

Will Lemback Vs. Rajan Mathur

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Court : Delhi

Decided On : Sep-01-1992

Reported in : 1993CriLJ365; 1992(3)Crimes692; 1993(41)ECC85; 1992RLR483

Judge : Mohd. Shamim, J.

Acts : [Customs Act, 1962](#) - Sections 132

Appeal No. : Criminal Miscellaneous (Main) Appeal No. 1438 of 1992

Appellant : Will Lemback

Respondent : Rajan Mathur

Advocate for Pet/Ap. : K.K. Luthra,; A.K. Kaul,; Siddharth Luthra,;

Judgement :

Mohd. Shamim, J.

(1) This is a petition under section 482 of the Cr. P.C. to quash the complaint/proceedings u/S 132 & 135 of the [Customs Act, 1962](#) pending before Shri K.C. Lohia, Additional Cjm, New Delhi against the petitioner.

(2) Brief facts are that the petitioner came to India on 21.2.1991 and reported at the Customs Hall at Igi Airport, New Delhi for Customs clearance for leaving for Frankfurt via Hong Kong. He was asked according to the complaint at the airport

as to whether he was carrying any contraband to which he replied in negative. On search of his person and baggage 6 gold biscuits weighing 347 grams Along with Us \$ 31,552 were recovered. It led to the arrest of the petitioner by the officers of the Customs Deptt. Later on he was produced before the Acmm, New Delhi who remanded him to judicial custody. The petitioner was released on bail on the same day i.e. on 21.2.1991. Subsequently, the respondent No. 1 filed a complaint against the petitioner u/S 132 & 135 of the [Customs Act, 1962](#) ('the Act'). The petitioner had withdrawn a sum of Us \$ 31,552 prior to his departure for Delhi via Kathmandu and the petitioner brought the same Along with him. He produced a certificate of the banker dated 6.2.1991 as well as the withdrawl slip from the bank in support of the above before the customs authorities. The petitioner also filed a certificate dated 7.2.1991 issued by his banker with regard to the valid acquisition of the 374 grams of gold. The Deputy Collector on 24.4.1991 confiscated the aforesaid 6 gold biscuits and the foreign currency alluded to above, u/S 113 (d) and (h) of the Act, Besides the above he also imposed a penalty of Rs. 40,000/- on the appellat u/S 11A of the Act.

(3) Aggrieved, petitioner preferred an appeal before the Collector who disposed of the said appeal on 10.2.1992 and set aside the above order passed by the Deputy Collector. While disposing of the said appeal, he observed that there was nothing to indicate that appellat was a smuggler or a carrier and in the absence of any evidence with regard to the smuggling activity on the part of the appellat (Petitioner) the charge of Smuggling against him cannot be sustained. The petitioner has thus been exonerated of the charge of smuggling as well as clandestine attempt to export gold and currency; the complaint u/S Section 135 of the Act. thus becomes untenable and falls to the ground. It is the intentional evasion of duty which is the subject-matter of provisions made u/S 135 of the Customs Act. In view of the above, the permission granted by the Addl Collector for the prosecution of the petitioner u/S 132 and 135 of the Customs Act would also be vitiated as the same shows complete non-application of the mind. In the above circumstances, no criminal intention can be imputed to petitioner. It has thus been prayed that the proceedings instituted against the petitioner pending before Shri K.S. Lohia, Acmm, New Delhi be quashed.

(4) The respondent in their reply to the above petition have denied all the above averments. According to them the complaint is very much maintainable. The petitioner was found in possession of gold weighing 374 grams and valued at Rs. 1,34,640/- and Us \$ 31,552 which he had not declared before the Customs Office as required u/S 77 of the Customs Act. The petitioner admitted the recovery and the seizure of the same vide his statement u/S 108. of the Act The finding of the Collector would not affect the criminal proceeding u/S 132 and 135 of the Act before the learned Acmm against the petitioner. The adjudication proceedings are separate and distinct in character. As such the prosecution can continue in spite of the above finding of the Appellate Authority and would not have any bearing on the said proceedings. Will Lemback vs. Rajan Mathur The petition is false and frivolous. It is liable to be dismissed.

(5) The learned counsel for the petitioner, Mr. Luthra has vehemently contended that once the Collector of Customs while dealing with the appeal of the petitioner came to the conclusion that the petitioner was neither a smuggler nor a carrier, and in the absence of any such evidence the charge of smuggling cannot be brought home to the petitioner. According to the learned counsel Collector of Customs further found that there was no mens-rea on the part of the petitioner. Hence the petitioner cannot be prosecuted for an offence u/S 132 & 135 of the Customs Act as no offence is made out under the said Section as per the observations of the Appellant Authority. Learned Sr. Pp for the Customs Dept, Mr. Kanojia has urged to the contrary.

(6) I have heard the learned counsel for the petitioner and the learned Sr. Public Prosecutor at sufficient length and have very carefully examined their rival contentions and have given my anxious thoughts thereto,

(7) It is manifest from the above that the only charge leveled against the petitioner is that he did not declare impugned biscuits and dollars while Landing at Delhi Airport. According to the learned counsel he did not make the requisite declaration because he was not given any declaration form as he came to India from Kathmandu. Hence the prosecution proceedings pending against him u/S 132 and 135 of the Customs Act are not sustainable in the eye of law and are liable to be

quashed as the petitioner has been completely exonerated of the charge of smuggling by the Collector of Customs and the penalty of Rs. 40,000/- imposed by the Deputy Collector of Customs for violation of Section 77 of the Customs Act has been set aside.

(8) I find myself in perfect agreement with the learned counsel for the petitioner. Admittedly, the petitioner has been exonerated by the learned Collector of the charge of smuggling vide his order dated 10.2.1992. I am tempted over here to reproduce a few relevant lines from the said judgment which can be adverted to with profit before proceeding any further in the matter. It is in the following words:

'THERE is nothing to indicate that the appellant is a smuggler or a carrier and in the absence of any such evidence of smuggling activity on the part of the appellant, the charge of smuggling against him cannot be sustained. In these circumstances the fact that he was taking the said goods back at the time of his departure leads to an inference that the origin of the act of non-declaration of the said goods at the time of departure lay in his failure to declare them at the time of his arrival.'

(9) It thus can be safely concluded from the above that the petitioner was completely exonerated of the charge of smuggling or having any mens-rea to take out of India the impugned goods. The learned Collector while disposing of the said appeal considered it as a lapse on the part of the petitioner to disclose the said items at the time of his arrival at Igi Airport.

(10) In the above circumstances, I feel the complaint filed by the Customs Deptt. u/Ss. 132 & 135 of the Act falls to the ground and becomes non-maintainable. In case the Customs Deptt. is allowed to pursue the same, I feel it would be simply an exercise in futility with no result.

(11) A matter very much akin to the matter in hand came up in : [1982]133ITR909(SC) Uttam Chand vs. Income Tax Officer . Their Lordships observed : 'In view of the finding recorded by the Income-tax Appellate Tribunal that it was clear on the appraisal of the entire material on the record that Shrimati Janak Rani was a partner of the assessed firm and that the firm was a genuine

firm, we do not see how the assessed can be prosecuted for filing false returns. We, accordingly, allow this appeal and quash the prosecution.'

(12) A similar matter also came up for hearing before Marik Sharief-Ud-Din, J. of this Court in : 1987(30)ELT900(Del) , S.K. Sinha vs. S.K. Singhal 'A decision by the Tribunal in the proper sense of the word therefore, is a decision of a departmental authority drawn on the basis of a set of facts and evidence. The least that can be said is that if the department does not feel to question the finding of the Tribunal and accepts it as final & correct, then it has to be contented with it. I, therefore, fail to understand as to how on the same set of facts and evidence, the department can foist criminal liability upon a person about whom it has accepted that on this set of facts and evidence he cannot even be proceeded against in the adjudication proceedings. In criminal matters the degree of proof required is far more strict. If the departmental authority, has no good case for purposes of adjudication. it cannot claim to have a good case for purposes of criminal prosecution, particularly when the prosecution is also based on the same set of facts and evidence.'

(13) Admittedly the petitioner is being prosecuted on the same set of facts and circumstances, which were before the Collector of Customs at the time of his verdict he found the appellant to be innocent and exonerated him of the charge of smuggling. It thus does not appeal to the reason as to how the petitioner can be allowed to be prosecuted for the same set of facts and on the basis of the same evidence which were before the appellate authority at the time of the adjudication. Complaint quashed.