

Satyanarayan Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-29-1987

Reported in : (1987)(12)LC113Tri(Delhi)

Appellant : Satyanarayan

Respondent : Collector of Central Excise

Advocate for Pet/Ap. : Shri. I.C. Upadhyay

Judgement :

1. The captioned appeal is directed against the order No. 418 of 1979 of the Central Board of Excise and Customs on Customs Appeal.

2. Factual backdrops : In pursuit,of an information that the appellant son of Shri Kanmalji would be carrying contraband gold from Jodhpur and would be leaving by the train, the appellant was apprehended in the morning at Luni Railway Station by the authorities concerned and as a result of the search two gold bars of foreign marks weighing about 20 tolas and the ornaments weighing about 72 tolas 6 annas and 3 rattis were recovered. After the usual investigation a Show Cause Notice calling upon the appellant to show cause as to why the seized primary gold and gold ornaments be not confiscated and why penal action be not taken was issued to the appellant. In reply to the Show Cause Notice, the appellant pleaded in defence that 47 and odd tolas of ornaments pertain to one Jassi Ram and 6 and odd tolas belongs to the mother of the appellant. The remaining ornaments and the two gold bars were disowned by the appellant. After the usual enquiry the

Adjudicating Authority ordered for the confiscation of the seized gold ornaments and the gold bars and also imposed a personal penalty of Rs. 10,000/- on the appellant. Being dis-satisfied, the appellant went in appeal. On appeal, the Central Board of Excise and Customs ordered for the release of part of the seized gold ornaments weighing 63 tolas and also remitted the personal penalty in full but confirmed the confiscation of the remaining gold ornaments weighing 9 tolas and two gold bars weighing 20 tolas. Being dis-satisfied with the order of confiscation of 9 tolas and gold ornaments and two gold bars weighing 20 tolas, the appellant filed his Revision Petition before the Central Government which now statutorily stands transferred to this Tribunal to be dealt with as an appeal.

3. At the time of hearing' learned SDR, Shri Shishir Kumar raised the preliminary objection about the maintainability of the appeal at the instance of the appellant. He submitted that the appellant has no locus standi to challenge the confiscation of 9 tolas of gold ornaments and the two gold bars because the same were disowned by the appellant immediately on the spot at the time of the seizure and the same were never claimed by the appellant during the adjudication proceedings. In this connection he also drew our attention to the impugned order of the Central Board of Excise and Customs on Customs Appeal to the effect that while releasing the 63 tolas of gold ornaments the Central Board of Excise and Customs has recorded a very clear finding to the effect that, "However, the Collector's order confiscating the remaining gold and ornaments are upheld as these are neither claimed by Sat Narain nor is there indication that the gold had not been smuggled and the ornaments had not been made out of smuggled gold. On the contrary, from the facts and circumstances of the case it is clear that because of their contraband nature no body had come forward to claim these ornaments and gold." In reply, Shri I.C. Upadhyay, learned counsel for the appellant submitted that since the confiscated 9 tolas of gold ornaments and two gold bars of 20 tolas have not been proved by the Department to be smuggled one, the same cannot be confiscated and therefore the same may be ordered to be released to the appellant.

4. Since both the parties insisted that they should be first heard on the preliminary objection and in case the preliminary objection is upheld the appeal may be heard

on merits. Accordingly, we have heard the parties on the preliminary objection. After hearing both the parties, we are of the opinion that the present appeal is not maintainable at the instance of the appellant.

5. It is an admitted fact that at no stage of the adjudication proceedings the appellant claimed the ownership of the confiscated gold ornaments and two gold bars. It is also an admitted fact that the appellant never admitted the recovery of the confiscated gold bars and gold ornaments from his possession. Even in the Revision Petition filed before the Central Government which now stands statutorily transferred to this Tribunal to be dealt with as an appeal as stated above, the appellant has not claimed the ownership of the confiscated gold bars and gold ornaments. He also does not say that the same were recovered from his possession. From the impugned order as extracted above it is clear that the confiscation of the seized gold ornaments weighing 9 tolas and two gold bars weighing 20 tolas was upheld by the lower appellate authority on the very finding that they were never claimed by the appellant and there is indication that the same were smuggled into India and the ornaments were made out of the smuggled gold and nobody had come forward including the appellant to claim the ownership of the same because of their contraband nature. Since the ownership and recovery of the same were denied by the appellant and there was no evidence on the record that the appellant had been dealing with the gold ornaments and gold bars in question, the personal penalty imposed by the Adjudicating Authority was remitted in full and in our opinion this appears to be the reason as to why the appellant has not claimed the ownership or the recovery of the 9 tolas of gold ornaments and two gold bars of 20 tolas in question in the Revision Petition (now Memorandum of Appeal). From the grounds taken in the Revision Petition (now appeal) and the arguments advanced before us, it is clear that the main thrust of the arguments of the counsel for the appellant is that since the Department has failed to prove the smuggled nature of the gold ornaments weighing 9 tolas and two gold bars of 20 tolas the same cannot be confiscated even though the ownership and the recovery of the same was not owned by the appellant. In support of his contention Shri I.C. Upadhyay, learned counsel for the appellant submitted that the appellant was also prosecuted in the Criminal Court for an offence under section 167(8) of the Sea Customs Act, 1978 with respect to the

gold and gold ornaments in question and was ultimately acquitted by the trial Court and confirmed by the High Court of Rajasthan in appeal by the State x x x x. He submitted that the High Court of Rajasthan has confirmed the findings of the trial Court holding that it was not proved that the gold bars and the gold ornaments out of which the confiscated gold ornaments were manufactured were smuggled into India.

He also cited the case of *Amba Lal v. Union of India*, AIR 1961 SC 264; *Hiralal Sarawgi v. Collector of Central Excise and Land Customs for Assam, Manipur and Tripura at Shillong and Anr.*, AIR 1962 Assam 39; M/s.

Valimahomad Gulam-hussain Sonavala and Co. v. C.T.A, Piliat, Addl.

Collector of Customs and Ors., AIR 1961 Bombay 48; *M.G. Abrol and Anr.*

v. Amichand Vallamji and Ors., AIR 1961 Bombay 227; and *Mangala Prasad v. V.J. Manerikar and Ors.* AIR 1965 Calcutta 507, to show that in the absence of any proof by the Department that the gold bars or gold ornaments in question were smuggled into India, the same cannot be confiscated. He further stated that since the Department has failed to prove the smuggling of the gold bars and gold ornaments in question, the same should be returned to the appellant as provided for in the Criminal Procedure Code 1973 and also held by the Madras High Court in *Misrimal Hansraj v. Union of India* 1975 Criminal Law Journal 16-17. We are afraid none of the contentions of the appellant has any force and the cases relied upon by the Ld. Counsel for the appellant does not advance the case of the appellant any further. In the case of *Amba Lal v. Union of India*, supra, it was laid down that the goods cannot be confiscated unless the State discharged its onus in establishing the offence or that they had been unlawfully imported. Same view was reiterated in the case of *Gian Chand v. State of Punjab*, supra. In the case of *Heera Lal Sarawgi v. Collector of Central Excise, Assam*, supra, it was held that the department is bound to prove that the goods were imported in contravention of the prohibitory orders and the burden of proof lying on the department is not discharged by merely holding that accused 'has failed to prove the bonafide purchase of the seized goods.

In M.G. Abrol V. Ami Chand Vallanji, supra, it was held that wherever the goods are seized, the seizure officer seizing the goods must at the time of seizure have a reasonable belief in his mind that the goods that he was seizing were smuggled goods. Any subsequent acquisition of such belief would be of no avail. In the case of Mangala Parshad v.V.] Manerikar, supra, it was held that if the goods were not covered by erstwhile Section 178-A(2) the burden to prove unlawful importation is on the Customs authorities. Same view was taken in M/s Valimahomed's case, supra. In the unreported judgement of Supreme Court Nos. 1430 to 1442 of 1966, it was held that when the prosecution in the Criminal Court fails, the goods shall be returned to the person from whose possession it was seized by the police. Thus from a resume of the cases referred to above, it is clear that ratio of the said decision is that the seizure of goods under the Customs Act must be on a reasonable belief that the goods in question are liable to confiscation under Customs Act and the burden lies on the department to prove that the same were unlawfully imported or smuggled one. With this proposition of Law, there can be no quarrel.

6. In the instant case the contraband gold bars bearing foreign markings were recovered by the police as a result of the personal search of the appellant which were subsequently seized by the Customs authorities under the reasonable belief that the same were imported into India without any valid permit. As a sequel thereof show cause notice calling upon the appellant to show cause as to why the gold in question be not confiscated and penal action be not taken, was issued.

In reply, the appellant disclaimed the ownership and recovery of the gold in question, and did not challenge the validity of the seizure or the smuggled nature of the gold in question. As such, the question regarding the validity of the seizure or the fact that the gold in question was imported illegally remained unchallenged. In other words, the case of the department that the seizure was made on the reasonable belief that the gold in question having foreign marking, was illegally imported was never challenged. Under these circumstances, it was not necessary for the department further to prove during adjudication proceedings that the seizure was valid or the gold was imported illegally. For, it is settled law that admitted facts/or unchallenged facts are not required to be proved. The fact that

the appellant was prosecuted in Criminal Court and was ultimately acquitted on the finding that the department has failed to prove in those proceedings that the gold bars and gold ornaments out of which the confiscated gold ornaments were manufactured, were smuggled into India, also does not advance the case of the appellant any further. Because it is settled law that criminal proceedings are separate from adjudication proceedings. In other words, by its very nature, the two proceedings are independent of each other and the adjudication proceedings before the departmental authorities are not affected by the criminal Court. In this view of the matter, we are supported by the Judgement of the Bombay High Court, rendered in M.P.85 of 1978. In that case a direct question fell for consideration in connection with the ambit and powers of the Customs Department in initiating adjudication proceedings., under Section 111 & 112 of the Customs Act and consequential order of confiscation under Section 121 of the Customs .Act and also penalty under Section 135 of the Customs Act. The facts of this case show that the petitioner was also tried in Criminal Court for offences punishable under Section 135 of the Customs Act, and ultimately, he was acquitted.

The argument that was advanced before the Division Bench was as follows : "At the very outset, Mr. Singhvi, appearing on behalf of the Petitioner, has contended that Captain Khan having been acquitted by the Additional Chief Presidency Magistrate and that acquittal having been confirmed by the learned Single Judge, it was not now open to the Central Government to proceed on the footing that diamonds were found in the coat brought by Captain Khan on 2nd November 1969 and that it was not permissible for the Central Government to proceed on the assumption that the finding was incorrect... according to the learned Counsel, it was wholly improper on the part of the Central Government as quasi-judicial Tribunal not to take into consideration of the finding recorded by the High Court".

A very exhaustive and elaborate Judgement has been delivered by Chandurkar J. as he then was. The Division Bench has also considered in its Judgment various authorities of the Supreme Court as well as of other High Courts on this question. The Division Bench has also construed the ambit of Sections 111, 112 and 135 of the Customs Act and after taking into account all these factors the Division Bench has observed as follows :- "15. Section 112 is an express provision which

authorises the levy of penalty in respect of acts or omissions referred to therein. The procedure with regard to adjudication of confiscation and penalties is expressly provided for in section 122 of the Act. The power to be exercised by the Collector of Customs or Deputy Collector of Customs or by an Assistant Collector of Customs or by Gazetted Officer of Customs lower in rank than an Assistant Collector of Customs in accordance with the value of the goods liable to confiscation. The procedure to deal with confiscation or imposition of penalty is prescribed in Section 124 and under that provision a notice in writing has to be given to the concerned person informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty, and he is to be given a reasonable opportunity of being heard in the matter. Then comes Section 127 which expressly provides that even though an order of confiscation and an order of penalty is made by the Customs Officer that does not affect the liability to punishment under the provision of Chapter XVI or under any other law. We already reproduced the provisions of Section 135 make it pointedly clear that the power to prosecute under Section 135 is without prejudice to the action which may be taken independently under the provisions relating to confiscation and penalty. Now, it cannot be the argument that while independent powers of making an order of confiscation and penalty can be made by the appropriate officer of the Customs, irrespective of a prosecution under Section 135 being resorted to or not, in case there is a prosecution and there is an acquittal, the power expressly bestowed under Section 112 must be treated as ineffective. Unless we are able to held that even in spite of the express provisions of Section 112 and Section 127, in case there is an acquittal in prosecution instituted under Section 135, their powers cannot be exercised, the contention on behalf of the Petitioner could not be accepted. We see no warrant for the view that there is a prohibition against the Customs Officer to perform their statutory functions and exercise their statutory power under the Act because of a failure of the prosecution started under Section 135 and the acquittal of the person concerned. By its very nature, the two proceedings are independent of each other. In a given case, evidence which may be available for the purposes of proceedings under Section 112 may not be available or even if it is available, it may be admissible in regular Court of law in which the admissibility and relevance of the evidence is determined with reference

to the provisions of the Evidence Act. In a Criminal prosecution the accused need not open his mouth nor make any statement while in the proceedings for adjudication or confiscation before the Customs Department, the statement made by the person from whom the contraband articles were seized can be looked into. The scheme of the Act, therefore, clearly indicated that the two proceedings have to be dealt with independently of each other on such material as it available and permissible in these proceeding".

In a subsequent decision, rendered in the case of *Manak Lal Pukhraj Jain v. Collector of Customs 1986 (26) ELT-689 (Bombay)*, the Bombay High Court reiterated the same view.

7. So far as the question relating to disposal of property by the Criminal Court is concerned, it would suffice to say that Section 452 of the Criminal Procedure Code of 1973 expressly provides for making such Order as the Court thinks fit for the disposal, by destruction, confiscation or delivery to 'any person claiming to be entitled to possession' thereof or otherwise of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence. In other words, .Section 452, *ibid*, empowers the Criminal Court to deliver the property or document to any person 'claiming to be entitled to its possession', But it is to be remembered that the Court while passing an Order under Section 452, *ibid*, is required only to consider the right to possess and not ownership of property and therefore an Order under that Section does not decide the question of 'ownership' of property. It decides only a right to 'possession' till the competent Court decides the question of ownership. On this premises it is held that where there has been an enquiry or trial and the accused person is 'discharged' or 'acquitted' by any Criminal Court, the Court should 'ordinarily' restore the property, the subject matter of the investigation, to the person from whose custody it was taken. It is on this view of the matter that the Supreme Court in the unreported Judgements rendered in Appeals Nos. 1430 to 1442 of 1966, *supra* held that since the prosecution has failed to prove its case, the goods in question be returned to the accused from whose possession the same were originally seized by the police during the investigation. But there is no such provision under the Customs Act. On the other

hand, it is settled law that proceedings of confiscation of contraband goods under Section 111 of Customs Act, 1962 are proceedings in rem and accordingly, confiscation can be enforced against the goods irrespective of whether the offender is known or unknown. Imposition of penalty is one in personam. Such a penalty can be levied only on the person who is involved in any offence enumerated in Section 112 of the Customs Act. In this view of the matter we are supported by the observations made by the Supreme Court in the case of *Swepujanrai Indrasanarai Ltd. v. Collector of Customs* AIR 1958 SC 845. In paragraph 15 their Lordships observed as follows :- "15... The point to note is that so far as the confiscation of the goods is concerned, it is a proceeding in rem and the penalty is enforced against the goods whether the offender is known or not known; The Order of confiscation under Section 182, Sea Customs Act, operates directly upon the status of the property, and under Section 184 transfers an absolute title to Government." It is interesting to note that the Learned Counsel for the appellant has cited the case of *Misrimal Hansraj v. Union of India*, 1975 Criminal Law Journal 1617 decided by the Madras High Court to show that the appellant is entitled to the return of the contraband gold in view of the fact that the appellant was acquitted on the ground that the prosecution had failed to show that the gold in question was smuggled gold liable to confiscation under Section 111 of the Customs Act, 1962.

But we are constrained to observe that the very case of *Misrimal Hansraj v. Union of India* was over-ruled by the same (Madras) High Court in the case of *Assistant Collector of Customs, Madras v. Misrimal*, 1977-Criminal Law Journal 1551 (Madras). While over-ruling the said case their Lordships of Madras High Court in paragraph 10 observed as follows : "10... When the goods had been validly confiscated under a valid law, it will not be open to the Criminal Court to ignore that law and make an Order regarding the disposal of the property. An Order of confiscation duly made can only be altered or set aside by authorities as contemplated under the Act (Customs Act) and not interfere with by Criminal Courts." This Tribunal has taken the same view in its series of judgements passed by it. To quote a few, this Tribunal, in the case of *H.C. Shah and Ors. v. Collector*, 1986 (25) ELT 973, *Shri S.G. Kaiganokar v. Gold Control Administrator*, 1986 (23) ELT 523 and *Madan Gopal v. Collector* 1986 (26) ELT 833 has held that the

acquittal by the Criminal Court does not affect the proceedings started under the provisions of the Customs Act.

8. In the instant case, 72 tolas 6 annas and 3 rattis of gold ornaments and two gold bars weighing 20 tolas were recovered and seized.' Out of these seized gold ornaments and gold bars, the appellant only claimed 63 tolas of gold ornaments. In other words, the appellant never claimed the ownership and recovery of the rest of the seized gold, that is to say, 9 tolas of gold ornaments and 20 "tolas of gold bars. He never challenged the validity of the seizure and the smuggled nature of the gold in question with respect to these 9 tolas of gold ornaments and two gold bars weighing 20 tolas. On these unchallenged facts the Adjudicating Authority confiscated the gold in question. However, in appeal the Lower Appellate Authority released the 63 tolas of the seized gold, but confirmed the confiscation of the remaining gold ornaments weighing 9 tolas and 20 -'tolas of gold bars holding that nobody had come forward to claim these ornaments and gold. The operative portion of the Lower Appellate Authority reads as follows : "As the departmental case does not in any way establish the connection of these ornaments weighing in the aggregate approximately 63 tolas with the smuggled gold and as the provisions of section 178(A) of the Sea Customs Act are not applicable in the facts and circumstances of the case, the board holds that these are not liable to confiscation and should be released. However, the Collector's order confiscating the remaining gold and ornaments are upheld as these are neither claimed by Sat Narain nor is there indication that the gold had not been smuggled and the ornaments had -not been made out of smuggled gold. On the contrary, from the facts and circumstances of .the case it is clear that because of their contraband nature no-body had. come forward to claim these ornaments and gold." Thus, it is clear that the seizure and the smuggled nature of 9 tolas of gold ornaments and 2 gold bars weighing 20 tolas was never challenged by the appellant before the authorities below. Under these circumstances, the appellant has no locus standi to challenge the validity of the seizure and smuggled nature of the confiscated gold in question. In this view of the matter we are supported by a Division Bench decision of this Tribunal rendered in the case of Dilipsingh v. Collector 1986 (26) ELT 187, wherein it was observed : "10... The seized gold included one gold biscuit of foreign origin weighing 10 tolas. Starting from the stage of investigation till the

hearing of the appeals before this Tribunal the applicant stated that the seized goods did not belong to him, but at no stage of the proceedings he contested the fact that the seized gold was smuggled gold and that it was primary gold. The fact that the seized goods were smuggled goods had been specifically mentioned in the Show Cause Notice issued to the applicant. He had not denied this averment in his reply nor had he disputed the smuggled nature of the goods at any stage of enquiry including the appeal before this Tribunal. In view of this failure of the applicant to deny the smuggled nature of the goods, the Adjudicating Authority (unlike a Criminal Court) was not barred from proceeding on the basis that the goods were smuggled. In that event all the presumptions under Section 123 of the Customs Act and Section 99 of the Gold (Control) Act, were available to the Adjudicating Officer." 9. Besides, it is interesting to note that in the Memorandum of Appeal (which was originally) a Revision Petition before the Central Government and now stands statutorily transferred to this Tribunal to be dealt with as appeal), the appellant has not claimed the ownership of the gold in question, that is to say, 9 tolas and 20 tolas of gold bars. He has also not stated that the same were recovered from his possession. He also has not challenged the validity of the seizure and the smuggled nature of these ornaments. On the other what he has stated in the Memorandum of appeal is that : "The High Court has held that the Department failed to prove that the two gold bars under seizure by the police authorities were smuggled. If the goods are not proved to have been smuggled, they cannot be ordered to be confiscated. Although it has been held by the High Court that gold bars weighing 10 tolas were recovered from the possession of the petitioner".

From the copy of the judgement passed by the Hon'ble Rajasthan High Court (Criminal Appeal No. 421 of 1960 dated 4.4.62) it is clear that the appellant was prosecuted in the Court of Railway Magistrate First Class, Jodhpur. In the Trial Court, the appellant clearly stated that the gold bars, the 'sankal' weighing about .12 tolas and 3 rings were not recovered from his possession by the Police, The Railway Magistrate disbelieved the version of the prosecution about the recovery of the gold from the possession of the appellant and accepted the contention of the appellant about the complicity of one Magraj in making up a false case against him and ultimately acquitted the appellant. Against this Order of acquittal, the

State went in appeal before the Hon'ble Rajasthan High Court, which was dismissed on 4.4.62. In the State appeal before the Hon'ble Rajasthan High Court, it was contended by the appellant that 'the two gold bars with foreign markings, one 'sankal' and the 3 rings mentioned by the accused in his statement, were not recovered from his possession and that no criminal liability could therefore be fastened on him for the possession of the other ornaments which belonged to him and in respect of which there was no evidence to show that they were smuggled gold'.

While disposing of this argument, their Lordships observed as follows : "It now remains to be considered whether there is sufficient evidence on the record to prove that the accused committed an offence under Section 167(81) of the Sea Customs Act. It is no doubt true that (i) the Central Government had placed restrictions on the import of gold under Section 8 of the Foreign Exchange Regulation Act by the Notification dated August 25, 1948, (ii) at least two of the gold bars found in possession of the accused bore foreign markings, and (iii) the accused simply denied the recovery of the gold from his possession, but these facts are not, by themselves, sufficient to bring home the guilt to the accused".

"It cannot, therefore, be held that the accused knowingly and with intent to defraud the Government of the duty payable on the gold and to evade the prohibition or restrictions imposed in regard to it, acquired possession of it or carried it at the time of its recovery by Head Constable Kumb Singh. The prosecution has, therefore, failed to prove a necessary ingredient of the offence under Section 67(81) of the Sea Customs Act, and for this reason the judgement of the Learned Magistrate does not call for any interference." 10. Thus, it is clear that even during the Criminal prosecution the appellant never claimed the ownership of these gold ornaments, that is to say, 9 tolas of gold ornaments and 20 tolas of gold slabs. It deserves to be mentioned here that no Order for the return of the gold in question was ever passed by the Trial Court or by the Hon'ble Rajasthan High Court and the appeal filed by the State against the Order of acquittal recorded by the Railway Magistrate was dismissed by the Hon'ble High Court observing that no interference was called for.

Under these circumstances, we are of the view that the appellant has no locus standi to challenge the confiscation of the 9 tolas of gold ornaments and 20 tolas of gold bars in question before this Tribunal.

11. Before parting with this Order, it deserves to be mentioned here that when this Order was in progress, the appellant vide his letter dated 14.1.87 submitted a photostat copy of the judgement passed by the Hon'ble High Court of "Calcutta in the case of Union of India and Ors.

v. Shambhunath Karmakar, with the request that it may also be considered. After a careful reading of the said judgement we are of the view that it has no application in the instant case. In that case, inter alia, it was held that the Government is obliged to return the seized gold or its equivalent or market price if seized gold is disposed of by sending it to the Mint for melting. From this ratio, it appears that the appellant wants to argue that in case the gold in question, that is to say, tolas of gold ornaments and 20 tolas of gold bars, are not available, then the Government should be directed to return its equivalent or market price. But the question of returning the confiscated gold' in question or its equivalent or market price does not arise in the instant case as held above.

12. Thus, from a resume of the discussion made above, it is clear that the appellant has no locus standi to challenge the confiscation of the 9 tolas gold ornaments and 20 tolas of gold bars in question and the appeal is misconceived.

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