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Court : Allahabad

Decided On : Nov-21-1983

Reported in : 1986(7)ECC174; 1984(15)ELT400(All)

Judge : H.N. Seth and ;A. Banerji, JJ.

Acts : Customs Act, 1962 - Sections 110, 110(1), 111 and 123; Import and Export Control Act, 1947 - Sections 3; Import and Export (Control) (Amendment) Act, 1955; Constitution of India - Article 226; Tourist Baggage Rules, 1978; Import Control Order, 1955

Appeal No. : Civil Misc. Writ Petition No. 1034 of 1983

Appellant : Ashok Kumar and anr.

Respondent : Collector of Central Excise and Customs and anr.

Advocate for Def. : Ansuman Singh and ;K.S. Sinha, Advs.

Advocate for Pet/Ap. : S.M. Dayal and ;K.C. Sinha, Advs.

Judgement :

H.N. Seth, J.

1. Petitioners Ashok Kumar and Raj Kumar run a video cassette library under the name and style 'M/s. Sufi 'Video House' at 16/86, Mall Road, Kanpur. On 6th

September, 1983 Shri K.M. Jain, Inspector, Central Excise and Customs, Kanpur (Respondent NO. 2) asked them to disclose the source from which they had obtained 115 recorded video cassettes as also that of a video cassette recorder and a telephone instrument (all articles of foreign origin) found there. Ashok Kumar, Petitioner No. 1, claimed that the said articles were lawfully possessed by him and he also produced certain documents (12 receipts) in support of his claim. As in the opinion of the Inspector the documents produced by Ashok Kumar required verification, he sealed all the aforementioned articles and after handing them over to Ashok Kumar instructed him not to, as provided by the Customs Act, 1962 (hereinafter referred to as the Act), either part, remove, transferor otherwise deal with them till further orders. This instruction was contained in the form of a letter dated 6th September, 1983 (Annexure-12 to the Writ petition) addressed to M/s. Sun Video House, 16/86, Mall Road, Kanpur.

2. The two petitioners then questioned the validity of the seizure of the video cassettes, V.C.R. and telephone by means of the present writ petition under Article 226 of the Constitution which they filed on 9th September, 1983. According to the petitioner, they had fully accounted for all the seized articles and that there was absolutely no relevant material on the basis of which respondent No. 2 could possibly entertain the belief that the articles seized by him had been improperly imported. The petitioners, therefore, prayed that the order contained in the communication dated 6th September, 1983 (Annexure-12 to the Writ Petition) be quashed and the respondents be directed to remove their seal and thereafter not to interfere 'With petitioners' dealing with those goods.

3. After the petition was filed on 9th Sept., 1983, this Court, before passing any orders on the petition, directed the learned counsel who represented the respondents, to obtain instructions and to place their version of the case before it. In the meantime the petitioners also moved an application dated 12th September, 1983 before the Superintendent, Customs, Kanpur, praying that the sealed goods be examined and released in their favour. The Preventive Officer, Customs put up a detailed report to the effect that there was sufficient reason to believe that 115 recorded video cassetttes and the telephone instrument found in petitioners' business premises were goods which were liable for confiscation under Section

111(d) of the Act and as such they were being seized under Section 110(1) of the Act. So far as the Video Cassette Recorder (V.C.R.) was concerned, the Preventive Officer opined that its possession had been properly accounted for by the petitioners. The report of the Preventive Officer was eventually approved and vide pachanama/recovery memo dated 12th September, 1983 (Annexure-III to the supplementary counter affidavit) 115 recorded video cassettes and the telephone instrument were formally seized by the respondents. Sri Ranjit Singh, Assistant Collector (Customs), Central Excise, Kanpur, filed a counter-affidavit on behalf of respondent No. 1 on 22nd September, 1983, in paragraph 5 whereof he refuted petitioners' claim that they had got the recording done on 115 blank video cassettes after purchasing the same from various dealers of New Delhi. The reason why the custom authorities thought that the said 115 video cassettes were not connected with the receipts produced by the petitioners have been mentioned in paragraph 6 of the counter-affidavit. Sri Ranjit Singh then went on the assert that petitioners' explanation that they had, after purchasing blank cassettes, got them recorded for use by the members of their library was not acceptable as the petitioners had at the time of search failed to satisfy the customs authorities about the manner in which they had got the recording done and further they had also not produced any proper authority for recording the cassettes.

4. In paragraph 7 of this counter-affidavit Sri Ranjit Singh asserted that the video cassettes which had been seized/detained were recorded cassettes. Video cassettes of foreign origin are restricted item as indicated at serial number 19 of Item No. 561 of Electronic items. They were dutiable goods and could be imported in India only in accordance with the provisions of the Act after payment of proper customs duty. The petitioners did not produce any evidence to indicate that the seized recorded film cassettes had been imported into India in accordance with the provisions of the Act.

5. According to the respondents the discrepancy between the cassettes of foreign origin found in possession of the petitioners and the receipts on the basis of which the petitioners wanted to explain their being in possession thereof, provided sufficient ground for custom authorities to feel satisfied that in law they were not permissible cassettes. So far as the telephone set was concerned, the case of the

respondents is that it was petitioner's own case before them that petitioner No. 1 had brought it as his personal baggage under the Tourist Baggage Rules, 1978, when he returned to India. After visiting foreign countries in 1982; but then at the time of search the petitioners did not produce any documentary evidence in support of their contention. As the petitioners did not produce any evidence to show licit import of telephone, there were sufficient reasons to believe that the said goods was liable to confiscation.

6. Further plea raised in the counter-affidavit of Sri Ranjit Singh was that according to Government of India, Ministry of Commerce, Export Policy for April 1983-March 1984,, it is only the actual user who can import the restricted item like video cassette. Moreover, such imported video cassettes are not meant to be sold. As such, even if the petitioners had purchased blank, video cassettes from Delhi, the said purchases would also -not be legal inasmuch as import of video cassettes is not governed by open general licence.

7. Subsequently Sri Ranjit Singh filed a supplementary counter-affidavit sworn on 26th September, 1983 according to which all goods imported in India are governed under the Import and Export Control Act, 1947, which impowers the Central Government to prohibit, restrict or otherwise control the imports and exports. The Government of India has framed the Import and Export Policy for the year 1983-84 wherein item relating to video cassettes finds place in Appendix-III which gives a list of limited permissible items. At serial number 561 of this list pertaining to electronic items, video cassettes is mentioned at S. No. 19, meaning thereby that video cassettes is a limited permissible item. Chapter VI of the policy lays down the conditions for general licence and clause 24(4) of the Chapter provides that import of spares other than those included in Appendix III, IV, XV and XXX will be allowed in open general licence to actual users subject to actual users' condition. Meaning thereby, that video cassette is not open for general licence. The term 'actual user' has been defined under Chapter II clauses 1, 2, 3 and 4 as a person who applies for secures licence for the import of any item or allotment of import item required for his own use and not for business and trade in it. Chapter IX of the policy makes various provisions for obtaining licence of permissible and non-permissible spares and provides conditions for obtaining the import licence for

non-permissible spares. Video cassettes, seized from petitioners' possession had not been imported by them and they had purchased the same and as such they could not have valid licence for possessing the said video cassettes as they did not come under definition of 'actual users'. On petitioners' own . showing the video cassettes were used by them for maintaining the library and that they used to charge a sum of Rs. 10/- from the member of the library for using the same. Accordingly, the petitioners were doing business from the said cassettes which was against the provisions of the policy inasmuch as the petitioners, were neither legal importers nor actual users of these cassettes since at the time of search the petitioners were neither 'actual users' nor importer, and they had purchased the said cassettes knowing that their sale and purchase was illegal, the customs authorities were justified in concluding that the video cassettes found in their possession were smuggled goods liable for confiscation.

8. In the rejoinder and the supplementary rejoinder affidavits filed by the petitioners on 4th October, 1983 they tried to explain the discrepancy in respect of the video cassettes and the receipts with which they wanted to connect them. The petitioners also demonstrated before us as to how the stickers placed on various video cassettes are not very material for forming an opinion about their actual make. However, we do not, at this stage, consider it necessary to express any opinion on the question as to whether, or not, various receipts produced by the petitioners were in respect of the cassettes found in their possession. Suffice it to say that if and when it becomes necessary to do so the explanation offered by the petitioners in this regard will . require careful consideration. The petitioners also asserted that the respondents ; were not justified in seizing or detaining the cassettes and the telephone

9. According to respondents' own case the seizure of the video cassettes and telephone set has been effected under the provisions of Section 110 of the Act which enables the proper officer to seize such goods concerning which 'he has reasons to believe that they are liable to confiscation, under the Act. Section 111 of the Act lays down as many as 15 categories of goods brought from a place outside India which shall be liable to confiscation. Clause (d) of Section 111 provides, that goods which are imported or attempted to be imported contrary to

any prohibition imposed by or under the Act or any other -law for the time being in force, are goods liable to confiscation. The respondents 'do not rely on any other clause of Section 111 for -treating the video cassettes and the telephone set found in petitioners' business premises as goods liable to confiscation. We accordingly asked the learned Standing Counsel appearing for the respondents to identify the law and the prohibition imposed by such law in contravention of which the video cassettes and the telephone set found in petitioner's possession have according to them, been imported. The respondents accordingly filed a second supplementary counter-affidavit on 28th October, 1983, in which they took the stand that as per the Import Control Order, 1955, issued under the Import and Export Control Act, no one can import any goods mentioned in Schedule 1 of the order except under and in accordance with a licence or customs clearance permit granted by the Central Government or by any officer specified in Schedule II to the order. They claimed that video cassettes fall under Items 92.11 and 92.12 of Chapter 92 of Schedule I which enumerates following articles :-

'92.11. Gramophones, dictating machines and other sound records and reproducers, including record players and tape decks, with or without sound-heads, television image and sound recorders and reproducers, magnetic.

92.12. Gramophone records and other sound or similar recordings, matrices for the production of records, prepared record blanks, film for mechanical sound recording, prepared tapes, wires, strips and like articles of a kind commonly used for sound or similar recording.'

and as such video cassettes cannot be imported in India without obtaining a licence and without payment of duty contemplated by Customs Tariff .Act, 1975 (Import Tariff). The respondents then proceed to take the following stand in paragraph 11 of the second supplementary counter-affidavit.

'That in view of the aforesaid provisions of the Act and the order the answering respondent has to examine whether the goods in question have been imported in India in accordance with the provisions of the Customs Act, 1962, along with Import and Export (Control) Act, 1955 or not, or whether the petitioner or some other agency have imported these goods under the valid licence. Admittedly, the goods have been recovered from the petitioners as such the burden lies on the petitioner to satisfy the adjudicating authority that whether he fulfills the conditions laid down in the aforesaid provision or not. Obviously, after giving the show cause notice the petitioner shall have an opportunity to satisfy their adjudicating authority.

10. A perusal of various affidavits filed on behalf of the respondents shows that so far as the 115 video cassettes were concerned, their stand is that there was material before them to show that they were cassettes of foreign origin and covered by entry Nos. 92.11 and 92.12 of Schedule I to Imports Control Order, 1955. The petitioners had failed to connect the same with the receipts for blank cassettes produced by them. Absence of a proper explanation on the part of the petitioner in this regard, provided sufficient material on the basis of which they could believe that those cassettes were smuggled goods. Moreover, according to Import policy declared by the Government of India video cassettes can be imported only by actual users thereof and such imported cassettes can neither be sold nor used for carrying on the business of the nature carried on by the petitioner. Action of the petitioners who neither were the importer of the cassettes nor actual users thereof rendered them liable to confiscation. In substance the respondents have proceeded to seize the cassettes because the petitioners had failed to satisfy them with regard to the source from which they had procured them and there was reason to think that the cassettes had after being imported dealt with in a manner different from the purpose for which they might have been lawfully imported.

11. Section 3 of the Imports and Exports (Control) Act, 1947, enables the Central Government to, by order published in the official gazette make provisions for prohibiting, restricting or otherwise controlling in all cases or in specified clauses of cases and subject to such exception if any as may be made by or under the order :-(a) the import, export or goods of any specified description, (b) the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried. In pursuance of the aforesaid provision the Government of India promulgated Imports (Control) Order, 1955, relevant portion of Section 3 whereof runs thus:-

'Save as otherwise provided in this order no person shall import any goods of the description specified in Schedule I except under and in accordance with the licence or customs clearance permit granted by the Central Government or by any offer specified in Schedule II.'

It was thus be seen that Imports (Control) Order, 1955 merely provides that goods mentioned in Schedule I of the order shall not be imported except under and in accordance with a licence or a custom clearance permit granted by the Central Government or any other officer authorised by Schedule II for that purpose. It does not place any restriction on the import of articles which are not specified in Schedule I to the order. According to the respondents, the video cassettes recovered from the petitioners fell under items Nos. 92.11 and 92.12 of Schedule I. It may be that video cassettes recovered from the possession of the petitioners may be covered either by the item television image and sound recorders contained in entry No. 92.11 or by the item prepared tapes, wires, strips and like article of kind commonly used for sound or similar recording mentioned in entry 92.12 or Schedule land, therefore, it may not be possible to import the same in this country except under and in accordance with the licence issued by the Central Government or any other officer authorised for the purpose. But then, before the respondents can proceed to treat these cassette recorders as goods liable for confiscation they are to have such material before them on the basis of which they can entertain a belief that the video cassettes found in possession of the petitioners have been imported in India except under and in accordance with the terms of the licence granted by a competent authority. For this purpose the fact that the goods have, after being imported, been dealt with in a manner not authorised would not be material. We may at this stage observe that the respondents have not been able to point towards any positive material which could generate a belief in them either that the video cassettes had been imported by the petitioners or that they had been imported by some one else without obtaining licence for the purpose. The respondents seem to take the view that in all cases where a person is found in possession of an article of foreign origin covered by Schedule I to the Import Control Order, 1955, it shall, unless the persons. accounts for his source, be presumed that he has imported the goods in contravention of relevant provisions. In our opinion the respondents are clearly in error in taking this view. Relevant portion of Section 123 of the Customs Act runs thus:

'Where any goods to which this section applies are seized under this Act In the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be,

(a) in a case where such seizure is made from the possession of any person.

(i) on the person from whose possession the goods were seized, and

(ii) * * * *(iii) * * * *(2) This section shall apply to gold, diamonds, manufactures of gold or diamonds, watches and any other class of goods which the Central Government may by notification in the official gazette specify.

12. Accordingly the presumption of the nature mentioned above can be raised only in respect of the goods to which Section 123 applies. According to sub-sec. (2) of Section 123, the section would apply to gold, diamonds, manufactures of gold or diamonds, watches and any other class of goods which the Central Government may by notification in official gazette specify. Video cassettes do not fall in the category of gold, diamonds, manufactures of gold or diamonds an dwatches. Learned Standing counsel could not bring to our notice any notification by the Central Government which has made the provisions of Section 123 applicable in respect of video cassettes. The respondents therefore were clearly in error in thinking that burden of proving that the cassettes seized from petitioners business premises were not smuggled lay on the petitioners and in entertaining a belief that they were smuggled goods merely because the petitioners had failed to discharge such a burden. Learned counsel for the respondents also could not place any material before us to show that legally it was not possible for any one to obtain licence for importing video cassettes for purposes other than for use by actual users. Reference to Import Policy, formulated and published by Government of India, for the years 1983-84, made by the respondents does not appear to be conclusive in this regard. In the result, we find that there neither is any positive material before the respondents nor is the presumption under Section 123 available to them for entertaining the belief that the video cassettes found in

possession of the petitioners are smuggled goods, liable to confiscation under the Customs Act. Even if it be that the video cassettes imported under a licence granted by the appropriate authority have, after being properly imported, dealt with in a manner which contravenes the provisions of the licence or any other provision of law, it would not mean that the cassettes have been imported contrary to the prohibition imposed under the Customs Act or any other law for the time being in force. Such cassettes would not be liable to confiscation under Section 111(d) and the respondents will have no jurisdiction to seize them under Section 110 of the Act.

13. In this view of the matter, we are of opinion that there was no material on the basis of which the respondents could reasonably believe that the 115 video cassettes found in petitioner's business premises had been imported in contravention of the provisions of the Import Control Order issued under the Import and Export Control Act, 1947 and were liable to be confiscation. Seizure of the video cassettes effected by the respondents therefore, is without jurisdiction.

14. So far as the telephone is concerned the petitioners admit that petitioner No. 1 has imported the same as a part of his own baggage when he returned from the foreign country. It is not claimed by the petitioners that the telephone set is an item which can be imported freely without licence or payment of duty. However, the baggage receipt produced by the petitioner showed that only two items, that is a National V.C.R. NV-300 and Soni Colour TV were brought by him as his personal baggage. In the circumstances, the customs authorities concluded that had some other baggage been available with the petitioner it would also have been entered in this baggage receipt, and allowance as admissible under Baggage Rules would have been given to him in respect of the additional baggage which would have been cleared duty free. Free baggage allowance was not admissible in regard to electronic items on the date of landing of the party in India. Accordingly, the petitioners could not claim that there was some additional baggage which they were allowed to clear duty free. In these circumstances, the respondents could have reasons to believe that the petitioners had imported the said telephone set from outside India without payment of duty and that the said article was liable to confiscation. It cannot be said that the belief of the respondents that the telephone

set was liable to confiscation was based on no material. Of course, it will be open to the petitioners to satisfy the adjudicating authority that the said telephone set had been imported by them in accordance with provisions of law.

15. In the result, the petition succeeds and is allowed in part. While holding that the action of the respondents in seizing the telephone set was within jurisdiction and that the petitioners are not entitled to the relief claimed by them in respect thereof, we direct the respondents to forthwith return the 115 video cassettes seized by them to the petitioners. Parties are directed to bear their own costs.