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SooperKanoon Citation : sooperkanoon.com/3947

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-10-1987

Reported in : (1988)(34)ELT673Tri(Mum.)bai

Appellant : Bashir Ahmed Patel

Respondent : Collector of Customs

Judgement :
1. This appeal arises out of and is directed against the order bearing No. S/14-1/75/81 Pint dated 1.9.1982 passed by the Additional Collector of Customs (P), Bombay.

2. The undisputed facts are that; on 7.10.1981 the baggages of 2 passengers viz. Mr. Vijay Ramluckan and Mrs. Prathima Devi were checked in the presence of panchas. The baggages contained 120850 pieces of Mandrex tablets valued at Rs. 1,20,850/-. They pleaded ignorance of the contents of their baggages. They stated among other things, that the appellant Shri Bashir Ahmed asked them to carry the baggages. The appellant, however, denied his complicity. After completion of the investigations show cause notices were issued to the appellant and others as to why the mandrex tablets should not be ordered to be confiscated and why penalty should not be imposed on them.

3. The Additional Collector of Customs who held the enquiry after considering the reply to the show cause notice and after affording personal hearing ordered confiscation of the mandrex tablets absolutely and he imposed a penalty of Rs.

10,000/- on the appellant Shri Bashir Ahmed Patel.

4. The appellant in this appeal did not challenge the confiscation but had challenged the penalty imposed on him.

5. During the hearing of this appeal, Shri Gehani, appellant's learned advocate submitted that mandrex tablet was not included in the Schedule to the Customs Act, on the alleged date of attempted export. He contended that the mandrex tablets came to be included in the Schedule to the Customs Act only on 24.4.1982 by a Customs Notification No.1'20. He, therefore, urged that, even if the allegation that there was an attempted export of mandrex tablets is accepted as established since no offence had been committed, no penalty should have been imposed on the appellant and on this ground alone the penalty imposed is liable to be set aside. Shri Gehani further submitted that the appellant was prosecuted before the Additional Chief Metropolitan Magistrate and the learned Magistrate has discharged the appellant mainly on the ground that on the date on which the appellant stated to have committed the offence the allegations would not constitute an offence.

6. Shri Senthivel, appearing for the Collector, firstly submitted that according to the allegation contained in the show cause notice psychotropic substances were included in the Schedule II of the U.N.Convention and any import or Export of such a substance requires authorisation from the Narcotics Commissioner. But then, there was no such authorisation. Secondly, that in the show cause notice it was specifically alleged that large quantity of mandrex tablets were sought to be exported through passengers' baggages. But then, under the Export Baggage Rules, medicines and drugs the value of which exceeds Rs. 200/-cannot be exported as baggage items. Shri Senthivel, therefore, urged that the penalty imposed on the appellant may be confirmed.

7. In his order the learned Additional Collector had held that the export of mandrex tablets containing methaquolone out of India without prior authorisation from the Narcotics Commissioner of India is prohibited. The mandrex tablets under seizure are therefore liable to confiscation Under Section 111(d) (apparently a mistake for 113), (e) and (h) of the Customs Act. Thus the only ground on which the Additional

Collector ordered confiscation was that mandrex tablets were attempted to be exported without prior authorisation from the Narcotics Commissioner of India.

8. The department was given an opportunity to establish that the authorisation of Narcotics Commissioner was required to export mandrex tables on 7.10.1981, the date on which the attempted export took place.

Even after obtaining an adjournment Shri Senthivel could not produce any Notification or order which requires authorisation from the Narcotics Commissioner for export of mandrex tablets. On the other hand, Shri Gehani had relied on the Customs Notification dated 24.4.1982 to show that it is for the first time under that notification the mandrex tablets came to be included in the Schedule to the Customs Act. Therefore, even if I am to accept that there was an attempted export of mandrex tablets on 7.10.1981 that by itself would not be sufficient to impose penalty because there was no prohibition for export of mandrex tablets on 7.10.1981. In other words, the export of mandrex tablets was not an offence at the relevant time. The person who attempted to export would not be contravening any of the provisions of the law and in the said circumstances no penalty can be imposed Under Section 114 of the Customs Act. Under Article 20(1) of the Constitution of India a person cannot be convicted of an offence which was not an offence at the time of commission of the act. Export or an attempted export of mandrex tablets on 7.10.1981 was not an offence hence imposition of penalty on the appellant is bad in law.

9. Shri Senthivel contended that at the relevant time the Export Baggage Rules place restrictions on export of drugs and medicines of the value exceeding Rs. 200/-. Shri Senthivel submitted that mandrex tablets would be a drug or medicine and therefore, having regard to the quantity and value of the mandrex tablets attempted to be exported there is clear violation of Export Baggage Rules. On this ground, the penalty imposed on the appellant is sustainable. While appreciating the valiant efforts made by Shri Senthivel. I am unable to uphold the penalty imposed on the appellant. The adjudicating authority did not record a finding that there was a violation of Export Baggage Rules. In an appeal filed by the aggrieved person, the departmental representative cannot make out a new case. No cross-

objection or cross appeal had been filed by the department. That apart, if the allegations in the show cause notice is read as a whole, it is clear, that the only charge made against the appellant was attempted export of mandrex tablets and not attempted export of large quantity in the baggage. As a matter of fact, the suit cases in which the mandrex tablets were found are not baggages of the appellant. The two persons from whose possession they were seized denied that those suit cases belonged to them. The Additional Collector had not imposed any penalty on the passengers. The very fact that he does not impose any penalty on the passengers goods to show that he accepts their plea that the two suit cases where from the mandrex tablets were recovered were not their baggages. There it cannot be said that there was violation of Export Baggage Rules.

10. After consideration of all the aspects, I hold that the Additional Collector committed an error in imposing the penalty on the appellant.

I, therefore, while allowing this appeal, set aside the penalty imposed on the appellant and direct that the penalty, if paid, shall be refunded to the appellant.