
(1998) 07 DEL CK 0085

Delhi High Court

Case No: Civil Writ Petition No"s. 3177 and 3276 of 1998

Sri Krishna

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision: July 29, 1998

Acts Referred:

- Customs Act, 1962 - Section 113, 114, 129, 129E, 2

Citation: (1998) 104 ELT 325

Hon'ble Judges: R.C. Lahoti, J; C.K. Mahajan, J

Bench: Division Bench

Advocate: Vivek Sood, for the Appellant; M.L. Bhargawa, for the Respondent

Judgement

R.C. Lahoti, J.

This order shall govern the disposal of CWP Nos. 3177/98 and 3276/98. In both the writ petitions respective Petitioners are aggrieved by the orders of the CEGAT passed u/s 129E of the Customs Act, 1962. It appears that a consignment of 133 pieces of woollen woven carpets valued at Rs. 44,45,000/- was found at Tikonía Rly. Station, close to Indo-Nepal Border. The Adjudicating Authority formed an opinion that the goods seized at the railway station were in the process of being taken to Nepal by one Shiv Raj Tiwari. As to Sri Krishna (petitioner in CWP 3177/98) the Adjudicating Authority recorded a finding that "he had made a false claim to smuggled goods at the railway station by producing a railway receipt." As to V.C. Rao, and eight others the writ petitioners in CW 3276/98 the finding arrived at the Adjudicating Authority is that they were the persons who had by supporting the false name of Sri Krishna abetted in securing the possession/custody and control of the smuggled goods. A penalty of Rs. 5 lakh was imposed on Sri Krishna and a penalty of Rs. 25,000/- each was imposed on Vishal Chand and eight others. These penalties are subject matter of appeals before the CEGAT. The CEGAT has by order dated 23-4-1998 directed Sri Krishna to deposit a sum of Rs. 2 lakhs and V.C. Rao and eight others to deposit a sum of Rs. 5,000/- each by way of pre-deposit as a condition precedent to the hearing of the appeal.

2. The learned Counsel for the petitioner has submitted that the case for penalty was not even prima facie made out and the Tribunal should have waived the entire penalty failing which the petitioner shall suffer undue hardship as they being poor persons would not be able to deposit the amount as directed by the Tribunal and would consequently be denied valuable right of their appeal being heard and decided on merits.

3. Having heard the learned Counsel for the petitioners, we are satisfied that there is substance in the submission made on behalf of the petitioners.

4. The Adjudicating Authority has found the seized carpets liable to be confiscated under clause (d) and (e) of Section 113 of the Customs Act, 1962. A bare perusal of the above said two provisions goes to show that the applicability of clause (e) in its entirety and of clause (d) later part is not attracted even prima facie inasmuch as the goods were neither brought nor found within the limits of the "customs area" as defined in clause (11) of Section 2 of the Act. The only expression within which the impugned seizure and confiscation can possibly be supported is "any goods attempted to be exported" as occurring in clause (d) of Section 113. The learned Counsel for the petitioners made the following submissions :-

(a) that the goods having been found and seized at the railway station Tikonja which is at a distance from Indo-Nepal border, it cannot be said that the goods were attempted to be exported. It may be said that Shiv Raj Tiwari had intention to export or had made all the preparations to export the goods but there was no "attempt" to do so.

(b) that so far as the petitioners before the Court are concerned, none of them has either smuggled or attempted to export the goods. The finding of the Adjudicating Authority as regards Sri Krishna is that he has made a false claim to the goods in question. Though the Adjudicating Authority has used the expression - "impugned smuggled goods," the expression is apparently not appropriate inasmuch as the goods on the own showing of the Adjudicating Authority were merely attempted to be exported. As regards V.C. Rao and 8 others, the finding of the Adjudicating Authority is that they had merely abetted in securing the possession/custody of the smuggled goods in question. On these findings Shri Krishna could not have been held liable to payment of penalty inasmuch as the penalty u/s 114 can be imposed only on such person who in relation to any goods does or omits to do an act which would render the goods liable to confiscation u/s 113.

5. What is an attempt came up for consideration of their Lordship in [Malkiat Singh Vs. The State of Punjab](#), . It was held :-

"As a matter of law a preparation for committing an offence is different from attempt to commit it. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence. On the other hand, an attempt to commit the offence is a direct movement towards the commission after preparations are made. In order that a person may be convicted of an attempt to commit a crime, he must be shown

first to have had an intention to commit the offence, and secondly to have done an act which constitutes the actus reus of a criminal attempt. The sufficiency of the actus reus is a question of law which had led to difficulty because of the necessity of distinguishing between acts which are merely preparatory to the commission of a crime, and those which are sufficiently proximate to it to amount to an attempt to commit it.

The test for determining whether the act of the accused person constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless."

6. So is the view taken in [State of Madhya Pradesh Vs. Narayan Singh and Others](#), and [Nasu Sheikh and Others Vs. The State of Bihar](#),

7. In view of the above said submissions in which we find substance, a case for waiver of pre-deposit was made out clearly and the Tribunal could not have insisted on pre-deposit of the amount of the impugned penalty either wholly or in part.

8. Mr. M.L. Bhargava, the learned Counsel for the respondent submitted that the impugned order being a discretionary order is not liable to be interfered with in exercise of writ jurisdiction of this Court. He relied on the decision of the Supreme Court in [South India Coir Mills, Poochakkal Vs. The Additional Collector of Customs and Central Excise and Another](#), and [Workmen of Oswal Weaving Factory Vs. State of Punjab](#), Suffice it to observe that while disposing of an application u/s 129 of the Customs Act, 1962 the Tribunal is obliged to adhere to the question of undue hardship. The order of the Tribunal should show if the pleas raised before it, have any merit prima facie or not. If the appellant has such a prima facie strong case as is most likely to exonerate him from payment and still the Tribunal insists on the deposit of the amount it would amount to undue hardship.

9. For the foregoing reasons both the petitions are allowed. The impugned order of the Tribunal dated 23-4-1998 is set aside so far as the petitioners in CWP 3177/98 and 3276/98 are concerned. Instead it is directed that recovery of the impugned penalty from the petitioners shall remain stayed during the hearing of their respective appeals by the Tribunal.

10. By way of abundant caution we would like to make it clear that whatever has been stated hereinabove is merely an expression of prima facie opinion formed by this Court and intended to decide the limited controversy as to pre-deposit arising for decision in these petitions. Any expression of opinion in this order shall not prejudice the hearing of the appeals on merits before the Tribunal and none of the parties shall be entitled to rely or refer to this order at the time of hearing of the appeals by the Tribunal on merits. The Tribunal shall be at liberty to form its own opinion unobsessed by any observation made in this order.

11. A copy each of this order shall be placed on the records of the CWP 3177/98 and 3276/98.