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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-27-1991

Reported in : (1991)(56)ELT64TriDel

Appellant : Balvir Singh

Respondent : Collector of Customs

Advocate for Pet/Ap. : Mr. K.C. Raj

Judgement :

1. The appellant came to India by air on morning of 7-8-1985 from Los Angels and he reported along with baggage for the purpose of Customs Clearance at Red Channel and made oral declaration of goods worth Rs. 5850 including a Sony T.V. on which he was charged customs duty which he paid. Then while he was going out of Red Channel exit gate he was asked if he was carrying any gold or undeclared currency or he had anything to declare to which he replied in negative. Thereafter his baggage was diverted for detail examination. His baggage was opened and examined in the presence of two independent witnesses but nothing incriminating was recovered. But on suspicion his person was searched as a result of which US \$ 6,100 were recovered from one bank account book and from the hand pouch 3 white envelopes were recovered which contained US \$ 5,500/-. Moreover from the specially stitched pocket of his black colour undergarment 10 pcs. of gold coins of foreign origin weighing 31 gms. each were recovered. The appellant could not produce any R.B.I permission or any other documentary evidence in support of his lawful acquisition, possession and import of aforesaid

goods recovered from him. So the said gold coins and currency were seized. A statement was recorded wherein he admitted his guilt. He waived requirement of issue of Show Cause Notice to him. So the matter was adjudicated and seized gold coins and currency were ordered to be confiscated absolutely and personal penalty of Rs 10,000/- under provisions of Section 112 of Customs Act, 1962 was imposed. The appellant preferred appeal and the Collector (Appeals) dismissed the appeal. The said order has given rise to the present appeal.

2. We have heard Shri D.D. Sharma, learned Advocate for the appellant and Ms. Renuka Mann, learned DR for the respondent.

3. Shri Sharma contended that the Department should have issued Show Cause Notice. It is a statutory requirement. The appellant did not waive it knowing and realising consequences thereof as he was not aware of the legal rights and statutory requirement. He also contended that foreign currency found from the pass book were duly earned by him in lawful manner and were entered into pass book; that the currency contained in 3 envelopes were belonging to 3 different friends of the appellant who had sent money to their parents with the appellant and that he had not committed any offence. In the alternative he pleaded for leniency on the basis that the appellant is already convicted by the Criminal Court and is fined Rs. 10,000/- which he has already paid.

4. We have carefully perused provisions of the Customs Act and Foreign Exchange Regulations Act, 1973. Under the provisions of Section 13 of FERA and of Notification No. 12 (11) F1/48 dated 25 August, 1948 as amended from time to time which is still in force, except with general or specific permission of the Reserve Bank no person shall bring or send into India from any place outside India any gold coins. In the same manner in exercise of powers conferred by Sub-section (1) of Section 13 of the Foreign Exchange Regulations Act, 1973 (46 of 1973) Central Government has issued Notification No. F1/107/EC/73 dated 01 Jan., 1974 whereby no person can bring or send into India from any place outside India any foreign exchange other than foreign coin except with the general or special permission of the Reserve Bank. Admittedly the appellant did not obtain any special permission from the Reserve Bank for import of either of the two and

learned Advocate Sharma could not show any provision whereby any general permission has been granted by the Reserve Bank for importing the quantity imported or for any part of both items. Learned Advocate Sharma contended that the currency was lawfully acquired. It might be so. But question is of the import in India without permission of the Reserve Bank and if it is proved it is an offence. Learned Advocate also contended that Show Cause Notice should have been issued, because the appellant, was a young man at relevant time and was not conversant with the statutory requirements and could not have consciously waived the notice. We are unable to agree with this contention. Because the appellant was intercepted on 07-1-1985. The adjudication order was passed on 18-12-1985. Meantime he was also prosecuted in the Criminal Court and fined Rs. 10,000/- which he had paid on 5-12-1985 (as stated in the adjudication order). So he had sufficient time to contemplate his action and obtain legal advice if he thought fit to do so. So there is no force in this argument also.

5. In final order notification pertaining to ban on importing currency into India is not mentioned and Sub-Section of Section 112 of Customs Act under which penalty is imposed is also not mentioned.

6. In the order in original the adjudicating authority has stated graveman of charges and therein it has been stated as under "further rendered himself liable to penal action under Section 112 of the Act *ibid*". So neither in the charges nor in the final order specific sub-section of Section 112 is mentioned. In *B. Lakshmi Chand v. Govt. of India*, 1983 (12) ELT 322 (Madras) it has been held that "if the penal action is proposed to be taken and proceedings initiated which are likely to culminate in the imposition of penalty, then the authorities must be clear in mind as to whether Clause (a) or Clause (b) of Section 112 will apply or both, and the order must make specific reference to the provisions failing which the order of penalty is not sustainable".

Relying upon this judgment this Tribunal has also in *Collector of Customs and Central Excise, Chandigarh v. C. Ajit Singh* -1987 (32) ELT 769 (Tribunal) has held that if the particular clause of the Section is not specified penalty imposed could not be sustained. In view of this clear position of law we also have to set aside the

penalty imposed in this case. So we pass the final order.

7. The appeal is partly allowed and impugned order regarding penalty is set . aside with consequential relief to the appellant.

8. [Contra per : S.K. Bhatnagar, Member (T)]. - With due respects to the learned Member (Judicial), my views and orders in the matter are as follows.

10. Admittedly the appellant was carrying the undeclared gold and undeclared currency. In fact the gold coins of foreign origin were concealed by him in his undergarments and the currency was found in the hand pouch.

11. Admittedly the appellant chose to waive the show cause notice.

Therefore it is no longer open to him to make a grievance of it and state that the department should have issued a show cause notice.

12. Further more it is an established practice that whenever the written show cause notice is waived, charges are orally explained to the persons concerned and the passanger is asked whether he wants a personal hearing. In this case it appears from a reading of the order in original that he was granted a personal hearing. Therefore he had all the opportunity to explain the position, but he chose to mention only that he has already been fined by the Court and would pray for leniency. In fact it is evident from the order in original that he admitted the offence before the adjudicating officer and requested for an early decision.

13. Again he got a second chance before the Collector (Appeals). At this stage he has contended, inter alia, that he was not served with the notice and was denied an opportunity to defend himself but has not substantiated the same. He has also mentioned that the currency had been acquired legally and part of it was seized from the account book.

He further stated that he was not aware of the present customs law and hence if he had been made aware of the same he would have made the declaration about the currency. He again pleaded for leniency.

14. At the Tribunal stage, these pleadings have been reiterated without making any effort to substantiate the same. On the contrary I note that the learned Collector's had observed that the appellant had waived the requirement of show cause notice and this waiver has not been disputed by the appellant himself even at the appeal stage.

16. In view of the above circumstances the pleading of violation of principles of natural justice cannot be accepted.

17. Furthermore the fact that the gold coins had been concealed and the manner in which they were concealed clearly shows that there was planned action on the part of the appellant to import them in violation of law. Since the fact of concealment has not been (even) contested and the offence had been admitted, therefore the plea of ignorance or innocence does not impress.

18. Furthermore it is well established that if the substance of a charge is duly communicated then, minor error or omission, if any in the mention of the appropriate Sub-section (or even incorrect mention, of statement) does not vitiate the proceedings.

19. In my opinion the case of B. Lakshmichand cited by the learned Counsel is distinguishable from the present case inasmuch as in the said case a show cause notice had been issued in writing but it could not be made out from the show cause notice whether the charge was being made with reference to Section 112(a) or (b). Therefore the show cause notice was struck down on the ground of ambiguity.

20. In the instant case there is nothing to show that the charges were not communicated orally as per the practice or what was communicated was vague or ambiguous. In any eventuality the appellant himself did not complain of either non-communication of charges or any ambiguity in such communication before the adjudicating authority and did not ask for any clarification. On the contrary, he admitted the charges once again and has not retracted the charges at any stages.

21. In the circumstances non-mention of the sub-clause (a) or (b) in the order does not vitiate the proceedings in my opinion.
23. In so far as the currency is concerned, it was also liable to confiscation in view of non-declaration but whether it could allowed to be redeemed and whether there was some scope of leniency, deserves consideration. In this connection I take note of the fact that the appellant has claimed that it included a part of his money which he had earned abroad legally and deposited in the U.S. Banks as per the account number disclosed to the customs authorities at the time of seizure; And that a part of currency was withdrawn by him before leaving United States from his own account for expenses in connection with his sister's marriage and he has prayed for leniency in this context.
24. This aspect of the matter does not appear to have been examined at length or given due consideration either at the original or the appellate stage but it was necessary so to do to be able to decide about the degree of seriousness of the offence relating to currency and to judge the appropriateness or otherwise of making the confiscation absolute and imposing the penalty to the extent indicated. Since this has not been done, I consider that this aspect of the matter should also be looked into by the authorities concerned; As such I pass the following order.
26. As regards the currency, the matter may be re-examined by the original authority in the light of the above observations. The fact that the Court has already imposed a fine could also be kept in view.
27. The appellant may be given another opportunity of being heard in the matter and may be allowed to produce the documentary evidence in support of his contentions. Thereafter the order may be passed by the adjudicating authority in accordance with law.
28. In view of the diffence of opinion between Member (Technical) and Member (Judicial), the matter is placed before the Hon'ble President for reference to a third Member for consideration of the following issues : 1. Whether in the facts and circumstances of the case the omission to mention a sub-section amounted to a serious mistake vitiating the proceedings and the order was liable to be set aside

on this ground alone.

2. Whether in the facts and circumstances of the case, non-mention of the sub-section in the order amounted to only a minor technical error/omission which does not vitiate the proceedings and therefore the matter could be considered on merits.

(1) What is the legal effect of non-specifying under which sub-section of Section 112 of the Customs Act the penalty is imposed, while imposing penalty in the impugned adjudication order? "In the facts & circumstances of the case what is the legal effect of not specifying under which sub-sec. of Section 112 of the Customs Act the penalty is imposed, while imposing penalty in the impugned adjudication order." 30. Shri Balvir Singh son of Shri Bela Singh, Village & P.O. Jalapur, District Hoshiarpur (Punjab) has filed an appeal being aggrieved from the order passed by the Collector of Customs (Appeals), New Delhi. The appeal was heard by Shri S.K. Bhatnagar, Technical Member and Shri D.M.Vasavada, Judicial Member and there was difference of opinion and miscellaneous order No. 109/90-NRB was issued. In terms of provisions of Sub-section (5) of Section 129C of the Customs Act, 1962, the Hon'ble President has referred the following point of difference to me :- "In the facts and circumstances of the case, what is the legal effect of not specifying under which sub-section of Section 112 of the Customs Act the penalty is imposed, while imposing penalty in the impugned adjudication order?" Repeated notices of hearing were issued to the parties. The matter was listed for hearing on 7th June, 1990 when Shri D.D. Sharma, Advocate had appeared and on his request the matter was adjourned. Again notices of hearing were issued listing the matter for hearing on 3rd July, 1990, 28th August, 1990, 22nd October, 1990 and 20th November, 1990.

Nobody had appeared on behalf of the appellant. Departmental Representative had been appearing on behalf of the revenue from time to time. Since the appellant has not appeared repeatedly, there is no alternative for me but to proceed to decide the same on merits.

31. Shri S.K. Sharma, the learned Junior Departmental Representative had appeared on behalf of the respondent and stated that the appellant had waived the issue of the show cause notice and it is the accepted practice. He has relied on

the orders passed by the lower authorities and pleaded for the rejection of the appeal.

32. I have heard the learned Junior Departmental Representative and have gone through the records. On internal page 2 of the order-in-original it is mentioned that he had waived the issue of the show cause notice and also there was a request for early decision. The Assistant Collector had imposed a penalty of Rs. 10,000.00 under Section 112 of the Customs Act, 1962. In the order-in-original there is no mention whether he had imposed penalty under Section 112(a) or 112(b) of the Customs Act, 1962. For the proper appreciation of the correct legal position, Section 112(a) and (b) of the Customs Act, 1962 is reproduced below :- (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, shall be liable - (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 Cls. (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 Cls. (ii) and (iii), to a penalty not exceeding five times the difference between the declared value and the value thereof or one thousand rupees, whichever is the highest." A simple perusal of Section 112(a) and (b)

shows that offences under Section 112(a) and (b) are different. On the appellant a penalty of Rs. 10,000.00 has been imposed, which is the subject-matter of the appeal before us. Hon'ble Madras High Court in the case of B. Lakshmi Chand v. Government of India reported in 1983 (12) ELT 322 (Mad.) had held that the charges against the accused should be clear and not ambiguous. Para No. 2 from the said judgment is reproduced below :- "2. Mr. K.C. Rajappa, learned Counsel for the petitioner made an attempt to canvass the merits of the case; but ultimately and rightly was content to make a legal submission in that there is no indication in the proceedings initiated and the orders ultimately passed by the authorities under the Act as to whether the penalty is being imposed either under Clause (a) or (b) of Section 112 of the Act and this would vitiate the orders passed. On an appraisal of the submission made by the learned Counsel along with the provisions of the Act and the relevant judicial pronouncements I am inclined to sustain the plea put forth on behalf of the petitioner. Clauses (a) and (b) of Section 112 of the Act read as follows :- "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 or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111;...." Clauses (i) to (v) which then follow deal with the classes of penalties, depending on the categories of goods. A plain reading of the above clauses makes it clear that they are distinct and separate. There is a possibility that the act complained of could fall within both the categories; but if the penal action is proposed to be taken and proceedings are prosecuted and if they should culminate ultimately in the imposition of penalty, then the authorities must be clear in their mind as to whether either of the above clauses would apply or both would apply. The Supreme Court with reference to Section 167 (8.a), of the Sea Customs Act, 1878, held in Gianchand v. State of Punjab - AIR 1962 SC 469 that in the absence of any valid statutory provision in that behalf the onus of establishing the essential ingredients under that provision, necessary to bring home the offence to an accused is on the prosecution. Obviously the stress was on the essential ingredients which go to make up the offence. There cannot be a

misconception or ambiguity with reference to the offence complained of because that would cast a cloud of doubt as to the essential ingredients and naturally the discharge of the burden of proof would be stifled.

Proceedings should not be allowed to be prosecuted on vague basis and camouflaged hypothesis and prejudice must be presumed to have been caused to the accused in these circumstances. Clause (a) of Section 112 of the Act contemplates the doing of an act or omitting to do an act in relation to any goods, which act or omission would render such goods liable to confiscation under Section 111, or abetting the doing or omission of such an act. Clause (b) of Section 112 of the Act lays down that any person who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe or liable to confiscation under Section 111, shall be liable to penalty as per the clauses set out. Section 112(b) of the Act would be attracted only if the person has been concerned in the offence of importation or exportation of goods which are, for the time being, prohibited or restricted. If that clause is attracted, there should be specific reference to it in the proceedings initiated and the findings rendered, and if there is a failure to do so, the order of penalty cannot be sustained. When the penal provisions are invoked and proceedings are prosecuted for the purpose of imposition of penalty, the matter should not be dealt with in the sphere of ambiguity. There should be precision in the application of the provisions of the act and it cannot be done in a camouflaged manner. There should be specific allegations even in the show cause notice and as well as in the subsequent proceedings and the ultimate orders to be passed by the authorities under the Act as to which of the clauses are attracted and as stated above, there is a possibility that on the facts of a particular case, both the clauses could also be attracted. In the absence of such specific allegations and specific findings, it is not possible to sustain the proceedings and the ultimate orders passed thereon. If the Customs authorities take recourse to any of the clauses dealing with the penalty, their order must further indicate the amount of duty payable in respect of the goods in question which was not paid." The Tribunal had followed the said decision of the Madras High Court in the case of Collector of Customs and Central Excise, Chandigarh v. Ajit Singh and Anr.

reported in 1987 (32) ELT 769. Para No. 12 from the said judgment is reproduced below :- "12. Coming now to the imposition of penalty, we observe that in the order appealed against, the Additional Collector has failed to mention specifically the clause of Section 112 under which orders are passed. On this issue, the judgment of the Madras High Court in the case of B. Lakshmi Chand - 1983 (12) ELT 322 (Mad.), which has been cited by the learned Advocate, is directly on the point. It has been held by the Madras High Court that if the penal action is proposed to be taken and proceedings initiated which are likely to culminate in the imposition of penalty, then the authorities must be clear in mind as to whether Clause (a) or Clause (b) of Section 112 will apply or both, and the order must make specific reference to the provisions failing which the order of penalty is not sustainable." *Thakur Amar Singh v. State of Rajasthan* reported in AIR 1955 SC 504 had held that when a particular authority or a public officer or a person entrusted is to perform a public duty under a statute, non-performance of such statutory duty cannot be explained away only by setting up a plea of estoppel.

Relevant extract from Para No. 74 of the said judgment is reproduced below :- "74. ...And even if such assurance had been given, it would certainly not have been binding on the Government, because its powers of resumption are regulated by the statute, and must be exercised in accordance with its provisions. The Act confers no authority on the Government to grant exemption from resumption, and an undertaking not to resume will be invalid, and there can be no estoppel against a statute." In the matter before me, the appellant had waived the issue of the show cause notice. In the case of *Collector of Customs and Central Excise, Chandigarh and Anr. v. Ajit Singh and Anr.* reported in 1987 (32) ELT 769 (Tribunal) in Para No. 12 it has been mentioned that: "Coming now to the imposition of penalty, we observe that in the order appealed against, the Additional Collector has failed to mention specifically the clause of Section 112 under which orders are passed." In the matter before me also, the Assistant Collector has passed the orders as under :- "In the result, goods and currency seized from him is ordered to be confiscated absolutely. In view of the consideration urged and the fact that he has been penalised by the court, I take a lenient view and impose on him a nominal penalty of Rs. 10,000.00 (Rupees ten thousand only) under Section 112 of the Customs Act, 1962." The facts of the present matter are on all force similar to the matter in

the case of Collector of Customs and Central Excise, Chandigarh and Anr. v. Ajit Singh and Anr. reported in 1987 (32) ELT 769 (supra) and in that case the Tribunal had followed the Madras High Court reported in 1983 (12) ELT 322. Accordingly, I am of the view that while passing the adjudication order, the adjudicating authority should have mentioned whether the penalty is being imposed under Section 112(a) or (b). Accordingly, I agree with the view of the Judicial Member. The matter to be placed before the Bench for passing appropriate orders.

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