

(2009) 03 DEL CK 0216
In the Delhi High Court
Case No : Writ Petition (C) 10982 of 2006

Vijay Gulati

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 20-03-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 108, 113, 114, 128, 129
Foreign Exchange Management Act, 1999 — Section 10, 13, 16, 6

Citation : (2009) 03 DEL CK 0216

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Pradeep Jain and Deeksha Bhutani, for the Appellant; Atul Bandhu and Anurag Kumar for Shilpa Singh, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—Issue Rule. Mr. Atul Bandhu, Advocate waives notice. With consent of the counsel for the parties, the matter was heard finally.

2. The petitioner claims for quashing of an order dated 30.1.2006 issued by the Central Government in exercise of its revisional powers under the Customs Act. The Central Government affirmed the findings of the adjudicating authority; confiscated foreign currency US \$73,020, Hongkong \$1,340, UAE Dirham 50, Singapore \$54 and certain other assorted currencies.

3. Briefly the facts are that the customs authorities alleged that on specific information from the Directorate of Revenue Intelligence intercepted one Ajay Gulati in the departure lounge of the IGI Airport on the night intervening 11/12.08.2002. The DRI contended that the said person was scheduled to travel in an outbound flight to Bangkok. The said Ajay Gulati along with two others were searched and the DRI claims to have recovered quantities of foreign currencies. It is claimed that during the course of follow up action, the joint residence of the said Ajay Gulati and the present petitioner Vijay Gulati were

searched on 12.8.2002 resulting in recovery of the amount of currencies mentioned earlier. The petitioner claimed ownership of the seized currency by his letter dated 16.8.2002, to the DRI. He contended that the currency was legally acquired from certain overseas visiting buyers as advance payments against their export orders, which was permissible in law. According to him, all relevant information and documents including Currency Declaration forms issued by the Customs Department to the buyers upon their arrival, along with authority letters in his favour, evidencing payments were also shown to the customs authorities. Apparently, the customs authorities further recorded a statement u/s 108 of the Customs Act on 20.9.2002.

4. On 10.2.2003, the customs authorities issued show cause notices to the petitioner, his son Ajay Gulati and others proposing confiscation of the currency seized on two separate occasions u/s 113(d), (e) and (i) of the Customs Act and also proposed personal penalty u/s 114(i). The Customs authorities proposed penalty under Foreign Exchange Management Act, 1999 (hereafter referred to as FEMA). The petitioner and others who were issued with such notices, resisted the proceedings. It was contended that the Customs Act and its provisions were inapplicable to the foreign exchange seized from residential premises. It was also contended that with the repeal under the FERA, 1973, all allegations pertaining to foreign exchange violations had to be dealt with by specified authorities under FEMA, 1999. On the merits, it is contended that the currency was legally acquired and that in any event, there was no attempt to export such currency within the meaning of Section 113(d).

5. On 21.6.2004, the adjudicating authority i.e. Additional Commissioner of Customs issued an order directing absolute confiscation of the seized currency as well as imposing penalty of Rs. 7 Lakh on the petitioner. He inferred that the currency was illegally acquired on the basis of his information gathered from the materials on record. The petitioner preferred an appeal before the Commissioner of Customs u/s 128 of the Customs Act. The Commissioner rejected the appeal on 31.5.2005. Being aggrieved, the petitioner approached the revisional authority i.e. the Central Government u/s 129(d)(d) of the Act. The revisional authority accepted the contention with regard to the contentions of Ajay Gulati. It is contended that even the criminal proceedings which were initiated by the respondents for violation of Section 135 of the Customs Act were quashed by the High Court.

6. The revisional authority by its impugned order on the one hand accepted Ajay Gulati's contentions and quashed confiscation. It set aside the orders of the Commissioner of Customs and the adjudicating authority. The revisional authority reasoned as follows with regard to the submissions of Ajay Gulati:

5. Facts of the present case reveal that in respect of Applicant No. 1 (Ajay Gulati) the seized foreign currency equivalent to US \$15,000 in form of Traveller's Cheques were purchased vide cash memo. No. 19306 dt. 11.8.02 from an authorized dealer approved as per Section 10 of FEMA under the Business Travel

Scheme in terms of the RBI Scheme contained in memorandum of Instructions, relating to full-fledged money changers allowing up to US \$25000 to a person, for travel abroad and up to \$5000 under BTQ (Basic Travel Quota). The payments were made by cheque from Company account and the foreign currency was not concealed and was kept in his hand bag. Similarly, foreign currency of US \$27000 each in form of pre-authenticated Traveller's Cheques under their signatures and US \$2000 each in cash carried by Applicant No. II (Kapil Rani) and Applicant No. III (Jatin Kapur) respectively were drawn for export from payment through cheque/Demand Draft against M/s LG Enterprises and M/s Gaurav Enterprises. This was again issued by an RBI authorized money exchanger against Business Travel Scheme and Basic Quota. These currencies were also recovered from their respective possession found in hand bag and not concealed. The currencies were thus within legitimate and permissible ceiling of RBI and acquired also for export from an RBI authorized money exchanger, a legally designated and legitimate channel for such transaction and for which no declaration for export was also necessary 2005 (186) ELT 296 Having fulfilled the required conditions there is nothing to treat such foreign currency as "prohibited goods" and no prohibition in terms of Section 113 of Customs Act read with Section 2(33) ibid thus gets attracted or comes into operation warranting confiscation of such currencies. A case is however made out in the show cause notice and the adjudication order on the basis of certain earlier and not fully proven or substantiated transgression of FEMA and Rules/Regulations etc. framed thereunder, stating that since certain transactions anterior to legally taking out of foreign currencies including cash and TCs through an authorized dealer appeared tainted the mischief of prohibition within the meaning of Section 13 read with 2 (33) of Customs Act is attracted and hence the order for absolute confiscation has been made. However, legally speaking in the facts and circumstances of the case, the prohibition in terms of Section 113 read with 2(33) of Customs Act comes into play only when the alleged transgressions and infractions have been found to be fully substantiated and proven by an appropriate and empowered authority. For such alleged contravention of Section 10(6) of FEMA or any other provisions of FEMA or allied Laws/regulations etc., no reference to any order or categorical finding in this respect confirming the infractions in terms of Section 13 and 16 of FEMA 1999 or any directive of the RBI being the primary agency for implementation of FEMA and allied Laws finds mention in the adjudication order or the Order-in-Appeal. Tentative conclusions, including the charge of under/overvaluation, dummy concerns etc. which were controverted later by documentary evidences, and surmises and inferences based on statements retracted immediately and sundry evidences pieced together but not fully supported by adequate documentary or other evidences (as discussed at pages 21-24 of adjudication order) to aver that the Applicants were "ineligible travellers" being an inconclusive and legally unsustainable finding cannot therefore form the basis to create and introduce existence of a distant prohibition for justifying confiscation u/s 113 of Customs Act of foreign currencies acquired for export in the prescribed manner and within the permissible ceiling from an

authorized dealer, which is a legal and permissible channel. Govt. is thus of the view that confiscation u/s 113 of Customs act 1962 is not sustainable in respect of seized foreign currencies (TCs and cash) pertaining to Applicant I, II and III is therefore set aside as contravention under Customs Act, is not established. Applicants No. V, VI and VII in any case having played an indirect and marginal role in procurement of foreign currency from authorized dealer as per adjudication order itself are also consequently not liable for penal action u/s 114 of Customs Act and the penalties against them are also set aside. However, the competent statutory authorities are free to initiate any action if not already initiated whether the confiscation or for penalty in case of alleged contravention of any of the provisions of FEMA/Rules, Regulations etc. framed thereunder or any directives of the RBI.

7. As far as the present petitioner is concerned by the very same impugned order, the revisional authority reasoned as follows and upheld the confiscation:

The second part of the case relates to the seizure and absolute confiscation of foreign currencies amounting to US \$73020, Hong Kong \$1340, UAE Dirhams 50, Singapore \$54 and other assorted currencies recovered and seized from the joint residence of Noticee No. I and IV. Facts of the case reveal that the Applicant No. IV claimed its ownership stating that these were received by him as advance payments from various overseas buyers against purchase order for the products of his firm M/s AVG enterprises. To substantiate this, a list of 8 foreign travelers was submitted from whom advance payments in foreign currencies amounting to US \$73500 were received. This list also indicated the details of Currency Declaration Form filed by these persons on their arrival in India. During enquiry all these 8 cases of advance payment were investigated by the Department and through independent overseas agencies and the reports received in 6 cases indicated falsity of claim advanced by Applicant No. IV. Most of them have also stated during investigation, that they did not advance any foreign exchange to anybody and do not know any person named Vijay Gulati. Although an effort has been made by the Applicant No. IV to challenge these findings, they have not at all been effectively countered. The legal source as claimed, having been found on investigations to be false, the only conclusion and logical presumption is that they were illegitimately and clandestinely obtained and govt., therefore, agrees with the observation in the Order-in-Original as confirmed by Commissioner of Appeals that "therefore circumstances and facts revealed by the investigations do not give credence to the version put forwarded by either Noticee and the inference that the seized currency was illegally acquired is inescapable." Foreign currency so acquired through illegitimate and non-permissible channel and source thus become "prohibited" and is liable to confiscation u/s 113 of Customs Act if exported or attempted to be exported. An argument in defence based on several case laws has been put up to state that even assuming that the foreign currency was illegitimately acquired no case under the Customs Act for the confiscation u/s 113 of Customs Act is established as the same was seized from the residence and did not involve any attempt to export the same. In this regard,

Govt. observes that the case Laws cited in support of this contention cannot squarely apply to the facts of this case which are not only different but the attendant circumstances are also peculiar. Even though in respect of the illegally acquired foreign currencies no direct attempt to export the same has been made as pleaded but the maxim of preponderance of probability [1988 (15) ECC 183 , 1987 (12) ECR 1 13] and especially the ratio of the judgment of the Hon''ble Calcutta High Court in Commissioner of Customs (Preventive) Vs. Amit Kumar Saha and Another, upholding liability to confiscation and ordering absolute confiscation u/s 113 of the Customs Act in a comparable situation renders the seized foreign currencies in the present case also liable to confiscation u/s 113 of Customs Act. Govt. therefore finds that the orders of absolute confiscation of foreign currency seized from the residence as well as that of penalty imposed on Applicant No. 4 are sustainable and accordingly does not want to interfere with the same.

7. As regards Applicant No. VIII, i.e., AVG Impex, no clear and specific charge of clandestine operation has either been clearly brought out or proven in the Adjudication Order/Order-in-Appeal. Generalized findings lacking in corroborated and specific details are however mentioned at para 14 of the Adjudication Order. In the order itself there seems to be some confusion and overlapping in the roles of AVG Enterprises and AVG Impex and no direct nexus is discernible between the illegally procured foreign currencies seized at the residence and AVG Impex so as to warrant penal action u/s 114 of the Customs Act. Accordingly, the penalty on applicant No. VIII, M/s AVG is set aside.

8. Learned Counsel submitted that facially the impugned order is contradictory because on the one hand the Central Government was persuaded to quash the confiscation on the ground that the prohibition u/s 113 read with 2(33) operated only when the alleged seizure and confiscation were found to be substantiated by an appropriate and empowered authority. The Central Government was impressed by the fact that such authority had not at any time rendered any adverse findings against Ajay Gulati. The second part of its reasoning concerning the individual was of course on the merits. It was submitted that such being the case and having regard to the express intentment of Section 113, the Central Government could not have adopted an entirely different reasoning so far as the petitioner is concerned and concluded, as it did, that the foreign exchange in question was justifiably confiscated.

9. Learned Counsel for the respondents contended that the adjudicating authority had examined the circumstances and recorded its findings after going into the merits. It was submitted that the basis of that order was the statement made u/s 108 of the Customs Act as well as the statements recorded by the Bank Manager who is alleged to have issued the certificates, endorsing the petitioner's stand. It is submitted that the said Bank Manager who has been issued with a notice, being Noticee No. 4 fairly conceded that certificates were issued by him upon asking of the petitioner. In these circumstances,

respondents" counsel submitted that this Court should not interfere with the concurrent findings of the authorities under Article 226 of the Constitution of India.

10. Section 2(22) which defines goods inter alia includes currency and negotiable instruments. Section 2(33) which states what are "prohibited goods" reads as follows:

Section 2(33) prohibited goods "means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with

11. Section 113 of the Customs Act which empowers the concerned authorities to confiscate goods is in the following terms.

113. Confiscation of goods attempted to be improperly exported, etc.:

The following export goods shall be liable to confiscation:

(a) any goods attempted to be exported by sea or air from any place other than a customs port or a customs airport appointed for the loading of such goods;

(b) any goods attempted to be exported by land or inland water through any route other than a route specified in a notification issued under Clause (c) of Section 7 for the export of such goods;

(c) any dutiable or prohibited goods brought near the land frontier or the coast of India or near any bay, gulf, creek or tidal river for the purpose of being exported from a place other than a land-customs station or a customs port appointed for the loading of such goods;

(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contracted to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any dutiable or prohibited goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation;

(f) any dutiable or prohibited goods which are loaded or attempted to be loaded in contravention of the provisions of Section 33 or Section 34;

(g) any dutiable or prohibited goods loaded or attempted to be loaded on any conveyance, or water-borne, or attempted to be water-borne for being loaded on any vessel, the eventual destination of which is a place outside India, without the permission of the proper officer;

(h) 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;

(i) any dutiable or prohibited goods or goods entered for exportation under a claim for drawback which do not correspond in any material particular with the entry made under this Act or in the case of baggage with the declaration made u/s 77 in respect thereof;

(j) any goods on which import duty has not been paid and which are entered for exportation under a claim for drawback u/s 74;

(k) any goods cleared for exportation under a claim for drawback which are not loaded for exportation on account of any willful act, negligence or default of the exporter, his agent or employee, or which after having been loaded for exportation are unloaded without the permission of the proper officer

(I) any specified goods in relation to which any provisions of Chapter IVB or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.

12. A textual reading of the above provisions would show that the customs authorities' jurisdiction ordinarily arises where an attempt to export the goods is made. Concededly there can be situations, where the authorities may exercise jurisdiction and visit the premises upon information received of contravention entitling them to exercise powers u/s 113. That is, however, an aspect which this Court should not go into in the present proceedings. What the petitioner argues substantially, is that the revisional authority after having concluded as it did that in the absence of an order by the empowered body or authority under the concerned law i.e. FEMA, it was not open to the Customs authorities to exercise powers and confiscate foreign exchange. That part of the order by which the Central Government quashed the confiscation vis-a-vis Ajay Gulati is not in question; apparently the respondents have accepted it. This would mean that in regard to its basic reasoning regarding illegality and such confiscation, there is no dispute. However, by a curious anomaly, the Central Government in the very same order proceeded to uphold the confiscation order as far as it related to the petitioner.

13. Now, the jurisdiction of the Customs authorities vis-a-vis the two sets of foreign exchange - one seized near the Airport and the other seized subsequently was on the basis that they formed part of the same transactions or arose out of the statement recorded in the first seizure. Such being the case and the notices having been issued as a part of the same investigation process, the Central Government could not have adopted a schizophrenic approach; on the one hand holding that the confiscation was unauthorized, and on other, upholding the confiscation in the absence of such order in the petitioner's case. The order nowhere discloses that insofar as the petitioner is concerned, there was any such determination by the authorities under FEMA or the RBI, as the case may be. Therefore, Central Government has, in the impugned order disclosed an inconsistent and wholly illogical approach in law which can hardly be commended by this Court. Having held that Customs authorities lacked jurisdiction to deal with

the matter in the absence of a proper determination under the relevant law, the Central Government committed a fatal error of law in not applying the same reasoning to the latter part as far as it concerned the petitioner. The latter part of the order is at odds with the earlier reasoning, and without any rationale.

14. In view of the above discussion, this Writ Petition is entitled to succeed. However, having regard to the circumstances, the respondents are free to take immediate and expeditious steps to have the matter referred appropriately to the authorities under FEMA for suitable adjudication. This is in line with the impugned order, reserving liberty to the customs authorities to refer the matter under FEMA, vis-a-vis Ajay Gulati. The impugned order is, therefore, quashed, subject to such terms.

15. The Writ Petition is allowed in the above terms.