

M.S. Element Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Apr-26-1989

Reported in : (1989)(24)LC129Tri(Chennai)

Appellant : M.S. Element

Respondent : Collector of Customs

Judgement :

1. This appeal is directed against the order of Collector of Customs (Appeals), Madras, dated 11-8-1987 confirming the order of the Assistant Collector of Customs (Preventive), Cochin, dated 9-1-1987 absolutely confiscating the Yacht HOA with accessories and fittings under Section 115(b) and 115(2) of the Customs Act, 1962 read with Section 60(3) of the Narcotics Drugs and Psychotropic Substances Act, 1985. On 26-9-1986, the Customs authorities at Bolghaty Kerala boarded the Yacht HOA. The Captain of the Yacht and the person incharge of the Yacht was one Zeborowski. The Customs authorities found a packet underneath a bed spread above the water tank in the mid-accommodation of the Yacht. Immediately the Captain caught hold of this packet and passed it on to his colleague one James David Munro who immediately jumped into the backwaters from the Yacht and dumped the packet into the water-bed. The Customs authorities subsequently salvaged the packet and the same was found to contain Hashish. Capt. Zeborowski also surrendered one steel dubba containing seven small packets of Hashish.

Proceedings were instituted against Capt. Zeborowski in connection with the recovery of Hashish totally weighing 2.265 kgs and other seven small packets in the dubba under the provisions of the Customs Act, 1962 and the proceedings eventually resulted in the imposition of a penalty on Capt. Zeborowski and James David Munro and absolute confiscation of the Yacht in question. This order of the original authority was confirmed in appeal out of which the present appeal arises.

2. Shri M.V. Mathai, the learned Counsel for the appellant submits that absolute confiscation of the Yacht is not legally sustainable inasmuch as show cause notice was not given to the appellant who was the owner of the Yacht. Since the impugned order absolutely confiscating the goods had been passed without a show cause notice to the owner and giving an opportunity of being heard, the same is violative of the principles of natural justice and is therefore liable to be set aside.

The learned Counsel further sub-mitted that under Section 122 of the Customs Act, 1962 the Assistant Collector has power only to adjudicate cases where the value of the goods does not exceed Rs. 25,000/- and in the present case, the value of Yacht is more than Rs. 5 lakhs and therefore the order of confiscation passed by the Assistant Collector is without jurisdiction. The learned Counsel further submitted that the Yacht was being used for conveyance for carriage of passenger for hire and the Captain also admitted this in his statement. Therefore, there cannot be any absolute confiscation of the Yacht in question in view of the proviso to Section 115 clause (2) of the Customs Act, 1962. The learned Counsel therefore urged that the order of absolute confiscation may be modified and the appellant permitted to redeem the Yacht on payment of a suitable fine as per law. In any event, the learned Counsel pleaded that the impugned order may be set aside and the matter remitted for re-consideration after affording an opportunity of being heard to the appellant.

4. The fact that on 26-9-1986 the Customs authorities effected seizure of Hashish which was kept in the Yacht is not disputed and is indeed admitted. The learned Counsel for the appellant also admits that the Captain Zeborowski was incharge of the Yacht in question as the agent of the owner at the relevant time. The plea of

the learned Counsel is that subsequent to the passing of Narcotics Drugs and Psychotropic Substances Act, 1985 the Customs authorities have no jurisdiction to adjudicate the matter and more so the confiscation of the Yacht, is without authority and this plea lacks substance. As a matter of fact Section 79 of the Narcotics Drugs and Psychotropic Substances Act, 1985 is very clear that if an offence is punishable under the Customs Act, 1962 as well as under the Narcotics Drugs and Psychotropic Substances Act, 1985, nothing under the Customs Act nor under the Narcotics Drugs and Psychotropic Substances Act prevents the offender being punished under the Customs Act, 1962. The possession of Hashish by any person is not permissible in law and the offence under the provisions of Dangerous Drugs Act, 1939 was repealed by Section 32 of the Narcotics Drugs and Psychotropic Substances Act, 1985 and under Section 79 of the NDPS Act, 1985 all the prohibitions and restrictions imposed by or under NDPS Act, 1985 will be deemed to be prohibitions and restrictions imposed by or under the Customs Act, 1962 and the provisions of the Customs Act, 1962 shall apply accordingly. Therefore, the jurisdiction exercised by the Customs authorities in effecting the seizure of Hashish from the possession of the Captain of the Yacht Zeborowski and the proceedings instituted thereafter for the absolute confiscation of the Yacht in question, is legally sustainable under the Customs Act, 1962. The Captain of the Yacht also immediately gave a confessional statement to the authorities admitting the fact of possession of Hashish. The Captain was proceeded against and penalised under the original order of the Assistant Collector and no appeal was also filed against the same. The order of the Assistant Collector regarding the culpability of Captain has become final. The short question that arises for our consideration in the appeal is whether the absolute confiscation of the Yacht is legally tenable or not, and whether the case would be governed by the proviso to Section 115 clause (2) of the Act. Section 115 clause (2) provides that in the event of a conveyance being confiscated where any such conveyance is used for the carriage of goods or passengers for hire, the owner of the conveyance shall be given an option to pay in lieu of confiscation of the conveyance a fine not exceeding the market price of the goods which are sought to be smuggled or the smuggled goods as the case may be. We have gone through the statement of the Captain of the Yacht given before the authorities and there is absolutely nothing to

indicate that the Yacht in question was being used as conveyance for the carriage of goods or passengers for hire. On the other hand the Captain has stated that he had taken it on hire on 19-5-1984 from the legal owner "on unspecified amount and has not paid anything as yet". To a specific query in this regard, the learned Counsel sub-mitted that the Captain had taken the Yacht for hire on a global tour. We are not able to see how in the circumstances it could be contended that the Yacht in question was used for the carriage of goods or passengers on hire within the meaning of the proviso to Section 115(2) of the Customs Act, 1962. As a matter of fact there is absolutely no evidence for the same nor any plea has been put forth by Captain who was admittedly the person incharge of the Yacht.

Therefore, the evidence on record does not bring the Yacht within the mischief of the proviso to Section 115(2) of the Customs Act, 1962. The plea of the learned Counsel that Assistant Collector has no jurisdiction, cannot be acceded to because adjudication and confiscation of the goods in the present case is Hashish the value of which is put at Rs. 7,927.50. It is only in consequence of having attempted to smuggle Hashish in the Yacht in question, the same was confiscated absolutely and the absolute confiscation of the Yacht was made in consequence of an offence by the Captain who was found to have kept Hashish concealed in the Yacht. There is nothing to indicate that the Yacht was being used as conveyance for carriage of goods or passengers on hire within the meaning of proviso to Section 115(2) of the Customs Act, 1962. We also do not agree with the plea of the learned Counsel that no opportunity was given to the appellant/owner.

The person incharge of the Yacht is the agent of the owner and notice to the agent would amount to notice to the owner. There is no penalty on the owner. The owner also cannot pretend that he did not know anything about the seizure of the Yacht by Customs Authorities. The learned Counsel at this stage made an impassioned plea that the matter may be remitted for re-consideration after affording an opportunity of hearing to the appellant. This is a case where substantial quantity of Hashish which is a dangerous drug has been recovered by the Customs Authorities from the Yacht. We do not think that the circumstances of the case warrant a remand of this matter at this distance of time.

Moreover no useful purpose will be served by remand inasmuch as the appellant did not even plead or produce any evidence to show that the Yacht in question was used as a conveyance for transport of goods or passengers on hire in terms of the proviso to Section 115(2) of the Customs Act, 1962. Trafficking in Hashish which is a dangerous and deleterious substance endangering the welfare of Society causing incalculable harm and irreparable damage to human lives is a very serious offence and would warrant a deterrent punitive treatment. The Yacht in question admittedly was used as a vehicle for concealing and transporting Hashish by the Captain who is a self-confessed opium eater admittedly incharge of the Yacht. We, therefore, uphold the order of absolute confiscation of the Yacht. In the result the appeal is dismissed.

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