

(2016) 03 BOM CK 0002
In the Bombay High Court
Case No : Criminal Appeal No. 43 of 2012

Union of India

APPELLANT

Vs

Harish Muljimal Gandhi

RESPONDENT

Date of Decision : 01-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Customs Act, 1962 — Section 108, Section 113, Section 113(d), Section 135 (1)(c)(ii),
Section 135(1)(c)(ii), Section 135(2), Section 135(i)(c)(ii), Section 136(1)

Citation : (2016) ALLMRCri 1769 : (2016) 3 BomCR(Cri) 424 : (2016) 340 ELT
93 : (2016) 4 MhLJCrI 796

Hon'ble Judges : S.B. Shukre, J.

Bench : Single Bench

Advocate : Raviraj R. Chodankar, Special Public Prosecutor, for the Appellant;
Arun Bras De Sa, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Shukre, J.—1. Heard learned Special Public Prosecutor for the appellant and learned Counsel for the respondent.

2. This is an appeal preferred against the judgment and order dated 23.03.2011 rendered in Criminal Case No. 1/C/2005/A passed by learned Chief Judicial Magistrate, South Goa, Margao, thereby acquitting the respondent of the offence punishable under Section 135(1)(c)(ii) of the Customs Act, 1962.

3. Briefly stated, the facts of the case are as under:

"On 14.07.2003 at about 14:00 hours when the respondent accompanied by two ladies namely, Smt. Shobha Khira and Ms. Tina Khira had checked in to board Indian Airlines Flight to Sharjah, officers of the appellant having received prior information intercepted the respondent and the two ladies accompanying him in order to find out if they were carrying with them any goods in contravention of the provisions of Section 135(1)(c)(ii) read with Section 113(d) of the Customs

Act. Upon interrogation, it was noticed that the respondent and the said two ladies had already checked in their baggage but, were also carrying with them one hand bag each as cabin baggage. When the checked in baggage and cabin baggage were subjected to search, it was found that there were some foreign currencies kept in the bag belonging to the respondent. On personal search of the respondent, it was further found that the respondent was carrying with him in the wallet also some foreign currencies. The foreign currencies consisted of various currency notes of different denominations of different countries. They were all counted and their panchanama was prepared and these foreign currency notes were of the value equivalent to Indian Rupees of 8,51,298.65 and also of Indian Rupees 2,54,875/-. Some Indian Currency was also found from the bag belonging to the respondent and it was of the value of Rs. 39,900/-. Statement of the respondent was recorded as per the provisions of Section 108 of the Customs Act on 14.07.2003. Another statement of the respondent was recorded under Section 108 of the Customs Act on 15.07.2003. The respondent admitted that he had brought in some foreign currency notes without declaration. These statements further disclosed that the respondent was exporting more foreign currencies than what he had brought in the Country. According to the appellant such an act on the part of the respondent was in contravention of Regulations 3(1)(a) and 7(3)(4) of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 (for short, "FEMA Regulations") and therefore, amounted to evasion of duty under the provisions of the Customs Act. The foreign currencies, according to the appellant, were also liable to confiscation under Section 113(d) of the Customs Act. After completion of the investigation, a complaint was filed against the respondent for prosecuting him under Section 135(1)(c)(ii) of the Customs Act."

Learned Chief Judicial Magistrate framed charge for the offence punishable under Section 135(2) of the Customs Act and proceeded with the trial upon the respondent pleading not guilty to the charge so framed against him. Upon consideration of the evidence of the prosecution, the statement of the respondent under Section 313 Cr.P.C. and arguments of both sides, the learned Chief Judicial Magistrate found that the appellant miserably failed to prove the guilt of the accused under Section 135(1)(c)(ii) of the Customs Act and acquitted the respondent of the said offence by order passed on 23.03.2011. Not being satisfied with the same, the appellant is before this Court in the present appeal.

4. I have heard learned Special Public Prosecutor for the appellant and learned Counsel for the respondent. I have gone through the record of the case including the evidence available on record and the impugned judgment and order.

5. It is well settled law that in an appeal filed against acquittal, it is not permissible for this Court to take another view just because other view is possible. This Court can upset the findings of facts of the trial Court only when it is seen that the innocence of the accused has been found in a perverse manner, that is to say, by ignoring the material evidence on record or is based upon some

extraneous consideration or ignorance of the applicable provisions of law. In the instant case, upon the consideration of the material available on record, I find that the impugned judgment and order cannot be considered to be passed in a perverse manner or by ignoring the material evidence available on record or by applying wrong provisions of law.

6. The charge as framed by the trial Court was only of Section 135(2) of the Customs Act, although the charge ought to have been framed also under Section 135(1)(c)(ii) of the Customs Act. The charge for an offence punishable under Section 135(2) arises in case of a person who has been previously convicted of similar offence or the offence under Section 136(1) of the Customs Act. No doubt, there is an allegation made in the complaint that the respondent has been convicted atleast on two occasions on similar charges and therefore, framing of charge under Section 135(2) of the Customs Act cannot be said to be illegal. But, the complaint disclosed that this was not the only allegation. The other allegation related to export of currency in contravention of the FEMA Regulations and the provisions of Section 113(d) of the Customs Act. Yet, no charge for an offence punishable under Section 135(1)(c)(ii) was framed. It was a mistake. The impugned judgment and order however, appears to have made amends to the mistake so committed while framing the charge. The learned Chief Judicial Magistrate while recording acquittal of the respondent specifically mentioned that the prosecution failed to prove the guilt of the accused for the offence under Section 135(1)(c)(ii) of the Customs Act, which in any case was required to be proved by the prosecution, it being one of the essential ingredients of the offence under Section 135(2). If the offence under the said Section could not be found to be proved by the prosecution, there would not be any question of recording any finding of guilt of the accused for an offence punishable under Section 135(2) of the Customs Act. The discussion regarding defect in the charge thus, now, has become of academic nature having no bearing upon the merits of the case.

7. It is seen from the evidence of C.A.B. Rebello (PW1) that he had produced on record one order dated 26, 27.10.2005 passed by the Joint Secretary, Government of India, Ministry of Finance (Department of Revenue), in the same matter of seizure of foreign currencies and Indian currency from the respondent on 14.07.2003 at Dabolim Airport, Goa. This order has been admitted in evidence as Exhibit-48. A bare perusal of this order would show that even though there was an allegation that the respondent was caught for exporting foreign currencies and Indian currency in contravention of the provisions of FEMA Regulations, the learned Joint Secretary found that the allegation was not completely supported by evidence on record. That is the reason why he allowed the respondent to redeem the foreign currencies as well as the Indian currency, simply on payment of some penalty. The penalty was imposed because it was found that the respondent had imported the said currencies without making any declaration at the time of his entry in India. However, it was particularly noted in the order that the respondent and his family members were entitled to import without declaration as much foreign currencies as were equivalent to US Dollar

15,000/- and with declaration anything exceeding the said limit, with no upper limit. In other words, as per the said order only restriction was that import of foreign currencies equivalent to US Dollar upto 15,000/- was permissible without declaration and for import exceeding said limit, declaration was required. In this case, since the import of foreign currencies into India exceeded the said ceiling of US Dollar 15,000/-, a declaration was necessary and the same having not been given by the respondent, penalty was imposed upon him while allowing him to redeem the said currencies by the said order. Thus, what emerges from this order admitted in evidence vide Exhibit-48 is that the respondent was permitted to redeem the said currencies subject to payment of some penalty and that the currencies were not declared as liable to confiscation under Section 113 of the Customs Act.

8. It is thus clear that these currencies were not found to be fit for confiscation as provided under Section 113 of the Customs Act. Once it is found that the said currencies were not liable to confiscation, offence under Section 135 (1)(c)(ii), which is to the effect that if any person attempts to export any goods, which are liable to confiscation under Section 113 of the Customs Act, he shall be liable to punishment of various terms of imprisonment mentioned in the Section, was also not established in this case. Offence punishable under Section 135(i)(c)(ii) is founded on an attempt to export those goods, currencies are goods, which are liable to confiscation under Section 113. If the very foundation of the said offence is taken away, the entire edifice of the prosecution case against the respondent must collapse and it was indeed brought down already by the order dated 26,27.10.2005 vide Exhibit-48 passed by the Joint Secretary. If this is so, no fault could be found in the judgment and order impugned herein.

9. Thus, I see no merit in this appeal. No interference with the impugned judgment and order is warranted. The appeal deserves to be dismissed and it is dismissed accordingly.