(2005) 03 BOM CK 0136

In the Bombay High Court

Case No : Writ Petition No. 613 of 1995

Shyam Swaroop Mundra — APPELLANT

Vs

Union of India (UOI) — RESPONDENT

Date of Decision : 15-03-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 111, 112, 124

Citation : (2005) 127 ECR 17 : (2005) 185 ELT 16

Hon'ble Judges : V.C. Daga, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : S.N. Kantawala, instructed by Kantawala and Co, for the Appellant; R.V. Desai and S.V. Bharucha, for the Respondent

Final Decision : Allowed

Judgement

1. This petition is directed against the Order No. 793/94, dated 27th October 1994 passed by the Joint Secretary to the Government of India reviewing the Order-in-Appeal No. 597/93-B, dated 27th December 1993 passed by the Collector of Customs (Appeals), Bombay.

The Facts:

2. The facts giving rise to the present petition, in nut shell, are that on 30th May, 1992 a show cause notice was issued by the Assistant Collector of Customs, Air Intelligence Unit to the petitioner amongst others. The main noticees Mr. Lakhani as well as the petitioner and other co-noticees were called upon to show cause as to why the gold seized from Mr. Lakhani should be confiscated u/s 111(d) of the Customs Act, 1962 and why penal action should not be taken against all of them for conspiring with Mr. Lakhani to smuggle the seized goods.

3. On 6th July, 1992 the petitioner filed a detailed reply to the show cause notice, inter alia, contending that the petitioner was neither connected with the goods seized nor his physical description tallied with the description given by Mr.

Lakhani; that is how he denied his involvement in the alleged act of smuggling alleged in the show cause notice.

4. The Additional Collector of Customs, Airport vide his order dated 18th March, 1993 rejected above submission and held that in smuggling cases evidence has to be gathered by bits and pieces. As such holding the statement of Mr. Lakhani as sufficient evidence against the petitioner went on to hold that the petitioner was involved in the act of smuggling and held him liable for payment of penalty in the sum of Rs. 3 lakh u/s 112(b) of the Customs Act.

5. Being aggrieved by the aforesaid order passed by the adjudicating authority, the petitioner preferred an Appeal before the Collector of Customs (Appeals), Mumbai which came to be allowed. The adjudication order imposing penalty came to be quashed and set aside.

6. The Collector of Customs, Sahar Airport dissatisfied with the above order preferred review application before the Joint Secretary to the Government of India, Respondent No. 2 herein; to challenge the order of the Collector of Customs (Appeals).

7. The Joint Secretary to the Government of India, reviewing authority; although held that there was no direct evidence against the petitioner regarding his alleged involvement in the act of smuggling of gold bars by committed Mr. Lakhani, but went on to observe that looking to the circumstantial evidence the order of the adjudicating authority seems to be correct and hence allowed the review application and restored the Order-in-Original imposing penalty on the petitioner.

8. The aforesaid order of Respondent No. 2, the reviewing authority is a subject matter of challenge in this petition filed under Article 226 of the Constitution of India.

Submissions :

9. The learned Counsel appearing for the petitioner submitted that the adjudicating authority as well as the Joint Secretary to the Government of India committed serious error in holding that the petitioner was liable to be penalised under the Customs Act for the alleged involvement of the petitioner in the act of smuggling alleged to have been indulged by one Mr. Lakhani. According to him, the order passed by the Collector of Customs (Appeals) required to be upheld being a well reasoned and speaking order appreciating the facts in its right perspective with clear finding that there was no enough and acceptable evidence to restore the order imposing penalty on the petitioner. In his submission the Collector (Appeals) took cognizance of the fact that the search of the petitioner''s premises resulted ''nil'' recovery and the physical description of the petitioner as given by Mr. Lakhani was also incorrect. That the name of the petitioner disclosed by Mr. Lakhani was also incorrect. That in the identification parade of Mr. Lakhani failed to identify the petitioner. He further submits that the penalty proceedings

are of quasi-judicial in nature and the burden to prove that a person was liable to be visited with a penalty under the Customs Act requires sufficient, reliable and concrete evidence.

10. The learned Counsel for the petitioner also pressed into service subsequent event, leading to the judgment dated 20th April, 2001, passed by the Chief Metropolitan Magistrate dismissing criminal prosecution launched against the petitioner resulting in honourable acquit able and exoneration of the criminal charge of smuggling the gold bars. In this factual view and background, he submitted that the impugned order, which holds that no evidence exists against the petitioner but still restores the order of the adjudicating authority, is liable to be quashed and set aside.

11. Per contra, Mr. Desai, learned Senior Counsel appearing for the respondents submitted that considering the previous involvement of the petitioner in the act of smuggling, the possibility of his involvement in the current act of smuggling of gold bars cannot be ruled out as such in his submission the view taken by the reviewing authority is reasonable and possible view. The said view does not need interference at the hands of this Court in this writ jurisdiction since this Court is not a Court of appeal.

Consideration:

12. Having heard rival parties, perusal of the memorandum issued u/s 124 of the Customs Act goes to show that during the course of interrogation of Mr. Mirza Lakhani on 21st December, 1991, had stated that he had brought gold bars on 5 times earlier too. While giving account of earlier 5 occasions he stated that on 2 occasions gold bars of 10 tolas each were handed over to one Muthu at his shop and on third occasion he had handed over 20 gold bars under the direction of one Akhtar to one Shyam Swaroop Mundra (present petitioner) and on subsequent 2 occasions he claimed to have handed over 30 gold bars to one Dinesh Kothari under the instructions of said Akhtar. So far as the smuggling in question; whereupon 20 gold bars of 10 tolas each smuggled on 20th December, 1991 is concerned, Mr. Lakhani did not implicate either petitioner or the other noticees. However, the present petitioner alongwith other persons were served with the show cause notices to seek their explanation. Each of them including the petitioner furnished explanation. The explanation furnished by the petitioner did not find favour with the adjudicating authority - Additional Collector of Customs, Airport. The authority, thus, came to the conclusion that on previous occasions 20 to 30 gold bars were handed over to the petitioner and to one Dinesh Kothari as such their involvement has to be taken as proved. In appeal, this finding came to be set aside finding no evidence in support of this conclusion. A finding of fact was recorded by the appellate authority that earlier references of allegedly handing over of the gold bars on some previous occasions to the present petitioner or other persons could not be a ground for implicating them in the current act of smuggling or the smuggling in question unless some independent evidence is available. The order of the adjudicating authority as such came to be

set aside.

13. On review, after hearing the parties, the respondent No. 2 observed as under:

".........While it is true that there is no direct evidence against the respondent regarding his alleged involvement in the smuggling of 20 gold bars by Shri Lakhani, this cannot be a ground for acquitting him as smuggling is clandestine activity and one has to by and large rely on circumstantial evidence......."

In our view, the above approach is absolutely impermissible in law. The chain of circumstances needs to be established to reach to a person involved in the act of smuggling. No such unbroken chain has been proved or established. No opportunity was given to the petitioner in respect of his alleged involvement in the act of smuggling prior to the current act of smuggling in which Mr. Lakhani was involved. Merely on the basis of unproved allegations about the past transactions nobody can be allowed to implicate any person. If that be so, the involvement of the petitioner in the act of smuggling of gold bars detected on 20th December, 1991 on the basis of unproved past transactions cannot be held to be proved. There is absolutely no evidence on record to hold that the petitioner was involved in the act of smuggling in past. Nobody has investigated the alleged past act of smuggling or involvement of the petitioner. No material is available on record to implicate the petitioner in the act of smuggling in question. In this view of the matter, the impugned order, in our opinion, is unsustainable in law. The same is liable to be quashed and set aside.

14. In the result, the impugned order is quashed and set aside. Petition is allowed. Rule is made absolute with no order as to costs.

