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In the Bombay High Court

Case No : Writ Petition No. 1573 of 2011 with W.P. No. 1260 of 2011

Union of India APPELLANT

Vs

Rostam Parvaresh RESPONDENT

Date of Decision : 11-10-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 113, 125, 129DD

Citation : (2012) 276 ELT 454

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : H.V. Mehta, for the Appellant; Sujay Kantawala with N.M. Shah, for the Respondent

Judgement

1. Rule; with the consent of Counsel for the parties returnable forthwith. With the consent of Counsel and al their request the Petition is taken up for hearing and final disposal together with companion Writ Petition No. 1260 of 2011.

2. This petition has been filed by the Union of India through the Commissioner of Customs in order to challenge an order of the revisional authority u/s 129DD of the Customs Act, 1962.

3. The brief facts are that foreign currency valued at Rs. 47.29 lakhs was seized on 28 September 1994 from the First Respondent by the Customs Air Intelligence Unit at Mumbai at a point of departure to Dubai. A notice to show cause was issued and after adjudication, the Deputy Commissioner of Customs ordered confiscation of the foreign currency equivalent to Rs. 17.29 lakhs under clauses (d), (e) and (h) of Section 113 of the Customs Act, 1962 read with the provisions of the FERA, 1973. A penalty of Rs. 5 lakhs was imposed on the First Respondent.

4. The First Respondent preferred an appeal to the Commissioner (Appeals). By an order dated 9 October 1997, the Appellate Authority held that the First

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Respondent was aware of the violation of the provisions of law and upheld the order of the adjudicating authority confiscating the currency. The Commissioner (Appeals), despite this, allowed the First Respondent to exchange Indian currency equivalent to Rs. 20 lakhs from the currency which was confiscated and reduced the fine from Rs. 5 lakhs to Rs. 2.50 lakhs. This order was challenged in revision both by the Revenue and by the assessee before the revisional authority. According to the Revenue, the order of the Appellate Authority was contradictory because while on the other hand, the authority had upheld the confiscation of the currency it had permitted the First Respondent to exchange the amount equivalent to Rs. 20 lakhs therefrom. The revisional authority by its order dated 13 October 1998, ordered the release of Indian currencies equivalent to U.S.$ 20,000/- covered under CDF as travelers cheques and a fine of 25% leaving the rest of the currencies to stand confiscated as ordered by the Appellate Authority. The Revenue thereupon refunded an amount of Rs. 4,15,750/-. The order of the revisional authority was corrected by a corrigendum following which the Department issued a refund of Rs. 6,32,188/-.

5. The First Respondent filed a Writ Petition before this Court under Article 226 of the Constitution in order to challenge the order of the revisional authority. A Division Bench of this Court by its order dated 4 August 2010 Rostam Parvaresh Vs. Union of India (UOI), set aside the entire order of the revisional authority and remanded the proceedings to the revisional authority to consider the issue relating to the release of the entire foreign currencies on payment of redemption fine on its merits. Upon remand, the revisional authority by its order dated 29 October 2010, imposed a redemption fine of Rs. 5,50 lakhs only on the balance of the confiscated foreign currency worth Rs. 27,29,678/- in lieu of confiscation u/s 125.

6. Two petitions have been filed before this Court : (i) Writ Petition 1573 of 2011 is by the Union of India through the Commissioner of Customs to challenge the order of the revisional authority; (ii) Writ Petition 1260 of 2011 is by the assessee to seek enforcement of the order of the revisional authority dated 29 October 2010.

7. The Petition filed by the assessee is consequential. If the order of the revisional authority is affirmed, then refund would have to follow and the order would have to be enforced. Contrariwise, if the order of the revisional authority is modified or set aside, the necessary consequence would follow in respect of the petition filed by the assessee.

8. Counsel appearing on behalf of the Union of India has submitted that when the proceedings were remitted back to the revisional authority by the Division Bench of this Court on 4 August 2010, that was on the specific submission of the assessee that the entire order of the revisional authority needed to be set aside, in view of the judgments of the Appellate Authority and the revisional authority wherein the entire confiscated currency was ordered to be released on the payment of fine. Consequently, it was submitted that the Division Bench having

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set aside the order of the revisional authority and having remitted back the proceedings for consideration of the issue relating to the release of the entire foreign currency on the payment of redemption fine, the revisional authority was bound to implement those directions. However, the revisional authority imposed the redemption fine only in respect of a part of the currency confiscated amounting to Rs. 27.29 lakhs, leaving out of consideration an amount of Rs. 20 lakhs. The submission which is urged is that the remaining amount of Rs. 20 lakhs should also have been subjected to a redemption fine. In this regard, Grounds (D) and (E) of the petition read as follows :

(D) The revisional authority erred in not following the directions of this Honourable Court to consider the issue relating to release of entire Foreign Currencies on payment of Redemption Fine on its own merits. Hence, the order of the revisional authority is not in consonance with the order of this Honourable Court.

(E) The revisional authority while passing the order dated 29-10-2010 did not take into consideration the entire Foreign Currencies, i.e. Rs. 47,29,678/-.

9. On the other hand, it was urged on behalf of the assessee that the Commissioner (Appeals) had ordered the release of an amount of Rs. 20 lakhs out of the total currency of Rs. 47.29 lakhs. The assessee, it was urged, was aggrieved only by the order of the Commissioner (Appeals) in so far as it confiscated the remaining balance of Rs. 27.29 lakhs. Hence, that part of the order by which an amount of Rs. 20 lakhs was ordered to be returned to the assessee was not a subject matter of the challenge by the assessee and could not have been, therefore, subjected to a redemption fine. On this basis, it was urged that the order passed by the revisional authority is correct and does not warrant interference.

10. The adjudicating authority had ordered the confiscation of the entire foreign currency which was seized and which was valued at Rs. 47.29 lakhs. The adjudicating authority had also imposed a personal penalty. In appeal, the Commissioner (Appeals) upheld the confiscation of the currency, but allowed the assessee a refund of Rs. 20 lakhs without imposition of any redemption fine. The amount of penalty was reduced from Rs. 5 lakhs to Rs. 2.5 lakhs. Before this Court it is not disputed that a revision was filed before the revisional authority both by the assessee and by the Commissioner of Customs. A common order was passed by the revisional authority on 12 February 1998 which then came up before a Division Bench of this Court in the earlier proceedings. It is significant that the submission of the first Respondent here was that the entire order of the revisional authority should be set aside and the matter be remanded back for a fresh consideration. The Division Bench recorded that submission as follows :

Mr. Kantawalla, learned Counsel for the Petitioner raised a sole contention that the revisional authority under the impugned order failed to consider a specific contention raised by the Petitioner based on the various judgments of the

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Appellate Authority as well as that of the revisional authority wherein the entire confiscated currencies have been ordered to be released on payment of redemption fine as such impugned order needs to be set aside and that the matter needs to be remitted back to the revisional authority for consideration afresh.

The Division Bench held that though the First Respondent-assessee had raised a specific contention as pointed out by the Counsel before the revisional authority, the submission had not been considered. In that view of the matter, the entire order of the revisional authority was set aside on the specific request of the first Respondent-assessee in the following terms :

In the result, impugned order is set aside. The Revision Application is remitted back and restored to the file of the revisional authority for consideration afresh so as to consider the issue raised by the Petitioner as pointed out hereinabove. The other findings on merits are confirmed. The revisional authority shall consider the issue relating to the release of entire foreign currencies on payment of redemption fine on its own merits.

11. The matter was thereupon remanded back to the revisional authority. The scope of the proceedings before the revisional authority was to consider the issue "relating to the release of the entire foreign currency on payment of redemption tine". Under the order of the Division Bench the issue pertaining to confiscation of the foreign currency in its entirety was at large before the revisional authority and not merely an amount representing Rs. 27.29 lakhs. Hence, we find merit in the contention of the Revenue that the revisional authority has erred in imposing a redemption fine of Rs. 5.50 lakhs only on the component of the confiscated foreign currency amounting to Rs. 27.29 lakhs. The entirety of the foreign currency stands confiscated. By the previous judgment of the Division Bench, all other findings on merits are confirmed.

12. In this view of the matter, we would have been inclined to remit back the proceedings to the revisional authority for imposing a redemption fine on the balance representing an amount equivalent to Rs. 20 lakhs. However, since the matter is of the year 1994 and in order to enable the proceedings to have finality, both Counsel appearing on behalf of the Commissioner of Customs and Counsel appearing on behalf of the Assessee joined in stating that it would be in the interests of justice that this Court should impose a suitable redemption fine and should ensure finality to the proceedings. Accordingly, we have applied the same yardstick as was applied by the revisional authority on the quantum of redemption fine imposed on the foreign currency amounting to Rs. 27.29 lakhs. On this amount a redemption fine of Rs. 5.50 lakhs was imposed. We accordingly direct that on the balance of the foreign currency equivalent to Rs. 20 lakhs a redemption fine of 25%, quantified at Rs. 5 lakhs shall be imposed.

13. The order of the revisional authority would, therefore, stand modified to the extent that in addition to the redemption fine and the personal penalty which

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have been imposed on the Petitioner in the amounts respectively of Rs. 5.50 lakhs and Rs. 2.5 lakhs, the Petitioner would be liable to pay an additional redemption fine quantified at Rs. 5 lakhs. The order of the revisional authority shall accordingly stand modified.

14. In view of the order which has been passed on the petition filed by the Union of India we direct, on the Petition filed by the assessee, that upon the adjustment of the redemption fine and penalty as directed in the earlier part of this order, the balance shall be refunded to the Petitioner within a period of four weeks from today. Both the Petitions shall stand disposed of in these terms. There shall be no order as to costs.

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