

Ashok Kumar Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-11-1994

Reported in : (1995)(57)LC401Tri(Delhi)

Judge : V T K.S., G B Deva

Appellant : Ashok Kumar

Respondent : Collector of Customs

Advocate for Pet/Ap. : Shri. Sunder Rajan

Judgement :

1. The brief facts of this appeal are that on 14.3.1989 four packages addressed to the appellant declared to be containing personal effects arrived at Delhi Customs Air Cargo Unit on 14.3.1989 by Thai Airways from Hongkong booked under Air Way Bill dt. 9.3.1989. Enquiries with the immigration authorities showed that the appellant arrived at New Delhi from Hongkong on 13.3.1989. On 14.3.1989, the appellant, after obtaining delivery order from Thai Airways filed a baggage declaration form for the clearance of the goods as unaccompanied baggage. The appellant, however, did not appear for the subsequent examination of the goods. Meanwhile, on 20.3.1989, the appellant requested Thai Airways for a duplicate delivery order on the ground that the original was lost and on the same day appellant also sought and obtained permission to file Bill of Entry under Section 46 of Customs Act, 1962 saying that he does not know about the contents and value of the consignment covered by the Air Way Bill referred to above. On 21.3.1989, a

Bill of Entry was filed supported with the duplicate delivery order obtained earlier declaring the description of the goods as personal effects. On 4.4.1989, following certain enquiries about the consignment the goods were got examined in the presence of independent witnesses which led to the recovery of integrated circuits, textiles and miscellaneous goods totally valued at Rs. 13,80,070.00 (market value) which were seized on the ground that these were not bonafide baggage and had been imported unauthorisedly. Summons were issued to the appellant, but he did not respond and a Show Cause Notice was issued to him on 9.11.1989. The appellant's defence was that the consignment of integrated circuit had been sent alongwith his personal effects from Hongkong by the Cargo Agents there by mistake where he had gone to negotiate purchase of these items. The Additional Collector disbelieved the appellant's version and observed that the goods were booked for India on 9.3.1989 when the appellant was very much in Hongkong, as he returned to India on 13.3.1989. His passport and the ticket Hongkong/Delhi flight date left open was given in the Air Way Bill which showed, observed the Additional Collector, that the appellant had not even got the return ticket confirmed at that stage.

Above all, the Additional Collector found, the goods were got booked by the appellant himself and not by any agent as evidenced from his signature on the Air Way Bill. Holding the charges against the appellant as established, the Additional Collector passed the impugned order confiscating the goods absolutely and imposing a penalty of Rs. 1 lakh on the appellant.

2. The Id. Consultant, Shri Sunder Rajan, appearing for the appellant, contended that in this case on the appellant's application the Assistant Collector has granted permission to file Bill of Entry under Section 46 of Customs Act for the clearance of the goods and in such circumstances, the Customs House was bound to determine the assessable value of the goods which is a pre-requisite for assessment of duty.

Citing the case law reported in 1991 (37) ECR 1 (SC) : ECR C Cus 1863 SC : 1992 (58) ELT 533 (SC) in the case of Dynamatic Hydraulics Ltd. v. Collector of Customs, the learned Consultant urged that valuation of the goods is an essential

condition for determining fine and penalty.

It was, further, pleaded that the goods imported are not prohibited goods and their import is permitted under the import policy at the material time. Hence, the absolute confiscation of the goods is unlawful. It was contended that the Additional Collector should have judiciously exercised the power given under Section 125 Customs Act, 1962 and allowed the goods to be cleared on a suitable fine in lieu of confiscation for which proposition reliance was placed in the Calcutta judgment reported in 1985 6 ECC 881. The learned Consultant also questioned the legality of the penalty imposed in this case when the Show Cause Notice issued had not specified the sub-section under Section 112 Customs Act, 1962 for proposing to impose such penalty.

Learned Consultant relied upon the Tribunal decision in the case of Balvir Singh v. Collector of Customs in this regard, which being a 3 Member Bench decision was bound to be followed. It was urged that there was no violation of Section 77 of Customs Act, 1962 which applies only to clearance of baggage without duty whereas the appellant has been permitted to file a Bill of Entry.

3. Learned D.R., Shri Singhal, pointed out that there was clear evidence that the appellant himself had acquired the goods at Hongkong and had himself booked them by air to his own address in India. When the attempt to clear the goods as baggage declaring them as personal effects ran into trouble, the appellant had obtained duplicate delivery order from the carrier airlines and filed the Bill of Entry, that too without disclosing the earlier filing of baggage declaration. The appellant had not responded to summon issued to him and had not contested valuation in spite of indication thereof in the Show Cause Notice. Nor has the appellant produced at any stage so far documentary evidence as to what, according to him, is the correct value of the goods. It was, further, argued that the goods though not banned for import under the relevant import policy, are yet prohibited. The power to allow redemption under Section 125 Customs Act, 1962 is discretionary as laid down in the case law in the case of Keluvallappu Mohamed Ibrahim v. Collector of Customs, Bombay. Further, reliance was placed on case law in the case of Kasinka Trading v. Collector of Customs to say that where the ingredients of the

offence are spelt out in Show Cause Notice, non-mention of the sub-section under Section 112 for imposing penalty, will not be an infirmity. The learned D.R. urged that the evidence on record clearly shows that the appellant had full knowledge about the nature of the goods imported and had yet misdeclared them as personal effect. The absolute confiscation and the penalty on the appellant are in the circumstances, justified, urged the learned D.R.⁴. The Misc. application for bringing certain documents on record was not pressed by the learned Consultant and is dismissed as such.

5. On a careful consideration of the submissions made, it is found that the appellant's contention that the goods integrated circuits, had been shipped alongwith his personal effects from Hongkong by his agents fails to carry conviction. As has been brought out in the adjudication order, the appellant's version in the reply to Show Cause Notice was that during his visit to Hongkong the transaction for purchase of integrated circuit was only at negotiation stage and that he was to place final order on the supplier after returning to India. But as a matter of fact, the goods were booked for India under the relevant Air Way Bill on 9.3.1989 when the appellant was still in Hongkong as he returned to India on 13.3.1989 and there is also the evidence of number of his open return ticket found on the Air Way Bill giving Reasonable ground to conclude, as the Additional Collector has done, that the goods had been booked at Hongkong by the appellant himself and not by any agent of his, which is further supported by the appellant's signature on the Air Way Bill showing that he had himself booked it.

The fact also remains that at no stage in the adjudication proceedings was the appellant able to produce any import licence. Nor has he produced any correspondence or other documentary evidence to substantiate his version of negotiations for the goods at Hongkong as undertaken by him before Additional Collector during personal hearing.

It is also noted that he also chose not to respond to the summons issued to him during the investigations. It has been argued before us that the assessable value of the goods ought to have been determined by the Department. But this argument over-looks the fact that the appellant has at no stage come forward to declare

what, according to him, is the assessable value, and, as we have observed above, it cannot be believed in the circumstances of this case that he was totally unacquainted of it. Further, the Show Cause Notice did indicate the Market Value of the goods and even in the face of that the appellant has chosen to remain silent as regards the assessable value, which albeit being a question of fact, is now being raised belatedly before us. In any case the goods, herein, have been confiscated absolutely and as per Section 126 of Customs Act, 1962 when any goods are confiscated under the Customs Act, such goods shall thereupon vest in the Central Government and the officer adjudging confiscation shall take and hold possession of the confiscated goods. It is, further, well-settled that proceedings for confiscation under Section 111 Customs Act or for levy of penalty under Section 112 are penal in nature and quasi-criminal in character even though such proceedings are under a fiscal enactment.

Assessment of duty and levy of penalty or a direction for confiscation are two separate aspects of adjudication penalty is not merely an adjunct to assessment nor is it consequential to assessment. It is in addition to tax and is an independent liability under the fiscal statute. See *Khamka v. State of Maharashtra*. It is, further, to be stated in response to the plea that the Additional Collector should have given the appellant option to redeem the goods on fine, that the goods though not banned for import, are still prohibited in the sense that licence is required for their imports. The appellant here is also aware of this as he undertook, but failed, to produce a valid import licence for the goods during the adjudication proceedings.

Nor are we impressed by the argument that the Show Cause Notice not having specified the sub-section of Section 112 Customs Act, 1962 for imposing penalty, the same is vitiated, for we find that the ingredients of the offence as well as the grounds for proposed penalty have been clearly brought out in the Show Cause Notice. And the appellant has not had any difficulty in putting forth his defence in response to such Show Cause Notice as the person concerned in the import of the goods. In this view of the matter, we see no reason to interfere with the order of confiscation of the goods passed by the Additional Collector. However, in the interest of justice, considering the fact that the goods imported are already under absolute confiscation, some relief in the quantum of personal penalty will be in

order, and, accordingly, we reduce the personal penalty from Rs. 1 lakh to Rs. 50,000/- (Rupees fifty thousand only). The Additional Collector's order is modified only to this extent; it is, otherwise upheld.

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