(2014) 03 KL CK 0078

In the High Court Of Kerala

Case No : W.P. (C). No. 6281 of 2014

Vigneswaran Sethuraman — APPELLANT

Vs

Union of India — RESPONDENT

Date of Decision : 12-03-2014

Acts Referred:

Citizenship Act, 1955 — Section 2(ee), 7A
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 108, 111, 111(d), 112, 112(a)
Customs Tariff Act, 1975 — Section 3
Foreign Trade (Development and Regulation) Act, 1992 — Section 3(3)

Citation : (2014) 308 ELT 394 : (2014) 2 KHC 448 : (2014) 2 KLJ 644 : (2014) 3 KLT 191

Hon'ble Judges : P.N. Ravindran, J

Bench : Single Bench

Advocate : Aswin Gopakumar, Anwin Gopakumar, Kala G. Nambiar, K. Amal Nath Naik and Roshni Manuel, Advocate for the Appellant; John Varghese, SC, Advocate for the Respondent

Final Decision : Allowed

Judgement

P.N. Ravindran, J.—The issue that arises for consideration in this writ petition is whether the Customs Act, 1962 and the Baggage Rules, 1998 prohibit foreign tourists entering India from wearing gold ornaments and whether they are bound to declare the gold ornaments worn by them on their person and are not carried in a baggage. Incidentally, the question whether such undeclared gold ornaments worn by a foreign tourist entering India are liable to confiscation also arises for consideration in this writ petition.

2. The petitioner, a Sri Lankan citizen holding Sri Lankan passport No. N5771160 arrived at Cochin International Airport on 22.2.2014 by Sri Lankan Airlines Flight UL-165 from Colombo. He is also an overseas citizen of India as defined in section 2(ee) of the Citizenship Act, 1955, he having obtained registration as an overseas citizen of India in terms of section 7A of the Citizenship Act, 1955. On

arrival at Cochin Airport, after emigration formalities were completed, he walked through the green channel. The petitioner has averred that after he walked through the green channel, a person in plain clothes who identified himself as an officer of the Customs intercepted him, executed a search on his person and asked him to remove the gold chain he was wearing and declared that he is taking it into custody for contravention of the customs laws. The petitioner has further averred that though very many other passengers were wearing gold ornaments and jewellery, he alone was taken to the Air Intelligence Office Unit within the airport and made to sign on a typed sheet of paper purporting to be a statement made by him u/s 108 of the Customs Act, 1962 (hereinafter referred to as "the Act" for short). A copy of the said statement is on record as Ext. P2. The writ petition proceeds to state that he was thereafter served with a copy of Ext. P3 order passed by the second respondent ordering confiscation of the gold chain seized from him and levying a penalty of Rs. 5,000/-. It is stated that believing the promise held out by the second respondent that the gold chain will be returned on payment of the penalty, he remitted the sum of Rs. 5,000/- levied as penalty with the Exchange Bureau of State Bank of Travancore at Cochin International Airport on 22.2.2014 itself and thereupon, Ext. P4 receipt was issued. In this writ petition, the petitioner challenges Ext. P3 order and seeks the following reliefs:

(i) issue a writ of certiorari or any other appropriate writ, direction or order and quash Ext. P3 order; and

(ii) declare that confiscation of the gold chain weighing 84 grams (10.5 sovereigns) seized by the respondents from the petitioner on 22.02.2014 at the Cochin International Airport, Nedumbassery under sections 111(d), (i), (l) and (m) and imposition of penalty under sections 112(a) and (b) of the Customs Act, 1962 is arbitrary, illegal and unsustainable; and

(iii) issue a writ of certiorari or any other appropriate writ, direction or order commanding the respondents to return the gold chain weighing 84 grams (10.5 sovereigns) seized by them from the petitioner on 22.02.2014 at the Cochin International Airport, Nedumbassery; and

(iv) issue a writ of certiorari or any other appropriate writ, direction or order commanding the respondents to return the amount covered by Ext. P3 receipt realized from the petitioner as penalty under sections 112(a) and (b) of the Customs Act, 1962; and

(v) issue a writ of certiorari or any other appropriate writ, direction or order commanding the respondents to permit the petitioner to re-export the gold chain or collect it on his way back to Sri Lanka.

3. The principal contention raised in the instant writ petition is that the petitioner has not violated any law in force in India and therefore, the confiscation of the gold chain worn by him and the levy of penalty are illegal, arbitrary and unjust. The petitioner has averred that the gold chain was confiscated on the ground

that he has violated Notification No. 117/92 dated 1.3.1992 and has not declared the gold chain as required u/s 77 of the Act, that the notification dated 1.3.1992 is no longer in force and has been superseded by Notification No. 171/94 dated 30.9.1994 and Notification No. 3/2012 dated 16.1.2012, that the said notifications relate to import of gold into India by a passenger of Indian origin or holding a valid passport issued under the Passports Act, 1967 in a baggage and not to gold ornaments worn by incoming passengers and for that reason also, confiscation of the gold chain worn by him is illegal and liable to be interfered with. He has also averred that he was not given a reasonable opportunity to show cause why the gold chain should not be confiscated and though several other passengers were wearing gold ornaments, he alone was subjected to punitive action and discriminated against. The petitioner has in Ground "C" of the writ petition contended that the Baggage Rules, 1998 have no application to the instant case for the reason that the confiscated gold chain was worn by him and was not carried in a baggage.

4. I heard Sri. Aswin Gopakumar, learned counsel appearing for the petitioner, Sri. John Varghese, learned Senior Counsel for Central Board of Excise and Customs, who took notice when the writ petition first came up for admission hearing before me on 5.3.2014. Sri. Aswin Gopakumar, learned counsel appearing for the petitioner contended that Notification No. 117/92 dated 1.3.1992 which is said to have been violated, does not apply to the case on hand as it deals with the duty payable on gold imported into India by a passenger of Indian origin or holding an Indian Passport, that in the instant case, the gold chain (84 grams) was not brought in the petitioner''s baggage but was worn by him and therefore, it was not liable to be declared in the baggage declaration contemplated in section 77 of the Act. The learned counsel for the petitioner submitted that the Baggage Rules, 1998 do not contain a stipulation that a foreigner travelling to India cannot wear gold ornaments on his person, that the Baggage Rules, 1998 have no application to gold ornaments worn by a person and has application only to gold or silver in any form whatsoever carried in a baggage and therefore, for that reason also, the impugned order is liable to be set aside. The learned counsel for the petitioner contended with reference to the definition of the term "Baggage" occurring in section 2(3) of the Act and the stipulations in sections 77, 80 and 81 thereof that the gold chain worn by the petitioner is by necessary implication excluded from the category of goods carried in a baggage and therefore, the Baggage Rules, 1998 can have no application.

5. Per contra, Sri. John Varghese, learned counsel appearing for the respondents submitted with reference to the Baggage Rules, 1998 that only personal effects excluding jewellery required for satisfying the daily necessities of life can be carried by a passenger travelling to India, that the petitioner had not, as required u/s 77 of the Act, declared that he is wearing a 24 carat gold chain weighing 84 grams and valued at Rs. 2,55,360/- and therefore, the gold chain was liable to be confiscated applying the provisions contained in section 111(d), (i), (l) and

(m) of the Act. The learned counsel for the respondents also submitted that even assuming that a passenger coming to India can wear gold ornaments, he/she cannot wear gold ornaments of 24 carat purity and can wear only 22 carat gold ornaments. Relying on the decisions of the Apex Court in Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, , Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another, , the learned counsel for the respondents contended that when alternative statutory remedies are available, this Court should not entertain a writ petition under Article 226 of the Constitution of India; that where the right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by the statute alone must be availed of and therefore on that short ground, the instant writ petition is liable to be dismissed.

6. I have considered the submissions made at the Bar by the learned counsel appearing on either side. I have also gone through the pleadings and the materials on record. Ext. P2 statement purporting to be one given by the petitioner before the Superintendent of Customs, Air Intelligence Unit, Cochin International Airport, Nedumbassery on 22.2.2014 conclusively establishes the fact that the gold chain was recovered from his person. The statement does not contain an admission by the petitioner to the effect that it was concealed by him in his body or in a baggage. There is also no such finding in Ext. P3 order. The finding is only to the effect that on personal search (PS) it was obtained. Ext. P2 statement also discloses that the petitioner had with him only one piece of hand baggage and no contraband was recovered from it or from his person. The relevant portion of Ext. P2 statement reads as follows:-

Today on 22.2.2014 on my arrival at Cochin Airport and after clearance of immigration formalities/hand X-ray, I opted for green channel. In the green channel, Customs officers asked me whether I have any dutiable goods or gold ornaments in my possession to which I replied in negative. At the exit gate I was intercepted by Customs Officer in plain clothes and I was told by the customs officers that a personal search is to be executed and I had the option to be searched before a judicial magistrate or a gazetted officer of Customs. I agreed for executing my personal search before a gazetted officer of Customs. Then the customs officers took me to ATU room in arrival hall of the Cochin International Airport. Then the Customs Officer also offered me to search him before my search which was declined by me politely. Accordingly, a personal search was conducted by Supd. Of Customs (Gazetted), Air Customs, Cochin International Airport, Nedumbassery, Cochin today (i.e. On 22.2.2014) and recovered 84 grams of gold chain from my person. Then the officers opened and examined my one piece of hand baggage in my presence and no contraband was recovered from the same. I purchased this gold at Colombo. I did not declare anything in the disembarkation card meant for Customs. I have one hand baggage which contains my personal items.

7. The fact that the petitioner had with him only one piece of hand baggage is borne out by the above quoted statement. The respondents have no case in Ext. P3 that the gold chain was concealed in the body of the petitioner or in a baggage. This fact coupled with the fact that it was not carried in the hand baggage of the petitioner leads to the conclusion that it was worn by him. The Deputy Commissioner of Excise and Customs, Cochin International Airport however ordered confiscation of the gold chain and also levied penalty by Ext. P3 order passed on 22.2.2014. The findings and reasons in support thereof are given in the hand writing of the Deputy Commissioner, which is not legible. The learned counsel appearing for the respondents however made available to me a typed copy of the findings and reasons. The second respondent has in the record of personal hearing and findings set out in Ext. P3, stated as follows:

Heard the passenger. He stated that he is a Sri Lankan National and not married. He is indulging in textile business. He smuggles in gold ornaments to India and buys textiles from India for sale in Colombo. He knows that he is a foreigner who is not entitled to bring in one gram of gold ornament free of duty or on payment and the gold chain of 24 carat brought by him was for sale in India to make a profit. He wanted to take a lenient view.

8. The finding entered by the second respondent in Ext. P3 is as follows:-

I have gone through the records. I find that the passenger is a foreigner who is not entitled to import even a single gram of gold free of duty or on payment of duty. The gold chain attempted to be smuggled by him is crude and is of 24 carat purity. He requested for a lenient view but I take the following decision.

(emphasis supplied)

9. The operative portion of Ext. P3 order reads as follows:

I order absolute confiscation of 84.000 gms. of gold valued at Rs. 2,55,360/- listed at Sl. No. 3 of pre-page u/s 111(d), (i), (l) & (m) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (D & R) Act, 1992. I further impose a penalty of Rs. 5,000/- (Rupees Five Thousand Only) u/s 112(a) and (b) of the Customs Act, 1962 on the passenger.

10. It is evident from Ext. P3, the relevant portions of which have been quoted above, that the second respondent has confiscated the gold chain worn by the petitioner on the short ground that a foreigner who is a tourist to India cannot import even a single gram of gold free of duty or on payment of duty. The second respondent has also found that the petitioner attempted to smuggle a 24 carat gold chain into India. He has on these findings ordered confiscation of the gold chain invoking section 111(d), (i), (l) & (m) of the Act and also levied penalty u/s 112(a) and (b) thereof.

11. The term "smuggling" is defined in section 2(39) of the Act. The said definition reads as follows:-

Smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation u/s 111 or section 113.

12. Clauses (d), (i), (l) and (m) of section 111 of the Act, which have been invoked in the case on hand, read as follows:

111. Confiscation of improperly imported goods, etc.-The following goods brought from a place outside India shall be liable to confiscation:-

xx

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force.

xx

(i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof.

xx

(l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made u/s 77.

xx

(m) Any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made u/s 77 in respect thereof or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54.

xx

13. Clause (d) of section 111 of the Act stipulates that any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under the Act or any other law for the time being in force, shall be liable to confiscation. Clause (i) of section 111 of the Act stipulates that any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof are also likewise liable to confiscation. Clause (1) of section 111 of the Act stipulates that any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under the Act, or in the case of baggage in the declaration made u/s 77 are also liable to confiscation. Clause (m) of section 111 of the Act stipulates that any goods which do not correspond in respect of value or in any other particular with the entry made under the Act or in the case of baggage with the declaration made u/s 77 in respect thereof or in the case of goods under transhipment, with the

declaration for transhipment referred to in the proviso to subsection (1) of section 54, are also liable to confiscation.

14. Section 112 of the Customs Act, 1962 relied on to levy a penalty of Rs. 5,000/- on the petitioner reads as follows:

112. Penalty for improper importation of goods, etc.-Any person,-(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation u/s 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation u/s 111, shall be liable,-

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded on such goods or five thousand rupees, whichever is the greater;

(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made u/s 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees, whichever is the greater;

(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest;

(v) in the case of goods falling both under clauses (ii) and (iii) to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest.

Going by the stipulations in section 112 of the Act, penalty can be levied only if the goods are liable to confiscation u/s 111 of the Act. That takes me to the question whether in the instant case, the gold chain which the petitioner was wearing (such an inference is irresistible on the facts of the case) was liable to be confiscated. The question whether the Baggage Rules, 1998 have any application to gold chain worn by the petitioner also arises for consideration.

15. Section 77 of the Act stipulates that the owner of any baggage shall for the purpose of clearing it make a declaration of its contents to the proper officer. The term "baggage" is defined in section 2(3) of the Act to include unaccompanied

baggage. Motor vehicles are excluded from the purview of the said definition. The declaration u/s 77 is to be made by the owner of the baggage. The term baggage ordinarily connotes suitcases or bags or containers in which a traveller carries his/her goods or belongings. Section 2(22) of the Act defines the term goods to include baggage. Having regard to the stipulations in section 77 and the definition of the term "baggage" occurring in section 2(3) of the Act, the body of a passenger cannot be said to be baggage. In the instant case, the gold chain was worn by the petitioner and was not carried in his baggage. It was therefore not necessary for the petitioner to declare the gold chain worn by him. Section 80 of the Act clarifies the position. Section 80 stipulates that the baggage of a passenger, which contains any article which is dutiable or the import of which is prohibited, may be detained at the request of the passenger for the purpose of being returned to him on his leaving India. The term baggage thus connotes something which is distinct and different from the passenger who has brought the baggage. Section 81 of the Act empowers the Central Board to frame regulations regarding the declaration of the contents of any baggage, its custody, examination, assessment to duty and clearance of baggage and transit of baggage from one customs station to another or to a place outside India. Going by the stipulations in sections 77, 80 and 81 of the Act, I am persuaded to take the view that the provisions therein can have no application to the instant case where the petitioner, a tourist coming from Sri Lanka had on his person a gold chain which he was wearing and was not kept concealed in his body. Such being the situation, clauses (l) and (m) of section 111 of the Act can have no application.

16. That takes me to the question whether the petitioner had imported or attempted to import or brought to Indian Customs Waters for the purpose of being imported, gold ornaments, contrary to any prohibition imposed by the Act or any other law, so as to attract clause (d) of section 111 of the Act. Necessarily therefore the question whether the Act or any other law prohibits a tourist coming to India from wearing gold ornaments arises for consideration. The second respondent has in the impugned order held that a foreigner cannot import even a single gram of gold free of duty or on payment of duty. He does not however refer to the law which imposes the prohibition. The learned counsel appearing for the respondents was also not able to bring to my notice any provision in the Act or the Baggage Rules, 1998 to that effect. No provision in any other law to that effect was also brought to my notice. In the absence of any prohibition imposed by the Act or any other law to the effect that a foreign tourist arriving in India cannot wear gold ornaments on his person or wear gold ornaments of 24 carat purity, clause (d) of section 111 could not have been invoked to confiscate the gold chain worn by the petitioner. The gold chain was not concealed in any package and therefore it could not have been confiscated invoking clause (i) of section 111. Even if it was dutiable, as it was not concealed in any manner in any package either before or after it was unloaded, it could not have been confiscated invoking clause (i) of section 111 of the Act. At best, only

the duty payable could have been levied. There is also yet another reason why the impugned action cannot be sustained. Even assuming for the sake of arguments that a foreign tourist arriving in India cannot wear gold ornaments on his/her person in view of an express provision of law in that regard (such a statutory provision was not brought to my notice and it is not referred to in Ext. P3 order), the respondents should have informed the petitioner that he cannot wear it for the reason that the import of it is prohibited and given him the option of having the goods detained for the purpose of being returned to him on his leaving India as contemplated in section 80 of the Act. The respondents have not stated in Ext. P3 that such an option was extended to him and therefore for that reason also, the impugned order is liable to be set aside.

17. The fact that the petitioner is a tourist of foreign origin is not in dispute. Rule 7 of the Baggage Rules, 1998 as amended stipulates that a tourist arriving in India shall be allowed clearance free of duty, articles in his bona fide baggage to the extent mentioned in column (2) of Appendix E.

18. Rule 7 of the Baggage Rules, 1998 reads as follows:-

A tourist arriving in India shall be allowed clearance free of duty articles in his bona fide baggage to the extent mentioned in column (2) of Appendix E.

19. Appendix E to the Baggage Rules, 1998 is extracted below:-

Appendix

1

Articles allowed free of duty 2

(a) Tourists of Indian origin coming to India other than tourists of Indian origin coming by land routes as specified in Annexure IV;

(i) Used personal effects and travel souvenirs, if-

(a) these goods are for personal use of the tourist, and

(b) these goods, other than those consumed during the stay in India, are re-exported when the tourist leaves India for a foreign destination.

(ii) articles as allowed to be cleared under rule 3or rule 4.

(b) Tourists of foreign origin, other than those of Pakistani origin coming from Pakistan, coming to India by air

(i) used personal effects

(ii) articles other than those mentioned in Annexure I upto a value of Rs. 8000 for personal use of the tourist or as gifts and travel souvenirs if these are carried on the person or in the accompanied baggage of the passenger.

(c) Tourists-(i) of Pakistani origin coming from Pakistan other than by land routes;

(ii) of Pakistani origin or foreign tourists coming by land routes as specified in Annexure IV;

(iii) of Indian origin coming by land routes as specified in Annexure IV.

(i) used personal effects

(ii) articles other than those mentioned in Annexure I upto a value of Rs. 6000 for personal use of the tourist or as gifts and travel souvenirs if these are carried on the person or in the accompanied baggage of the passenger.

In the instant case, the relevant entry will be, entry (b) in Appendix E.

20. I shall now consider whether the Baggage Rules, 1998 prohibit a tourist of foreign origin from bringing even a single gram of gold free of duty or on payment of duty to India as stated by the second respondent in Ext. P3. Rule 7 of the Baggage Rules, 1998 stipulates that a tourist arriving in India shall be allowed clearance free of duty, articles in his bona fide baggage to the extent mentioned in column (2) of Appendix E. The petitioner is a tourist of foreign origin. This fact is not in dispute. Going by entry (b) in Appendix E, tourists of foreign origin, other than those of Pakistani origin coming from Pakistan, coming to India by air can be allowed clearance free of duty (i) his or her used personal effects and (ii) articles other than those mentioned in Annexure I, up to a value of Rs. 8000 for personal use of the tourist or as gifts and travel souvenirs if these are carried on the person or in the accompanied baggage of the passenger. Annexure I referred to in Appendix E is extracted below for easy reference:-

1. Firearms.

2. Cartridges of fire arms exceeding 50.

3. Cigarettes exceeding 200 or cigars exceeding 50 or tobacco exceeding 250 gms.

4. Alcoholic liquor or wines in excess of two litres.

5. Gold or silver, in any form, other than ornaments.

21. The effect of the aforesaid stipulations in Appendix E and Annexure I of the Baggage Rules, 1998 is that a tourist of foreign origin coming to India by air is not entitled to duty free clearance of firearms, cartridges of fire arms exceeding 50 numbers, cigarettes exceeding 200 or cigars exceeding 50 or tobacco exceeding 250 gms., alcoholic liquor or wines in excess of two litres and gold or silver in any form other than ornaments. It is evident from the Baggage Rules, 1998 that the restriction or prohibition is on the duty free clearance of gold or silver in any form other than as ornaments and not on the import as such. It is not stipulated in the Baggage Rules, 1998 that a foreign tourist who is coming to India by air cannot wear a gold chain or even his/her wedding ring. In the absence of an express provision in the Baggage Rules, 1998 prohibiting a foreign tourist entering India from wearing a gold chain or other gold jewellery, I am of

the considered opinion that the impugned order was passed without any legal foundation.

22. In paragraph 6 of Ext. P3 order, which appears to have been kept printed and ready, it is stated as follows:-

Legal provisions violated

Notification No. 117/92 dated 1.3.92 permit import of Gold in any form (excluding ornaments studded with stone or pearls) not exceeding 10 kgs brought as baggage by a passenger of Indian origin after a period of not less than 6 months of continuous stay abroad on payment of duty at the rate of Rs. 250 per 10 gms. u/s 77 of the Customs Act, the owner of any baggage shall for the purpose of clearing it, give a declaration of its contents to the proper officer. Since the seized gold/goods have not been declared by the passenger this gold/ good is liable for Confiscation u/s 111(d), (i), (l) & (m) of the Customs Act, 1962. The Passenger is liable to pay personal penalty u/s 112(a) & (b) of the Customs Act, 1962. Any goods used for concealing the smuggled gold/goods are liable to confiscation u/s 119 of the Customs Act, 1962.

23. Notification No. 117/92-Cus., dated 1.3.1992 referred to in paragraph 6 of Ext. P3 order reads as follows:-

No. 117/92-Customs

G.S.R. 227(E)-In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts gold, in any form including ornaments (but excluding ornaments studded with, stones or pearls), falling under Heading No. 98.03 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India by a passenger of Indian origin or a passenger holding a valid passport issued under the Passports Act, 1967 (15 of 1967), as baggage, from so much of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), as is in excess of the amount calculated at the rate of Rs. 450 per ten grams; Provided that:-

(i) such passenger is coming to India after a period of not less than six months of stay abroad; and

(ii) the duty at the rate specified above shall be paid in convertible foreign currency.

Provided further that the exemption contained in this notification shall apply only to a quantity of such gold not exceeding five kilograms per passenger.

V.V. Hariharan, Under Secy.

24. Later, it was superseded by Notification No. 171/94-Cus., dated 30.9.1994, with effect from 1.11.1994. The notification dated 30.9.1994 was superseded by

Notification No. 31/2003-Cus., dated 1.3.2003. Still later Notification No. 3/2012-Cus., dated 16.1.2012 was issued in supersession of the notification dated 1.3.2003. The notification dated 16.1.2012 is extracted below:-

Notification New Delhi, the 16th January, 2012 No. 3/2012-Customs

G.S.R. 24(E)-In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 172/1994-Customs, dated the 30th September, 1994, published in the Gazette of India, Extraordinary vide G.S.R. No. 734(E), dated the 30th September, 1994 and notification No. 31/2003 Customs, dated the 1st March, 2003, published in the Gazette of India, Extraordinary vide G.S.R. No. 166(E), dated the 1st March, 2003, except as respects things done or omitted to be done before such supersession, the Central Government on being satisfied that it is necessary in the public interest so to do, hereby exempts goods of the description specified in column (2) of the Table below and falling under Chapter 71 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India by an eligible passenger, from so much of the duty of customs leviable thereon which is specified in the said First Schedule, as is in excess of the amount calculated at the rate as specified in the corresponding entry in column (3) of the said Table and from the whole of the additional duty leviable thereon u/s 3 of the said Customs Tariff Act.

Table

Sl. No.

Description of goods

Rate

1

2

3

1.

Gold bars, other than tola bars, bearing manufacturer''s or refiner''s engraved serial number and weight expressed in metric units, and gold coins having gold content not below 99.5%

2.00%

2.

Gold in any form other than at S. No. 1 above, including tola bars and ornaments, but excluding ornaments studded with stones or pearls

5.00%

3.

Silver, in any form including ornaments, but excluding ornaments studded with stones or pearls.

6.00%

(2). The exemption is subject to the following conditions, namely:

(i) the duty shall be paid in convertible foreign currency,

(ii) the quantity of import shall not exceed ten kilograms of gold and one hundred kilograms of silver per eligible passenger, and

(iii) the gold or silver is either carried by the eligible passenger at the time of his arrival in India or is imported by him within fifteen days of his arrival in India.

Notwithstanding anything contained above, the exemption under this notification shall also apply to gold or silver taken delivery of by an eligible passenger from a customs bonded warehouse of the State Bank of India or the Minerals and Metals Trading Corporation Ltd., subject to the conditions (i) and (ii) of para 2 above, and subject to further condition that such eligible passenger files a declaration in the prescribed form before the proper officer of customs at the time of his arrival in India declaring his intention to take delivery of the gold or silver from such a customs bonded warehouse and pays the duty leviable thereon before his clearance from customs.

Explanation:-For the purposes of this notification, "eligible passenger" means a passenger of Indian origin or a passenger holding a valid passport, issued under the Passports Act, 1967 (15 of 1967), who is coming to India after a period of not less than six months of stay abroad, and short visits, if any, made by the eligible passenger during the aforesaid period of six months shall be ignored if the total duration of stay on such visits does not exceed thirty days and such passenger has not availed of the exemption under this notification or under the notification being superseded at any time of such short visits.

3. This notification shall come into force on the 17th day of January, 2012.

[F. No. 354/4/2012-TRU] Raj Kumar Digvijay, Under Secy.

25. It is evident from a reading of the aforesaid notifications that they are notifications issued in exercise of the powers conferred on the Central Government under sub-section (1) of section 25 of the Customs Act, 1962 exempting gold and silver in any form but excluding ornaments studded with stones or pearls, from customs duty as specified in the First Schedule to the Customs Tariff Act, 1975 to the extent mentioned in the notifications. A foreigner cannot claim the benefit of the said notification. It applies only to Indian citizens. The notifications do not prohibit import of gold or gold ornaments, but only exempt duty to the extent mentioned therein. The reliance placed on Notification No. 117/1992-Cus., is therefore, misconceived. The term "smuggling" is defined

in section 2(39) of the Act. As per the said definition smuggling in relation to any goods means any act or omission which will render such goods liable to confiscation u/s 111 or section 113 of the Act. As I have held that the order of confiscation was passed without any legal foundation, the finding in Ext. P3 that the petitioner attempted to smuggle the gold chain cannot be sustained. Consequently, I hold that the order of confiscation and the levy of penalty are liable to be set aside.

26. The Customs Act, 1962 or the Baggage Rules, 1998 do not stipulate that a foreign tourist entering India cannot wear gold ornaments on his person. The Customs Act, 1962 and the Baggage Rules, 1998 do not provide sufficient warning to foreign tourists entering India that wearing a gold chain is prohibited. The Act and the Rules do not even remotely indicate that a foreign tourist entering India cannot wear a gold chain on his person. In other words, foreign tourists entering India are in a boundless sea of uncertainty as to whether it is prohibited or not. As the Customs Act, 1962 and the rules framed thereunder contemplate confiscation and levy of penalty as also prosecution, the State has a duty to specify with a degree of certainty as to what is prohibited and what is not, without leaving it to the foreign tourist to guess what is prohibited and what is not.

27. The Apex Court has in Kartar Singh Vs. State of Punjab, held that vague laws offend several important values. It Was held that it is insisted or emphasised that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. The Apex Court also held that vague laws may trap the innocent by not providing fair warning, that such a law impermissibly delegates basic policy matters to policemen and also to judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. The relevant portion of the decision of the Apex Court in Kartar Singh Vs. State of Punjab, is extracted below:

130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasised that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to "steer far wider of the unlawful zone....than if the boundaries of the forbidden areas were clearly marked.

(emphasis supplied)

28. In Jay Giaccio v. State of Pennsylvania, (1966) 382 US 399 , Black J. held as follows:

It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves Judges and Jurors free to decide, without any legally fixed standards, what is prohibited and what is not, in each particular case..............Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government to impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce.

(emphasis supplied)

29. The principle laid down in the aforesaid decisions is founded on a universal sense of fairness or reasonableness. The apprehension voiced by the Apex Court in Kartar Singh Vs. State of Punjab, and by the Supreme Court of United States in Jay Giaccio v. State of Pennsylvania (1966) 382 US 399, has proved to be true in the instant case where, without the backing of a law which expressly prohibits a foreign tourist entering India from wearing a gold chain, the respondents have, relying on a notification which has no application, confiscated the gold chain worn by the petitioner holding that he is not entitled to import free of duty or on payment of duty even a single gram of gold. If that were the law, what fate will befall foreign tourists with gold capped teeth who arrive in India. Though the learned counsel, appearing for the respondents submitted that the gold chain worn by the petitioner was of 24 carat purity, which is prohibited, no statutory stipulation to that effect was brought to my notice. In the absence of a statutory prescription in express terms to the effect that a foreign tourist entering India should not wear 24 carat gold jewellery much less gold jewellery, I am of the opinion that the impugned order cannot be sustained.

30. The Apex Court has in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, reiterated the proposition that the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution of India is not affected in spite of alternative statutory remedies in cases where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation. In the view that I have taken it has to be necessarily held that the order of confiscation passed in the instant case is one without a legal foundation. I therefore overrule the contention of the learned counsel appearing for the respondents that the petitioner should be relegated to the alternative statutory remedies available to him.

For the reasons stated above, I allow the writ petition, quash Ext. P3 order and direct the respondents to unconditionally return the gold chain confiscated as per Ext. P3 order in specie to the petitioner and to refund to him the sum of Rs. 5,000/- paid towards penalty, on the day the petitioner produces a certified copy of this judgment before the second respondent. No costs.

