain was also made which resulted in the recovery of 46 silver cubes weighing 30.130 Kgs. valued at Rs. 1,80,0007- and Indian currency of Rs. 1,45,000/-. On investigation it has been found to have been obtained by melting conversion of foreign origin silver slabs. It has further been stated that a show cause notice has been issued to petitioners Nos. 1 and 2 according to the Customs Act, 1962 on 25th September, 1989 which was received by the petitioner No. 2. The statement of Dhanya Kumar Jain recorded u/s 108 of the Customs Act itself speaks of his involvement in the smuggling activities. The involvement of petitioner Nos. 1 and 2 is evident by the confessional statement of Ramkumar Agarwal and petitioner No. 2. The search operation was conducted on 3-4-1989 and the notice was served on the party on 25-9-1989. As such the notice was given within the time limit prescribed u/s 110(2) of the Customs Act. They should have filed the reply

before the authorities and exhausted the departmental remedy before approaching the Court. The other petitioners have not made any request to the authorities. Therefore, the petition be dismissed.

5. In view of the aforesaid averments, the first question which falls for consideration is whether a notice as provided under clause (a) of Section 124 of the Customs Act, 1962 was given to the petitioners within six months of the date of the seizure. According to the learned counsel for the petitioners there is nothing on record to show that such a notice was given to the petitioners within six months. The respondents have averred that a notice dated 25-9-1989 was served on the petitioners under clause (a) of Section 124 of the Customs Act, but reading Annexure-R3 and Annexure R-4 it is manifest that no notice dated 25-9-1989 was served on the petitioners. Even the copy of the notice has also not been filed by the respondents with the acknowledgment of the aforesaid notice by the petitioner. The acknowledgment Annexure-R4 is pertaining to show cause notice dated 13-9-1989 along with memorandum of charges and copies of the documents shown in the list of documents; whereas the learned counsel for the respondents Shri Neema places reliance on Annexure R-3, the report of the Jailor. Now the two documents Annexure R-3 and Annexure R-4 which have been filed before us by the respondents do not show that a show cause notice under clause (a) of Section 124 of the Customs Act, 1962 was served on the petitioners. If such a notice was given a copy of that notice should have been on the record of the respondents. Now Annexure R-3 is a letter from the Jailor that show cause notice dated 25-9-1989 was served on Dhanya Kumar Jain, whereas acknowledgment Annexure-R4 by Dhanya Kumar Jain is pertaining to a show cause notice dated 13-9-1989 along with the memorandum of charges and copies of the documents shown in the list. As such from reading Annexure R3 and Annexure R-4 together it is manifest that the respondents have failed to show that any notice under clause (a) of Section 124 of the Customs Act was served on petitioner No. 2 in view of the fact that the acknowledgment of which reliance is being placed by the respondents is pertaining to notice dated 13-9-1989.

6. Now, it is the duty of the respondents to show that a notice under clause (a) of Section 124 of the Customs Act was issued to the petitioners and they have received it. If such a notice is not issued within a period of 6 months of the seizure of the goods, then according to Section 110(2), the goods have to be returned to the person from whose possession they were seized. Section 110(2) of the Customs Act, 1962 provides that where any goods are seized under Sub-section (1) and no notice in respect thereof is given under clause (a) of Section 124 within six months of the seizure of goods the goods shall be returned to the person from whose possession they were seized. It had also been argued that u/s 123 it is for the person from whose possession the goods were seized to show that they are not smuggled goods. The aforesaid section is made applicable by virtue of Sub-section (2) of Section 123 of respect of gold, diamonds, manufactures of gold or diamonds, watches and any other class of goods which

the Central Government may, by notification in the Official Gazette, specify. It has been stated by both the parties that silver is not a notified goods under Sub-section (2) of Section 123. Therefore, the onus does not shift on the petitioner in respect of silver which has no foreign mark on it nor the currency notes. As such the petitioners could not be called upon to prove that the silver and currency notes seized are not connected with any smuggled goods. It is the duty of the respondents to prove this fact which they have failed to prove in the instant case.

7. In view of the aforesaid it is manifest that the seizure of the goods in question by the respondents was without jurisdiction and subsequent to the seizure no notice under clause (a) of Section 124 of the Customs Act was given to the petitioners. Therefore, the goods are liable to be returned u/s 110(2) of the Customs Act, 1962.

8. In the result this petition is allowed and the order of seizure of the goods is quashed. The respondents are directed to return the seized silver and currency notes to the person or persons from whose possession they were seized. There shall be as to costs.