

**(2002) 09 CAL CK 0004****Calcutta High Court****Case No:** Matter No. 1490 of 1993

Thai Airways International Ltd.

APPELLANT

Vs

Collector of Customs

RESPONDENT

**Date of Decision:** Sept. 24, 2002**Acts Referred:**

- Constitution of India, 1950 - Article 226
- Customs Act, 1962 - Section 115(2)

**Citation:** (2003) 108 ECR 62 : (2003) 160 ELT 75**Hon'ble Judges:** Amitava Lala, J**Bench:** Single Bench**Advocate:** P.K. Roy, Mukul Lahiri, Shovan Kr. Chakrabarty and S. Kanodia, for the Appellant; N.C. Roy Chowdhury and A. Deb, for the Respondent**Final Decision:** Allowed**Judgement**

@JUDGMENTTAG-ORDER

Amitava Lala, J.

The Court : The writ petitioners are a foreign Airways Company and its General Manager. They are affected by an order passed by the Collector of Customs (Preventive), West Bengal, dated 19th April, 1993. They invoked the writ jurisdiction of this Court as far back as on 22nd July, 1993 challenging such order.

2. It appears to this Court, that on numerous occasions this matter was heard by the Court from such time and ultimately the matter was placed under the heading old matters. Subsequently it was placed under the heading "old adjourned matters" and ultimately it was heard by this Bench in respect of the merit of the matter.

3. Factual background of the case is that on 3rd April, 1991 at Calcutta Airport the Thai Airways Flight TG-311 landed as an non-scheduled flight due to some mechanical fault. The flight was on its route from Bangkok to Kathmandu. After

necessary repairing the flight took off for Kathmandu. But after half an hour the flight came back again to Calcutta Airport with developed mechanical problem. Then the aircraft was rummaged by the Officers of Calcutta Customs after disembarkation of all the passengers from the aircraft. The rummage was held in presence of two independent witnesses and the Captain and other crew members of the aircraft. In course of rummage the Customs Officers recovered 15 packets which were concealed inside the hollow space besides the oil tanks under the toilet covers of the commodes of the rear-most part of the toilet of the aircraft. On examination of the packets gold bars were recovered. The total amount of gold bars was 55780 kgs. On enquiry, it was found that the gold bars were neither manifested in the aircraft, no documentary evidence was available with the gold and none came forward to claim ownership of the same. The Captain of the aircraft and other crew members failed to throw any light in respect of the gold bars and as such the gold bars so recovered were seized in the reasonable belief that the same had been smuggled into India in contravention of the provisions of the Foreign Exchange Regulation Act, 1973 and the Customs Act, 1962. However, goods were confiscated by the Customs Authority. A notice u/s 110 of the Customs Act was served upon the Captain of the aircraft. Search list was prepared. The aircraft was released provisionally on an undertaking given by the Station Manager of the Airways from the Calcutta office. A show cause notice was issued upon the Captain. The Station Manager and the Captain were examined. Nobody claimed the right of the confiscated goods.

4. It appears to me, that against this background authority concerned has taken a very peculiar stand. Even such stand cannot be taken as a legally tenable stand. The authority presumed that when the confiscated articles were available in the specially made cavity in an aircraft, therefore, the aircraft authority cannot avoid any responsibility as regards the precautionary measures. But the Captain who is entrusted with the responsibilities of navigational job and safety of the aircraft as well as of the passengers cannot be held to be responsible for such import of gold. Therefore, the Captain was released from the charge. But the confiscation of the aircraft which had been released on undertaking, was allowed to remain subject to payment of redemption fine of Rs. 1,00,000/- and penalty of Rs. 50,000/- only u/s 112 of the Customs Act.

5. The petitioners have given guarantee of such amount and proceeded with this writ petition. Therefore, there is no charge against the Captain. The aircraft has been released on certain conditions. No one claimed the right of the confiscated goods. Therefore, the short point involved here is whether the order passed by the authority for giving redemption fine along-with the penalty is sustainable in these circumstances or not. If it is sustain-able the bank guarantee can be encashed by the authority. If it is not sustainable the bank guarantee will be returned to the petitioners.

6. Under these circumstances, now the question of law is to be understood in the present situation.

7. Mr. P.K. Roy, learned Senior Counsel appearing in support of the petitioners, contended before this Court that in case of confiscation, aircraft vessel or vehicle a person who is in charge can be held responsible u/s 2(31). The Commander or Pilot-in-Charge of the aircraft is the person-in-charge.

8. According to me, such person directly and/or indirectly has to be held as in-charge of the aircraft unless and until he hands over his charge to anybody else after completion of voyage and owner of an aircraft cannot be said to be responsible admittedly as he is not involved in any manner in such situation. Therefore, when in one hand owner is not responsible and in other hand the Captain is not responsible how the aircraft will be responsible is not at all clear to this Court. If the person-in-charge is released by an order of the authority concerned then it cannot be construed as any charge excisable against such aircraft unless and until it is specified under the provision of law.

9. Before 1988, Section 115 of the Customs Act, 1962 which is dealing with confiscation of conveyances was read as follows :-

"(2) Any conveyance or animal used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation, unless the owner of the conveyance or animal proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance or animal and that each of them had taken all such precautions against such use as are for the time being specified in the rules".

10. By Section 79 of the Finance Act, 1988 (26 of 1988) the underlined part as aforesaid has been deleted. Present Section 115(2) will be read which is as follows :-

"(2) Any conveyance or animal used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation, unless the owner of the conveyance or animal proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance or animal".

11. The cause of action arose in 1991 i.e. long after the introduction of the newly amended Act. Therefore, any action is to be governed by such Act but not by the deleted portion of the Act which was applicable prior to the particular date of incident i.e. 1988. The direct import of the Section is that the confiscation of the conveyances should be remained valid unless and until it proves that it was used without the knowledge or connivance of the owner or his agent i.e. person-in-charge. In the instant case, there is no charge against the owner. The Captain of the aircraft is acquitted from the charge. Therefore, how the confiscation of the conveyance remains operative is unknown to this Court. Particularly, this is

not a case of confiscation of the conveyance at all. It is a case of alternative claim on account of such confiscation of conveyance which has been discharged by release of the Captain. Therefore, the redemption fine or penalty or encashment of bank guarantee on this account cannot be sustainable in the eye of law.

12. When the law is not sanctioned to pass any order mere surmise or conjecture on the part of the authority concerned that as because such confiscated goods were kept in a secret portion of the aircraft, therefore, the aircraft is liable for confiscation cannot be held to be sustainable. Although it has been urged by Mr. N.C. Roy Chowdhury, learned Senior Counsel, appearing for the authority concerned who has pin-pointed the part of the proviso u/s 115(2) to justify the stand of the Customs Authority but I do not find that such proviso will have any leg to stand in view of non-applicability of main part of Sub-section (2) of Section 115 of the Act. If the Captain being person-in-charge is released from the charge, there is no charge as against the conveyance. Therefore, whether conveyance will be confiscated or released in lieu of a fine not exceeding the market price of the goods, etc., is immaterial in the eye of law.

13. According to me, Section 112 deals with the penalty for improper importation of goods. Therefore, one question will remain upon that who has improperly imported such goods. Either it has been done by the conveyance with the help of the owner or by the person-in-charge or associates under the person-in-charge i.e. crews etc. or the others who are not connected with the conveyance. If the persons not connected with the conveyances are involved, conveyance cannot be involved for confiscation. Therefore, any redemption fine or penalty cannot be said to be given for any improper importation by such conveyance. Similarly, if the owner is not responsible, as I find hereunder, or the Captain being the person-in-charge if released, the same cannot be said to be an action on the part of the conveyance for confiscation. Therefore, it is far to say that any redemption fine or penalty can be imposed in respect of such conveyance.

14. I am very much surprised with the observation that the Captain is primarily responsible for navigational job and safety of the aircraft as well as passengers. It is apparently appeared to be a unconscious act on the part of the Captain to bring the gold bars into India. I have no grievance against the release of the Captain. I have only grievance in respect of the logic of drawing inference by such authority concerned. He proceeded on a cause of precaution assuming that for this moment the precautionary part was necessary for the conveyance. Can it be said that Captain is not responsible for the same? Certain goods were hidden in the toilet. Unless the goods are detected as gold bars nobody can say that it is surely such type of goods. The goods might have been the damageable goods for the aircraft or the passengers. Therefore, how it can be said that the Captain being person-in-charge is not responsible for the purpose of enquiry as to the availability of the goods is not known to this Court. On the other hand, it can be said that the person-in-charge is

primarily responsible for such cause of precaution. If it is not, a conveyance being a machine itself cannot be responsible for carrying any illegal goods. Therefore, there is no case as against the conveyance.

15. Incidentally, a question arose before this court about invocation of the writ jurisdiction challenging the order of the Collector of Customs (Preventive), West Bengal. According to Mr. Roy Chowdhury having an alternative and efficacious remedy available, writ jurisdiction under Article 226 cannot be invoked.

16. My first reaction in respect of such submission is that availability of alternative or efficacious remedy is no bar for plenary jurisdiction of the High Court under Article 226 of the Constitution of India. Only restriction is the Judge's own restriction in interfering or not interfering into the matter based upon the circumstances. In the instant case, such test is necessary. Originally the writ jurisdiction was filed on 22nd July, 1993. Parties have exchanged their affidavits, I find that the submissions were made not only in respect of the question of availability of the forum of appeal but also in merit. Such writ jurisdiction was entertained by this court and pending before this court. By an administrative action the court thought it fit that all the arrears old matters are to be brought in the notice of the court and after giving available opportunities to them the same will be disposed of. The matter was placed in the list of this court under the heading "old matters". Even thereafter, such old matters were adjourned by a replaced heading "old adjourned matters" to give further opportunity. Although, unlike many of the High Courts of the country, there is no scope of admission of the writ at the initial stage to come to a definite conclusion that once it has been admitted the same cannot be ignored for having alternative remedy yet, in effect, in the present situation similar analogy applies. Moreover respondents submitted to the jurisdiction in respect of merit of the case. Therefore, at this stage such question become fit accomplished.

17. Therefore, taking into totality of the matter, both on account of merit and technicality, I am of the view that imposition of redemption fine and penalty by the Collector of Customs (Preventive) West Bengal is not proper imposition. If the amount in connection with the redemption fine and penalty have already been made by the petitioners the same will be refunded to them with simple interest @ 12% per annum within a period of one month from the date of communication of this order. In case such amount is not paid but given by way of bank guarantee under any order, such order stands vacated hereunder. The authorities are permanently injunctioned from encashment of the bank guarantee amount. There is no necessity on the part of the petitioner to renew the bank guarantee in respect of such amount. Documents in connection with the Guarantee lying with the Customs Authorities will be returned within a period of one month from the date of communication of order. On the other hand, the Customs Authorities, if not already sold the confiscated goods, can sell it in proper way to fetch the best available price as early as possible.

18. Accordingly, the writ petition stands allowed and disposed of. However, no order is passed as to costs.

19. Xeroxing certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites for drawing up and completion of the order and certified copy of this judgment.

20. All parties are to act on a signed copy minute of the operative part of this judgment on the usual undertaking and subject to satisfaction of the officer of the court in respect as above.