Gopal Saha Vs. The Union of India and Another

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Court : Kolkata

Decided On : Apr-28-2016

Judge : Sanjib Banerjee

Appellant : Gopal Saha

Respondent : The Union of India and Another

Judgement :

IN THE HIGH COURT AT CALCUTTA CONSTITUTIONAL WRIT JURISDICTION ORIGINAL SIDE WP279of 2016 GOPAL SAHA -Versus THE UNION OF INDIA AND ANOTHER And WP280of 2016 AJGAR SHEIKH -Versus THE UNION OF INDIA AND ANOTHER For the Petitioner: in WP279of 2016 Mr Mainak Bose, Adv., Mr Ravi Kumar Dubey, Adv. For the Petitioner: in WP280of 2016 Mr Soumya Mazumder, Adv., Mr Manoj Malhotra, Adv., Mr Mainak Ganguly, Adv. For the Respondents: Mr Rajarshee Bhardwaj, Adv., Mr Subir Kumar Saha, Adv. Hearing concluded on: April 27, 2016. BEFORE SANJIB BANERJEE, Judge Date: April 28, 2016. SANJIB BANERJEE, J.

: - The petitions involve a common issue and pertain to the same order of November 24, 2015.

2. Though the petitions carried prayers challenging the constitutionality of amended Section 129E of the Customs Act, 1962, such challenge has been expressly abandoned at this stage on the ground that the petitions can be pursued

otherwise since the order impugned is without jurisdiction.

3. By the common order of November 24, 2015, the Commissioner of Customs (Preventive) has imposed exemplary penalty. of Rs.10,07,00,000/- in case of either petitioner. The petitioner in the first matter has been found to be the mastermind and king pin of the instant smuggling operation. and the petitioner in the second matter has been found to be the principal accomplice of. the other petitioner.

4. The penalty in either case has been imposed under Section 112 of the said Act for improper importation of gold bars of foreign origin. The penalty that has been levied on the petitioners is on the basis of a clause in the relevant provision that permits a penalty not exceeding the value of the goods or five thousand rupees, whichever is greater. to be imposed for improperly bringing into the country goods in respect of which any prohibition is in force under this Act or any other law for the time being in force..

5. The question of law that has been urged is as to whether the expression goods in respect of which any prohibition is in force. implies goods which have been specifically barred from being brought into the country and not the smuggling of any goods into the country which may otherwise have been brought into the country by the appropriate channel upon payment of due duty thereon. In such view of the matter the facts are not really relevant, except to appreciate how the legal issue arises in the context thereof.

6. It is the allegation of the Customs authorities that the Directorate of Revenue Intelligence had specific intelligence input that nine Bongaon residents would carry smuggled gold from Bongaon to Kolkata on April 8, 2013. According to such information, the smuggled gold was to be collected from the petitioner in the second matter to be delivered to the petitioner in the first matter in Kolkata.

7. In course of the search and seizure operations carried out on the nine carriers, 272 rectangular-shaped gold bars weighing 36.856 kg were recovered from such persons and the materials were seized on the belief that they were illegally imported into the country from Bangladesh and were liable for confiscation under

Section 111 of the Act. All nine persons, from whose possession the gold was recovered, were examined under Section 108 of the Act and, on the basis of their statements, it was perceived that the two key players were the two petitioners herein. The petitioner in the first matter was also examined but the petitioner in the second matter did not respond to the several summons issued to him.

8. The facts are not much in dispute and the findings rendered in course of the order of adjudication as to the culpability of these petitioners have not been questioned. The only ground urged is that the penalty imposed on either petitioner on the basis of the value of the smuggled gold could not have been made as gold is not a prohibited item nor is the import thereof prohibited by virtue of any notification or order under the Act of 1962 or any other law for the time being in force. The petitioners assert that only the duty that may have been sought to be evaded on these smuggled goods could have been made the basis of assessing the penalty liable to be imposed on the petitioners; and the petitions have been heard only on such limited aspect without calling for any affidavit from the Customs authorities.

9. It is imperative to notice Section 112 of the Act at the outset to consider whether the penalty imposed on either petitioner is in accordance therewith:

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, 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 the value of the goods or five thousand rupees, whichever is the greater; (ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher: Provided that

where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty so determined; (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 the difference between the declared value and the value thereof or five thousand rupees, whichever is the greater; (iv) in the case of goods falling both under clauses (i) and (iii), to a penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest; (v) 10. in the case of goods falling both under clauses (ii) and (iii), to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest.

. The petitioners first refer to Section 11 of the Act and the power of the Central Government to prohibit, either absolutely or subject to such conditions as may be specified, the import or export of goods of any specified description.

. The petitioners contend that for the purpose of the expression goods in respect of which any prohibition is in force under this Act or any other law for the time being in force., there must be an order of prohibition under either the said Act of 1962 or any other statute and such prohibition would relate to the nature of the goods prohibited and not cover the manner of its import or smuggling into the country. They seek to make a distinction between the illegal import of any goods within the meaning of the definition in Section 11-A(a) of the Act and the definition of prohibited goods. under Section 2(33) thereof. The petitioners next refer to dutiable goods. as recognised in Section 12 of the Act and assert that it is one thing to say that the goods were illegally brought into the country by not following the proper procedure for import thereof and, thereby, evading the payment of duty thereon; but quite another to suggest that any illegal import of goods otherwise than through the proper channel and without paying the due duty thereon would amount to an act in derogation of any prohibition under the said Act or any other law in force. Sections 104 and 135 of the Act have been placed in such context to suggest that wherever prohibited goods are referred to in the said Act, it must necessarily be understood to relate to only such goods which are specifically prohibited from being brought into the country by the said Act or any other law.

11. The Union submits that when the import of any goods is permitted by the said Act or any other law in an particular manner and form, any other mode or method adopted to bring such goods into the country would tantamount to conduct infringing the prohibition of the import of the goods in accordance with law. Apart from relying on the definitions of dutiable goods., imported goods. and smuggling., the Union says that an act of import in contravention of the statutory process recognised therefor has to be regarded as conduct in derogation of the prohibition imposed by law.

12. The Union has given an overview of the Act by referring to several chapters and individual provisions, including the relevant rules and regulations framed thereunder pertaining to baggage, jewellery and the like. The Union has also referred to the Foreign Trade (Development and Regulation) Act, 1992, the foreign trade policy formulated thereunder and the distinction made therein between goods which are freely importable, those in respect whereof certain restrictions apply and others which are prohibited from being imported. The Union has referred to a circular issued by the Central Board of Excise and Customs that permits only nominated banks to import gold and prohibits the import of certain items of gold.

13. The Union has relied on the judgments reported at (2003) 6 SCC161(Om Prakash Bhatia v. Commissioner of Customs) and (2011) 2 SCC74(Commissioner of Customs (Preventive) v. M. Ambalal and Company) for the proposition that smuggled goods cannot be regarded as dutiable goods. In the first matter the Supreme Court considered the meaning of the expression contrary to any prohibition imposed by or under this Act or any other law for the time being in force. appearing in Section 113(d) and the expression subject to any prohibition under this Act or any other law. in the definition of prohibited goods. in Section

2(33) of the Act and concluded that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods.

. In the later judgment, it was held that smuggled goods could not be regarded as imported goods.

14. There is a distinction between Section 111 and Section 112 of the Act. The former provides for confiscation of improperly imported goods and the latter prescribes the penalty for improper importation of goods. The judgments relied upon by the Union reveal a liberal construction of a provision in favour of the State to deal with the mischief for which the statute and the provision have been enacted. However, such construction may not apply to a penalty as the cardinal rule for construing a penal provision is otherwise. It is possible for a provision providing for confiscation of goods to be liberally interpreted, but when a provision provides for punishment it has to be strictly construed.

15. The expression goods in respect of which any prohibition is in force" in the context of Section 112 of the Act would imply goods which are prohibited from being imported and not goods which have been smuggled into the country in contravention of the procedure established by law for the import thereof. Thus, while the corresponding provision in Section 111 of the Act permits the confiscation of the goods on a broader construction of the relevant expression with reference to the definition of prohibited goods.; the similar provision in Section 112 of the Act has to be strictly construed and confined to goods which are expressly prohibited from being imported into the country.

16. As a consequence, the order impugned dated November 24, 2015, in so far as it imposes a penalty on either petitioner based on the value of the goods, is set aside and the matter remanded for such limited purpose for the imposition of such other quantum of penalty that may be permissible.

17. WP279of 2016 and WP280of 2016 are allowed to the limited extent as indicated above.

18. There will be no order as to costs.

19. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities. (Sanjib Banerjee, J.)