

Rajendran Thangam Vs The Chief Commissioner of Customs, The Commissioner of Customs (Airport) and The Assistant Commissioner of Customs (Airport Administration)

Court: Madras High Court

Date of Decision: March 16, 2011

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 9

Constitution of India, 1950 â€" Article 226

Customs Act, 1962 â€" Section 111, 112, 113, 122, 125

Foreign Exchange Management Act, 1999 â€" Section 34, 35

Citation: (2011) 270 ELT 37

Hon'ble Judges: M. Jaichandren, J

Bench: Single Bench

Advocate: P. Satish Sundar, for the Appellant; P. Mahadevan, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

M. Jaichandren, J.

It has been stated that the Petitioner is a Non-resident Indian employed in Singapore. He has been issued with the

passport, bearing passport No. B3003988. The Petitioner had arrived at the Chennai Airport, from Singapore, on 11.10.2009. The Petitioner was

carrying with him gold chains weighing 297 grams, valued at Rs. 3,59,073/-. The Petitioner being a Non-resident Indian, was eligible to import

gold chains as part of his baggage, availing the benefits under the Notification No. 31/2003-Customs, dated 1.3.2003, which provides for the

bringing of gold/gold jewellery, at a concessional rate of duty at Rs. 50/- per gram, on certain conditions.

2. In the said notification it has been stated that the gold imported should not be over 10 kilograms and that the person bringing the gold should

have stayed abroad for a period of not less than six months. Since, the Petitioner had satisfied all the necessary conditions he is eligible to bring

gold ornaments, as part of his baggage. However, the customs authorities attached to the Air Intelligence Unit had intercepted the Petitioner and

several others, who were bringing gold, as part of the baggage and had seized the gold ornaments from them. According to the Respondent

customs department the Petitioner and the others were only carriers of gold ornaments, which were being brought for some unknown operator.

3. It had also been stated that investigation had been carried out, with regard to one Rahamathullah, who is alleged to have helped and abetted in

the illegal import of gold jewellery, on behalf of an unidentified operator. Pursuant to the said investigation, the case was taken up for adjudication,

by the Additional Commissioner of Customs (Airport), without issuing a show cause notice. Under the order, dated 11.10.2009, the adjudicating

authority had confiscated the gold chains, absolutely, u/s 111(d) and 111(m) of the Customs Act, 1962, read with 3(3) of the Foreign Trade

(Development and Regulation) Act, 1992. A penalty of Rs. 10,000/- had also been imposed on the Petitioner, u/s 112 of the Customs Act, 1962.

A further penalty of Rs. 5,000/- had also been imposed on the said Rahamathullah, u/s 112 of the said Act, on fifteen counts, amounting to a total

sum of Rs. 75,000/-.

4. It has been further stated that the Petitioner had preferred an appeal before the Commissioner of Customs (Appeals) Chennai, challenging the

absolute confiscation of the goods in question and against the imposition of penalty. The appeal was taken up for disposal, along with the appeals

filed by the other persons, from whom gold jewellery had been seized. The Commissioner of Customs (Appeals), had issued a show cause notice

to the Petitioner and the others, including the said Rahamathullah, as to why the penalty imposed on them should not be enhanced, in terms of the

first proviso to Sub-section (3) of Section 128A of the Customs Act, 1962. The other appeals and the show cause notice had been taken up for

hearing and a common order, dated 5.2.2010, had been issued setting aside the order of absolute confiscation and had allowed re-export of the

gold ornaments, on payment of a redemption fine of Rs. 36,000/-, besides a penalty of Rs. 20,000/-. The penalty of Rs. 5000/- imposed on the

said Rahamathullah, had been enhanced to Rs. 25,000/-, in each case.

5. It has been further stated that the Petitioner had paid the fine and penalty and had sought for the re-export of the seized ornaments. The payment

of fine and the enhanced portion of the penalty had been done, immediately, after the receipt of the order of the Commissioner of Customs

(Appeals), dated 5.2.2010. Under the said order the Petitioner has to exercise the option to re-export the gold, within a period of 60 days.

However, for reasons best known to the Respondents the goods had not been released for re-export, in spite of the payment of fine and penalty.

Since, no appeal or revision had been filed against the order of the Commissioner of Customs (Appeals), dated 5.2.2010, the said order had

become final and it has to be implemented by the Respondents, in its true letter and spirit.

6. The reasons stated for the refusal to release the goods is that the said Rahamathullah had to pay a sum of Rs. 3,00,000/- and therefore, the

goods had not been released. The refusal of the Respondents to release the goods in question, for the non-payment of the enhanced penalty, by

the said Rahamathullah, is arbitrary and illegal. It is for the Respondent department to collect the enhanced penalty from Rahamathullah. The other

passengers cannot be held responsible, in any manner, for the non-payment of the enhanced penalty by Rahamathullah. In such circumstances, the

Petitioner has preferred the present writ petition before this Court, under Article 226 of the Constitution of India.

7. In the counter affidavit filed on behalf of the Respondents the averments and allegations made by the Petitioner in his affidavit, filed in support of

the writ petition, had been denied. It has been stated that a well planned operation, by an unknown operator, is being carried on, exploiting gullible

passengers, by smuggling gold ornaments into India, without payment of duty. The passengers had not declared the gold ornaments and they were

not in possession of foreign currency to pay the duty to avail the scheme envisaged in the Notification No. 31/2003-Customs, dated 1.3.2003. The

goods did not belong to the persons who were carrying them. Therefore, the said goods had been confiscated, absolutely. However, the

Commissioner of Customs (Appeals), Chennai, by his order, dated 5.2.2010, had extended the option to the passengers to re-export the gold

jewellery, on payment of redemption fine. He had also enhanced the penalty payable by Rahamathullah. Since, Rahamatullah is the key person to

receive and deal with the gold brought by the 15 passengers he was imposed with an enhanced penalty. Even after sufficient time was granted to

Rahamathullah to pay the enhanced penalty of Rs. 3,00,000, he had not complied with the same. Therefore, the Respondent Department had no

option but to resort to Section 142(1)(b) of the Customs Act, 1962. Since, Rahamathullah had played a vital role in the matter and as the penalty

imposed and enhanced on him has to be recovered from 15 passengers, including the Petitioner before the release of the goods, Section 142(1)(b)

of the Customs Act, 1962, had been invoked. As such, the impugned order cannot be said to be arbitrary, illegal or void. Therefore, the re-export

of the gold jewellery can be ordered only on compliance with the order, asking the Petitioner and the others to pay the enhanced fine, including the

amount payable by Rahamathullah.

8. The learned Counsel appearing on behalf of the Petitioner had stated that the impugned communication, dated 24.12.2010, is contrary to the

provisions of the Customs Act and the Rules framed thereunder. The penalty imposed and enhanced for Rahamathullah cannot be recovered,

either from the Petitioner, or from any other person. The penalty imposed on Rahamathullah is in the nature of a personal penalty. It is only a

penalty in personam and not a penalty in rem, which is imposed against the offending goods. It had also been submitted that, even though the

Petitioner and the other passengers are entitled to the custody and possession of the gold ornaments for their re-export they cannot be detained for

the payment and recovery of the enhanced penalty imposed on Rahamathullah. There is no finding that Rahamathullah is the owner of the goods in

question. The imposition of enhanced fine that would be paid by Rahamathullah, amounting to Rs. 3 lakhs, cannot be recovered from the Petitioner

and the other passengers, as there is no power vested in the third Respondent, or in the other officers of the customs department, u/s 142 of the

Customs Act, 1962, to recover the penalty imposed on a third person. There is no rule order or regulation permitting the recovery of the penalty

imposed on a person from others, who had no direct connection with the same, as in the present case. Therefore, the goods should be permitted to

be reexported subject to the adjudication proceedings, u/s 122 of the Customs Act, 1962.

9. The learned Counsel appearing on behalf of the Petitioner had relied on the following judgments in support of his contentions:

9.1. In *V. Vembu Iyer v. Collector of Customs, Bombay and Anr.* 1988 (33) E.L. 646 (Karnataka), it had been held as follows:

6. A certificate issued could be enforced only on the person named therein and not on any other party. Sri Hakeem, however, submitted that as the

Petitioner was admittedly partner of the firm and there is a liability against the firm, he is liable to discharge the liability. The liability, if any, of the

Petitioner in respect of the penalty imposed against the firm cannot be enforced on the basis of a certificate that has been issued only against a firm.

Therefore the proceedings initiated by the Tahsildar are without jurisdiction. Accordingly attachment effected by him is without jurisdiction and is

liable to be set aside.

9.2. In *E. Abdul Rahiman v. Union of India* 2009 (235) E.L.T. 227 (Ker), it had been held as follows:

3. The question to be considered is whether penalty levied on Mr. Yahoo could be recovered from the Petitioner or whether the imported vehicle

could be retained by the Customs for recovery of the personal penalty levied on Sri. Yahoo. It is seen from the impugned order Ext.P1 that

separate penalty is levied on the importer namely, the Petitioner and two other persons against whom proceedings for penalty was initiated u/s

112(a) of the Customs Act. The personal penalty levied against Sri. Yahoo u/s 112(a) of the Customs Act is for helping the Petitioner to commit

the offence i.e. for abetment. The penalty so levied being personal cannot be recovered from the importer or any other person. Therefore, the

Petitioner is not personally liable for the penalty levied on Sri. Yahoo and the amount also cannot be recovered from the Petitioner. The next

question to be considered is whether the vehicle imported by the Petitioner could be detained by the Customs until personal penalty levied on Sri.

Yahoo is paid or recovered. This is permissible only if the statute creates charge for the personal penalty on the imported vehicle which is not there

in the statute. Release of vehicle after confiscation is covered by Section 125 of the Act which gives an option to the importer to pay the fine levied

in lieu of confiscation and the import duty and other charges. Petitioner has admittedly remitted the import duty, redemption fine, personal penalty

and other charges for releasing the vehicle pursuant to order issued u/s 125 of the Act. The Supreme Court has considered the nature of penalty

levied under various provisions of the Customs Act in the decision in Union of India and Another Vs. M/s. Mustafa and Najibai Trading Co. and

Others, whereunder the court has held as follows:

This distinction between the nature of the two penalties, viz., penalty in rem and penalty in personam, has been maintained in the Act. The provision

regarding confiscation of goods contained in Sections 111 and 113 of the Act is a penalty in rem which is enforced against the goods, while the

personal penalties imposed u/s 112 and other provisions of the Act are in the nature of penalty in personam which are enforced against the person

concerned.

Since the penalty levied on Sri. Yahoo u/s 112(a) is a personal penalty, it cannot be recovered against the importer or against the goods. The O.P.

is therefore allowed declaring that the personal penalty imposed on Sri. Yahoo vide Ext.P1 order cannot be recovered from the Petitioner or

against the vehicle imported by him. It would be open to the Respondents to proceed for recovery against the defaulter personally in exercise of

powers conferred u/s 142 of the Customs Act.

10. The learned Counsel appearing on behalf of the Respondents had submitted that the provisions under Notification No. 31/2003-Customs,

dated 1.3.2003, would be available only if the goods in question belong to the Petitioner. Therefore, the gold jewellery would not be available for

re-export, as the Petitioner is not the owner of the goods. Further, they were only carriers of the goods, in favour of an unknown dealer. It had

also been submitted that an enhanced penalty had been paid by nearly 13 out of the 15 persons, who were liable to pay the same. It had also been

submitted that an efficacious alternative appellate remedy is available to the Petitioner, under the 128 of the Customs Act, 1962. However, it had

been admitted that the owner of the goods is not known.

11. The learned Counsel appearing on behalf of the Respondents had relied on the following judgments in support of his contentions:

11.1. In Hamza Haji Vs. State of Kerala and Another, , it had been held that the party who secured a decision by fraud cannot be allowed to

enjoy its fruits. The Supreme Court had further held that obtaining the relief from the Court by deliberately suppressing a fact which was

fundamental fact to entitlement of relief sought and founding the claim on the basis of a non-existent fact, amounts to practising fraud on Court.

11.2 In Commissioner of Customs (Exports), Chennai v. Ishwar Impex 2010 (250) E.L.T. 33 (Mad), it had been held as follows

7. Having heard the counsel for respective parties we find that the order is liable to be set aside substantially on two grounds. In the first place, we

are of the view that the Tribunal ought not to have passed the impugned order in the absence of M/s Sandip Exports Limited. Therefore, for non-

impleading of the proper party, the order impugned is liable to be set aside. We say so because when we peruse the Order-in-Original we find this

question as to the entitlement of the original importer to the goods imported has been considered by the original authority who has found that there

was no relinquishment of the goods by the original buyer of the title to the goods, that it can never relinquish the title to the said goods inasmuch as

the goods have already been seized by the Customs Authority for infringement of the conditions of advance licence, that in law, the supplier had

not recalled the documents in respect of the said goods, that the so-called amendment of manifest by the overseas supplier was after the efflux of

time, that too after the seizure of the goods and that the recalling of the documents by the overseas supplier from the importer's bank could have

been made only on the advice of the importer on the ground that the importer relinquished the title to the goods. That apart, the original authority,

while passing the order in original had imposed the penalty of Rs. 8 lakhs apart from the additional duty and redemption fine for the release of the

goods of M/s Sandip Exports Limited. As far as the first Respondent is concerned, the first Respondent would seek for release of goods on

payment of the additional duty along with the redemption fine. If that be so, for the recovery the penalty of Rs. 8 lakhs the Appellant will have to

look upon the original importer, namely, M/s Sandip Exports Limited. In the said circumstances, we are of the view that the presence of M/s

Sandip Exports Limited as a party to the proceedings before the Tribunal was imminent. Though the learned Counsel for the first Respondent

would contend that M/s Sandip Exports Limited did not appear before the original authority and therefore, no useful purpose would be served by

impleading him as a party, it will have to be stated that the impleading of the party to the proceedings on the principle as to whether such a party is

a necessary party or not to the proceedings cannot be determined based on the party's option to avail the opportunity to participate in the

proceedings. Therefore, the said contention of the learned Counsel for the first Respondent cannot be accepted.

8. After impleading the original importer in the appeal proceedings before the Tribunal it is for M/s Sandip Exports Limited to either avail the

opportunity or to abstain itself from participating in the proceedings. But so long as the said party is a necessary party to the proceedings, the

disposal of the appeal in its absence i.e., without even being impleaded as a party, in our considered opinion would vitiate the very proceedings.

We therefore hold that M/s Sandip Exports Limited ought to have been impleaded as a party to the appeal proceedings before the Tribunal.

11.3 In *Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another*, , the Supreme Court, while dealing with the issue of

maintainability of the writ petition, had held that any order or decision of the Appellate Tribunal means all decisions or orders of the Appellate

Tribunal and all such decisions are, subject to limitation. The Supreme Court had further held that the High Court had fell into a manifest error by

not appreciating the aspect of the matter and it ought not to have entertained the writ petition, even if it had territorial jurisdiction.

11.4 In *Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another*, , it had been held as follows:

The word "any" in this context would mean "all". We are of this opinion in view of the fact that this Section confers a right of appeal on any person

aggrieved. A right of appeal, it is well settled, is a creature of Statute. It is never an inherent right, like that of filing a suit. A right of filing a suit,

unless it is barred by Statute, as it is barred here u/s 34 of FEMA, is an inherent right (See Section 9 of the CPC Code) but a right of appeal is

always conferred by Statute. While conferring such right Statute may impose restrictions, like limitation or predeposit of penalty or it may limit the

area of appeal to questions of law or sometime to substantial questions of law. Whenever such limitations are imposed, they are to be strictly

followed. But in a case where there is no limitation on the nature of order or decision to be appealed against, as in this case, the right of appeal

cannot be further curtailed by this Court on the basis of an interpretative exercise.

20. u/s 35 of FEMA, the legislature has conferred a right of appeal to a person aggrieved from "any" "order" or "decision" of the Appellate

Tribunal. Of course such appeal will have to be on a question of law. In this context the word "any" would mean "all".

11.5. In Commissioner of Customs (Exports) Vs. Sudarshan Cargo Pvt. Ltd., :

3. So far as waiver of redemption fine is concerned, in our opinion, the concept of redemption fine arises in the event the goods are available and

are to be redeemed. If the goods are not available, there is no question of redemption of the goods. u/s 125 a power is conferred on the Customs

Authorities in case import of goods becoming prohibited on account of breach of the provisions of the Act, rules or notification, to order

confiscation of the goods with a discretion in the authorities on passing the order of confiscation, to release the goods on payment of redemption

fine. Such an order can only be passed if the goods are available, for redemption. The question of confiscating the goods would not arise if there

are no goods available for confiscation nor consequently redemption. Once goods cannot be redeemed no fine can be imposed. The fine is in the

nature of compensation to the state for the wrong done by the importer/exporter.

12. In view of the averments made on behalf of the Petitioner, as well as the Respondents and in view of the submissions made on behalf of the

parties concerned and on a perusal of the records available and on considering the decisions cited supra, this Court finds it appropriate to set aside

the impugned order of the third Respondent, dated 24.12.2010, in so far as it relates to the deposit of Rs. 3,00,000/-, being the enhanced penalty

imposed on one Rahamathullah, for the release of the gold chains and to direct the second and the third Respondents to release the goods in

question for the purpose of re-exporting the same, without imposing any conditions, as per the provisions of the Customs Act, 1962. The

Respondents have not been in a position to show as to how the Petitioners would be liable to pay the enhanced penalty imposed on

Rahamathullah. Further, there is no finding that the goods in question belongs to Rahamathullah. It is also noted that the order of the Commissioner

of Customs (Appeals), Chennai, dated 5.2.2010, had become final. In such circumstances, the Petitioner need not be compelled to avail the

appellate remedy, available under the provisions of the Customs Act, 1962.

The writ petition is ordered accordingly. No costs. Consequently, connected miscellaneous petition is closed.