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**Court : Delhi**

**Decided On : Jan-25-2007**

**Reported in : 2007(94)DRJ566; 2007(218)ELT331(Del)**

**Judge : A.K. Sikri, J.**

**Acts : [Customs Act, 1962](#) - Sections 8, 11, 14, 27, 50(2), 111, 104, 113, 123, 132, 135, 135(1), 135(2), 136, 136(1) and 136(2); [Finance Act, 2003](#); [Income Tax Act, 1961](#) - Sections 43B; [Finance Act, 1987](#); Indian Penal Code (IPC) - Sections 107; Foreign Exchange Regulation Act - Sections 18 and 67**

**Appeal No. : Crl. M.C. No. 4594/2003**

**Appellant : Pawan Kumar and ors.**

**Respondent : Directorate of Revenue Intelligence**

**Advocate for Def. : Pooja Bhaskar, Adv.**

**Advocate for Pet/Ap. : Ashutosh, Adv**

**Disposition : Petition dismissed**

**Judgement :**

**A.K. Sikri, J.**

1. Sh. S.K. Mishra, Intelligence Officer in the Directorate of Revenue Intelligence, Delhi Zonal Unit, New Delhi, is the complainant, who has filed complaint against six accused persons alleging that they have committed certain acts, which are offences punishable under Sections 132 and 135(1)(a) of the Customs Act. The allegations, stated in nutshell, against these accused persons are that they, which include, accused No. 5 A.K. Saxena, who is a customs officer, have floated various firms in false and fictitious names and some of the firms are not even existing at the given address. Under these assumed names they have allegedly exported readymade garments and claimed duty drawback amount to the tune of Rs. 1,04,62,596/-. Names of these firms and the manner in which they allegedly drew these duty drawbacks illegally by showing fictitious exports is mentioned in para 72 of the complaint. It is alleged that A.K. Saxena verified the feasibility report of factory stuff of export goods in respect of non-existing firms, namely, Dig Dig Creations, Anu Exports, Amico International, Zebra Inc. and Prayas Enterprises. The allegations against him specifically are that he connived with other accused for fraudulent export of inferior quality of readymade garments, which had been over invoiced. Some of the other accused persons, namely, Pawan Kumar, Govind Jha, Radhey Lal and Gurcharan Singh in their statements under Section 8 of the Customs Act have also corroborated this fact. It is stated in the complaint that A.K. Saxena was supposed to draw representative samples from the consignments of exported goods but, in fact, he has not drawn the samples from the containers, which were to be exported but arranged samples from open market from Faridabad. According to the allegations made in the complaint, samples of exported goods received from Dubai authorities through Consulate General of India were old, used and torn rags only. It is, on this basis, alleged that these firms made exports of these inferior quality garments and in fact, used and torn rags giving false description and in this manner, claimed fraudulently duty drawback of more than a crore of rupees. The learned ACMM took cognizance of the complaint and issued summons to all the accused persons vide order dated 16.4.2003. After receiving the summons, four accused persons, namely, Pawan Kumar, Gurcharan Singh, Govind Jha and A.K. Saxena filed application for their discharge. This application has been dismissed by the learned ACMM vide impugned order dated 1.10.2003 and challenging this order, present petition has been filed.

2. The submissions made at the time of arguments were the same, which were canvassed before the trial court. It would, therefore, be prudent to scan through the orders of the trial court to find out as to what these submissions were and how they are dealt with.

3. The petitioners raised two arguments. First submission was that in so far as Sh. A.K. Saxena is concerned, he was wrongly implicated and made accused in the proceedings under Section 135 of the Customs Act inasmuch as there was specific provision in the form of Section 136 of the Act for prosecuting a Customs Officer. The argument was that under Section 104 of the Customs Act, there was no power to arrest such officers and in order to arrest Sh. A.K. Saxena, the complainant had resorted to Section 135 and not Section 136 of the Act. It was also claimed that the Customs Officer does not fall within the term 'any person' as occurring in Section 135.

4. Second contention was that the allegations contained in the compliant even taken to be correct on its face value, would not make it an offence punishable under Sections 132 and 135 of the Customs Act. This submission was based on the amendment in the Act made by the [Finance Act, 2003](#), which had brought in the activities of fraudulent claim of duty drawback within the four corners of punishing sections, namely, 135 and 136 by suitable amendments in Sections 113, 135 and 136. This amendment came into force with effect from 1.4.2003 and on this basis it was sought to be argued that prior to 1.4.2003 such activities were not intended to be punishable under the Act, which was also apparent from 'Explanatory Notes' to the said legislative changes as per the Budget Bulletin 2003, which reads as under:

(17) Section 135 of the Customs Act, is being amended so as to provide for prosecution in cases of mis-declaration of value and of fraudulent exports.

5. As noted above, first argument of the learned Counsel for the petitioners was that expression 'any person' occurring in this Section, who could evade duty etc. cannot include a customs officer, as it has to be necessarily some person other than the customs officer. In so far as the customs officers are concerned, offences committed by them were specifically made punishable under Section 136 of the

Act.

6. This submission of the counsel for the petitioners appears to be attractive in the first blush. However, reading of Section 136 would make it clear that the offences, which are made punishable under that provision, are: (a) relating to evasion of customs duty; (b) exceeding/misusing his position as customs officer in carrying out searches, arrest etc. indiscriminately and satisfying himself that he had reason to believe that such search and arrest were needed as required under Sub-section (2) of Section 136; (c) disclosing any particulars learnt by him in his official capacity in respect of any goods, except in the discharge of his duty as customs officer in good faith or in compliance with any requisition made under any law. No doubt, if any Customs Officer is alleged to have committed any of the aforesaid acts, he has to be proceeded with under Section 136 of the Customs Act. However, these offences, as specified in Section 136 of the Act, would not cover the case where a customs officer conspires with other person(s) enabling such person(s) to evade customs duty or prohibitions, as mentioned in Section 135 of the Act. In this context, the learned ACMM rightly observed that even if a customs officer in the doing of an act takes part or consciously takes any step in the illegal import/export of the contraband/prohibited goods, he may qualify as 'any person', the expression used in Section 135. What Section 135 stipulates is that if 'any person', in relation to any goods is in any way knowingly concern in any fraudulent evasion..., or acquires possession of or is in any way concerned in carrying, removing.... Thus, any person, who is concerned with the acts stipulated in Clauses (a) and (b) of Sub-section (1) of Section 136 would be covered under Section 135. The learned ACMM, in this respect, has observed as under:

It is well settled under the customs law that a person will be considered in the doing of an act if he takes part or consciously takes any step whatsoever in the illegal export import/export on the contraband/prohibited goods. The word 'Concern' as per the Chambers Dictionary means 'to relate or belong' to affect or interest; to involve by interest and the word concerned means, interested, involved, troubled. As per the Oxford Dictionary to be concerned means, take part in or to be related to. The expression of word concerned in as such is of wide import. thereforee, a person may be concerned in the importation/exportation for

goods without being a smuggler himself or himself contravening any of the provisions of FERA/Customs Act. Even the expression concerned will cover cases which will not amount to abatement of the offence Under Section 107 of the IPC. As such it has to be said that if a person is interested in or consciously takes any step whatever in the illegal import, he will be guilty, particularly because the words concerned in have been anything to do in the process or operation which proceeds the bringing or prohibited goods into the country. therefore, a person will be concerned in the doing of an act if he takes part or consciously takes any step whatsoever in the illegal import of the goods.

After considering the entire facts and circumstances of this case it is clear that applicant A.K. Saxena is well covered under the definition of word 'Concern' for along with other applicants for and it cannot be said that his arrest under Section 132/135 of the customs act is illegal fraudulent for claim of duty drawback is also punishable Under Section 132/135 of customs act.

7. I do not find any fault with this approach of the trial court and, therefore, am of the opinion that Sh. A.K. Saxena could be arraigned as accused person in relation to nature of the allegations made against him.

8. Second argument is also meritless. Section 135 of the Customs Act makes certain accounts of evasion of duty or prohibitions as punishable offences. The unamended provision reads as under:

135. Evasion of duty or prohibitions.-[(1) Without prejudice to any action that may be taken under this Act, if any person-

(a) is in relation to any goods in any way knowingly concern in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods, or

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing 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 punishable,-

(i) in the case of an offence relating to any of the goods to which Section 123 applies and the market price whereof exceeds one lakh of rupees, with imprisonment for a term which may extend to [seven years] and with fine: Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be less than [three years].

(ii) in any other case with imprisonment for a term which may extend to [three years] or with fine, or with both.

[(2) If any person convicted of an offence under this section or under Sub-section (1) of Section 136 is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court such imprisonment shall not be for less than [one year].(3) For the purpose of Sub-section (1) and (2), the following shall not be considered as special and adequate reason for awarding a sentence of imprisonment for a term of less than [one year], namely:

(i) the fact that the accused has been convicted for the first time for a reference under this Act;

(ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods which are the subject matter of such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party to the commission of the offence;

(iv) the age of the accused.]

9. The learned ACMM has referred to the judgment of this Court in the case of Sanjeev Kumar Gupta v. Commissioner of Customs 2001(1) JCC 146 in which it was clearly held that mis-description of goods or the value of the goods to be exported makes such goods prohibited in terms of Section 18 and 67 of FERA read with Section 11 and 50(2) of the Customs Act and hence, punishable under Section 135 of the Act. The learned ACMM also relied upon the judgment of the Supreme Court in Om Prakash Bhatia v. Commissioner of Customs, Delhi 2003 (88) ECC 457 with regard to claim of duty drawback and following observations are quoted from the said judgment:

export prohibited goods organized racket to claim fraudulent drawback over invoicing prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods where the export value is not correctly stated, but there is intentional over invoicing then it would amount to violation of the conditions for import/export of the goods. The purpose may be money laundering or some other purpose, but it would certainly amount to illegal/unauthorised money transaction. Over goods would result in illegal irregular transactions in foreign currency. [Customs Act, 1962](#) Section 14 value of goods to be exported whether, while exporting the goods, exporter has to give value of the goods as provided under Section 14 of the customs act, 1962 or the value of goods which he expects to receive on sale of goods in the overseas market the submission that there is no scope of application of Section 14 for determining the value of goods by applying the criteria laid down in the said section cannot be accepted. If the export value of the goods is to be determined, then even if no duty is leviable, the method (mode) for determining the value of the goods provided under Section 14 is required to be followed.

9. The submission of the counsel for the petitioners, as noted above, was that in view of amendment to the Act with effect from 1.4.2003 making such offence punishable by amending Section 113 of the Act, it was clear that such activities prior to 1.4.2003 were not intended to be punishable under the Act. This argument of the counsel is totally misplaced. Even in unamended provisions, in the aforesaid judgment of this Court, it was very clearly held that such an offence would be

covered and punishable under Section 135 of the Act. What is done by the legislature is simply to make the position clear and beyond the pale of doubt, by inserting express provision. It is, what is called as declaratory provision or declaratory statute, i.e. to remove doubts existing in the meaning or effect of any statute. Such Acts/Amendments shall be held to be retrospective. It is clear that even without such an amendment this Court had interpreted that offence of the type alleged would be covered by Section 135 of the Customs Act. It is not unknown that to remove doubts or difficulties and many times when there are sharp differences of opinion by High Courts, such clarificatory and declaratory amendments are made in the legislations.

10. The presumption against retrospective operation is not applicable to declaratory statutes. CRAIES has explained the position regarding declaratory statutes in the following manner [Statute Law, 7th Edn., p. 58]:

For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word 'declared' as well as the word 'enacted'.

(approved by the Supreme Court in *Central Bank of India v. Their Workmen* : [1960]1SCR200 )

11. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law, retrospective operation is generally intended. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit.

12. A proviso added with effect from 1.4.1988 to Section 43B inserted in the Income-Tax Act, 1961 with effect from 1.4.1984 came up for consideration in *Allied Motors (P) Ltd. v. Commissioner of Income-Tax* : [1997]224ITR677(SC) and it was

given retrospective effect from the date of inception of the section. The reason given was that the proviso was added to remedy unintended consequences and supply an obvious omission so that the section may be given a reasonable interpretation and that in fact the amendment to insert the proviso would not serve its object unless it is construed as retrospective. In *Commissioner of Income-tax, Bombay v. Podar Cement Pvt. Ltd.* : [1997]226ITR625(SC) , the Supreme Court held that amendments introduced by the [Finance Act, 1987](#) in so far as they related to Section 27(iii), (iiia) and (iiib) which redefined the expression 'owner of house property', in respect of which there was a sharp divergence of opinion amongst the High Courts, was clarificatory and declaratory in nature and consequently retrospective.

13. In the present case the amendment is purely clarificatory in nature inasmuch as even as per the unamended provision, as interpreted in *Sanjeev Kumar Gupta (supra)*, misdescription of goods or the value of the goods to be exported would be punishable. This submission of the petitioner is, therefore, misconceived.

14. The consequence would be to hold that this petition is meritless and it is accordingly dismissed.

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