

**Ashok Kumar Vs. Cc**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Oct-30-2002

**Reported in :** (2003)(86)ECC321

**Judge :** P Chacko

**Appellant :** Ashok Kumar

**Respondent :** Cc

**Judgement :**

1. In this appeal filed against the order of the jurisdictional Commissioner of Customs, the appellant challenges the penalty of Rs. 5 Lakhs imposed on him under Section 112 (b) of the Customs Act.

3. The incident which has led to these proceedings occurred on 11.4.98.9 HDPE bags containing goods consigned by various parties were being carried from the appellant's premises to the domestic terminal of the Delhi Airport. The goods were in a vehicle hired by the appellant for his courier service. The appellant had another partner namely Sabir Ali in the courier-firm. The vehicle was intercepted near the Airport by the officers of Customs. The bags were opened and the contents examined. It was found on examination that foreign origin computer parts, photographic cameras, cellphones & batteries thereof and watch movements were the contents of the bags. All the goods were seized by the officers believing that the goods were liable to confiscation. The vehicle was also seized. Statements of numerous persons were recorded, who included the

appellant, his partner Sabir Ali, the driver of the vehicle and a few persons who loaded the goods onto the vehicle. On the basis of the investigative results, show-cause notices were issued. In the show-cause notice issued to the appellant the department proposed to impose penalty on him under Section 112 (b) of the Customs Act, alleging that he dealt with goods which were allegedly liable to confiscation under Section 111 (d) of the Customs Act. The proposal was contested. In adjudication of the dispute, the Commissioner imposed a penalty of Rs. 5 Lakhs on the appellant as already noted, apart from absolutely confiscating the seized goods under Section 111 (d) of the Act. Hence the present appeal.

4. Reiterating the grounds of this appeal, Ld. Consultant submits that the earlier statements made by the appellant incriminating himself were retracted in his reply to the show-cause notice. He further submits that none of the seized goods was prohibited for purposes of Section 111 (d) of the Act. Referring to Nabhi's Book on Exim Policy 1997-2002 (Vol.3), Ld. Consultant submits that all the goods were indeed freely importable at the material time and, therefore, Section 111 (d) of the Act was not attracted and the goods were not liable to confiscation.

Where the goods were not liable to confiscation, the question of imposition of penalty under Section 112 (b) did not arise. It is further submitted by the consultant that the adjudicating authority has relied on the statement of Sabir Ali, one of the co-noticees. In the absence of corroborative evidence, such reliance on the statement of co-noticee for imposing penalty on the appellant is not justified in law. In this connection, Ld. Consultant relies on the Supreme Court's decision in Superintendent of Customs v. B.K. Patel, 1995 (76) ELT 508 (SC). Ld. Consultant has a further case that the penalty imposed by the Commissioner is disproportionately high.

5. Ld. JDR reiterates the findings recorded by the Commissioner and submits that the impugned order has to be sustained on the strength of the confessional statement of the appellant. In this connection, he relies on the Supreme Court's judgment in Surjeet Singh Chhabra v. Union of India, 1997 (89) ELT 646 (SC). The DR further submits that the adjudicating authority has correctly relied on the statements of the co-accused, Shri Sabir Ali. In this regard, he seeks to draw

support from the Supreme Court's decision in Naresh Sukhawani v. Union of India, In this appeal, the challenge is only against the penalty imposed by the lower authority on the appellant under Section 112(b) of the Customs Act. The appellant has disowned the goods which have been absolutely confiscated by the Commissioner, and, therefore, he is not challenging the confiscation. However, Ld. Consultant for the appellant has raised a limited challenge to the confiscability of the goods. His argument is that, before imposing penalty under Section 112 (b) of the Customs Act, the adjudicating authority should have recorded a finding that the goods were liable to confiscation. On a perusal of the impugned order, I find that such a finding is forthcoming from the order.

7. The question which arises for my consideration is whether the penalty imposed under Section 112 (b) by the adjudicating authority on the appellant is sustainable or not. The relevant part of Section 112 reads as under: Section 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 under Section 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 under Section 111, (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 five times the value of the goods or one thousand rupees, whichever is the greater; (ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding five times the duty sought to be evaded on such goods or one 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 under Section 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 five times the difference between the declared value and the value thereof or one thousand rupees, whichever is the greater; (iv) in the case of goods falling both under Clauses (i) and (iii), to a penalty not exceeding five times the value of the goods or five times the difference between the declared value and the value thereof or one thousand rupees,

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

8. According to the above provisions, any person who acquires possession of or is in any way concerned in carrying,.....or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111 shall be liable to a penalty. Ld. Consultant has argued that the appellants, being a domestic courier, had no obligation to check the nature of the goods which were presented to him for carriage, Whether the goods were liable to confiscation or not under the Customs Act was not his concern. He simply carried the goods which were entrusted to him. He had no knowledge as to whether the goods in question were liable to confiscation or not, nor did he believe that any of those goods were liable to confiscation under the provisions of the Customs Act.

Therefore, according to Ld. Consultant, the penal provisions of Section 112 (b) were not attracted in this case. I can hardly accept this proposition.

9. In my view, Section 112 is a law that should caution couriers like the appellant. Before accepting any consignment for carriage, a courier should inter alia make sure that it does not contain offending goods which are liable to confiscation under Section 111 of the Customs Act.

If he carries such goods, it will be presumed that he does so with the knowledge and belief envisaged under Section 112, in which event he will be liable for penalty under Section 112(b). Now it has to be examined as to whether the goods in question were liable to confiscation under Section 111 (d). Clause (d) of Section 111 reads as under: "(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:" The Book of Procedure under Exim Policy 1997-2002 referred to by the Ld. Consultant is relevant here. I have perused whatever provisions of this book were referred to me. On page VII.313 of this book, I come across an entry relating to parts and accessories of the machines of Heading No.

84.71. Items of Heading 84.71 admittedly include computer (automatic data processing machine). The above entry, therefore, covers parts of computer. I have not come across anything in this book to show that the goods covered by this entry were freely importable at the material time. The entry relating to cellular phone is found under heading 85.25 on page VII. 330. This item is found to be freely importable. Photographic cameras are covered under heading No. 90.06 on page VII. 353. The items covered by all the sub-entries, barring one, are found to be freely importable. Nothing has been brought on record to show as to which of these sub-entries covered the photographic cameras involved in this case. Lastly, the heading No. 91.08 on page VII. 363 covers Watch movements. I find that all the items under this heading are freely importable. Ld. JDR has not disputed the authenticity/applicability of this Book, I, therefore, find that, out of the seized goods, some were freely importable and some were not, at the material time, it would follow that some of the goods were liable to confiscation under Section 111 (d) and some were not.

10. Ld. Commissioner has found that the appellant has admitted in his statement that he was in the know of the nature, of the goods when the goods were accepted for carriage. There is no valid retraction of this statement of the appellant. The retraction in the reply to the show-cause notice is too belated to be recognised as a valid retraction. On the basis of this admission, even if the statement of the co-noticee was to be ignored, it has to be found that the appellant was in the knowledge of the confiscability of at least some of the seized goods, under Section 111 (d), warranting invocation of the penal provisions of Section 112(b). Therefore, in my view, the Commissioner has correctly held that the appellant was liable to penal action under Section 112(b). However, in view of the findings recorded above, the quantum of penalty cannot be sustained. In view of the provisions of the Exim Policy 1997-2002, the appellant had no reason to know or believe that the freely importable goods were liable to confiscation.

To know or believe so was restricted to those goods which were not freely importable and hence attracted Section 111 (d), Having regard to this position, I reduce the penalty from Rs. 5 Lakhs to Rs. 1 Lakh. The appeal is disposed of in the above terms.

