(2003) 04 BOM CK 0095

Bombay High Court

Case No: Customs Application No. 1 of 1999

Commissioner of Customs (P)		APPELLANT
	Vs	
Jayantilal Ambalal Chokshi (P) Ltd. and Shri Purshottamdas A. Patel		RESPONDENT

Date of Decision: April 25, 2003

Acts Referred:

- Customs Act, 1962 - Section 108, 112, 121, 129A, 130

Citation: (2003) 5 BomCR 54 : (2004) 163 ELT 13

Hon'ble Judges: V.C. Daga, J; J.P. Devahdar, J

Bench: Division Bench

Advocate: R.V. Desai and P.S. Jetly, instructed by T.C. Kaushik, for the Appellant; D. Chavan and S. Kenalkar, instructed by H. Mehta, for the Respondent

Final Decision: Allowed

Judgement

J.P. Devadhar, J.

The Commissioner of Customs (P), Mumbai has filed this application u/s 130(3) of the Customs Act, 1962 against the order of CEGAT, Bombay dismissing the Reference Application filed by the Commissioner u/s 130(1) of the Customs Act, 1962.

2. This application was admitted on April 17, 2002 by this Court only on Question No. 2, which as proposed by the Commissioner reads as under:

"Is it open in law to the Honourable Tribunal to hear an appeal from a person who is not aggrieved person in the eyes of law in terms of Section 129A and grant a prayer / relief on an appeal of the order which does not cause a grievance to that person ? For the sake of clarification, in the instant case, the applicant before the Honourable Tribunal construed to be aggrieved only with the imposition of the penalty and not with the order relating to the confiscation of seized currency ?"

3. The facts relevant for the present application are as follows:

The Respondent No. 1 is a company carrying on business of ''Angadia'' i.e. the business of carriage of documents and goods. The Respondent No. 2 is a Director of Respondent No. 1

4. On 26th April, 2001 the Officers of the Marine & Preventive Wing of Customs Collectorate, Bombay searched the premises of Respondent No. 1 and recovered a sum of Rupees Thirteen lakhs and Rupees Two and half lakhs respectively from the two premises of Respondent No. 1 company. Since the currency notes were not accounted for in the books of the Respondent No. 1 company the said currency notes were seized and detained on the prima facie belief that the same represented sale proceeds of smuggled goods. During the course of investigation, statement of an employee of the Respondent No. 1 company as well as the Director of Respondent No. 1 company were recorded u/s 108 of the Customs Act, 1962, wherein they have stated:

i) that the amounts of Rs. 15,50,000/- did not belong to the Respondents and the same belonged to private bankers, viz., CM Bankers and MP Bankers,

ii) that both CM Bankers and MP Bankers used to deal in smuggled goods and the seized currency represented sale proceeds of smuggled gold and silver.

iii) that the said amounts received from the bankers were not entered in the books of account of the Respondent No. 1 company.

iv) that the CM bankers and MP Bankers on handing over the Indian currency to the Respondent did not turn up thereafter.

v) that the full addresses of CM Bankers and MP Bankers are not known to them.

5. After recording of the statements u/s 108 of the Customs Act, 1962, and on completion of investigation a show cause notice dated October 7, 1991 was issued to the Respondents, their employee and CM and MP Bankers, requiring them to show cause as to why the Indian currency amounting to Rs. 15,50,000/- under seizure should not be confiscated u/s 121 of the Customs Act, 1962 and why personal penalty should not be imposed upon them u/s 112 of the Customs Act, 1962.

6. The owners of seized currency viz. CM and M.P. Bankers did not participate in the adjudication proceedings even though a show cause notice was issued to them. However, the Respondents in their reply denied the allegation and sought for cross examination of the assessing officer/investigating officer/panch witnesses. After permitting cross examination of the officers who recorded the statement of the director as well as the employee of the company, personal hearing was granted and, thereafter by an order dated January 29th, 1993, Collector of Customs (P) absolutely confiscated the Indian currency of Rs. 15,50,000/- u/s 121 of the Customs Act, 1962

and imposed penalty of Rs. 5,00,000/= on Respondent No. 1, penalty of Rs. 2,00,000/= on Respondent No. 2 u/s 112(a)(1) of the Customs Act, 1962.

7. Being aggrieved by the aforesaid order, the Respondents filed an appeal before CEGAT, Mumbai challenging the confiscation of Indian currency amounting to Rs. 15,50,000/= and penalty of Rs. 5,00,000/= and Rs. 2,00,000/= on the Respondent. The Revenue opposed the challenge to the confiscation of currency. The CEGAT by its order dated July 9, 1998 allowed the appeal filed by the Respondents and quashed and set aside the order confiscating the currency and also the penalty levied upon the Respondents. Thereupon the revenue filed Reference Application u/s 130(1) of the Customs Act, 1962 requesting the CEGAT to raise and refer the two questions of law set out therein for the opinion of this Court. By its order dated November 17, 1998 the CEGAT rejected the Reference Application by holding that the said question of law do not arise from the order of the Tribunal.

8. Being aggrieved by the aforesaid order, the Commissioner of Customs (P) has filed the present customs application u/s 130(3) of the Customs Act, 1962 and as stated hereinabove, while admitting the Application, this Court granted Rule only on Question No. 2.

9. Mr. Desair, learned Senior Counsel appearing on behalf of the Applicant submitted that the confiscated Indian currency admittedly did not belong to the Respondents and that the Respondents claimed to be in possession of the said currency in their capacity as carried of goods. Although, it was claimed that the said amount belongs to the CM Bankers and MP Bankers, in spite of the notice, said owners of the currency had chosen not to participate in the adjudication proceedings and claim the seized currency. It was submitted that in view of the admission of Respondent No. 2 that the seized currency represented sale proceeds of smuggled gold and silver, the same were rightly confiscated by the adjudicating authority and since the Respondents have no title to the confiscated currency, they had no locus standi to file the appeal before the CEGAT. It was submitted that the Respondents could not be said to be aggrieved persons within the meaning of Section 129A of the Customs Act, 1962 and, therefore, the order passed by the CEGAT, quashing the order of confiscation of Indian currency was not justified. It was submitted that whether the order of confiscation of Indian currency could bet set aside at the instance of the Respondents to whom the said currency did not belong, was a question of law and the Tribunal was in error in refusing to state the questions for the opinion of this Court.

10. Mrs. Chavan, learned Counsel appearing on behalf of the Respondents on the other hand vehemently contended that the question raised by the revenue does not arise out of the order of the Tribunal because whether the Respondents were aggrieved persons or not was not an issue either raised or decided by the Tribunal and, therefore, the question sought to be raised by the revenue cannot be said to arise out of the order of the Tribunal. The learned Counsel submitted that the

jurisdiction of this Court u/s 130(3) of the Act is an advisory jurisdiction and the questions of law arising out of the Tribunal''s order can only be referred. By relying upon the decision of the Apex Court in the case of Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., , it was submitted that when a question of law is neither raised before the Tribunal nor considered by it, the said question cannot be said to arise out of the order of the Tribunal notwithstanding that it may arise on the findings given by the authority. The learned Counsel relied upon the decision of the Punjab & Haryana High Court in the case of CCE, Chandigarh Vs. Cegat, New Delhi and Another, and the decision of the Apex Court in the case of Shri K. Ravindranathan Nair Vs. Commissioner of Income Tax, Ernakulam, and submitted that if the question as framed by the Revenue does not arise out of order of the Tribunal, then no statement of the case can be called for from the Tribunal. The Counsel for the Respondent strongly urged that the jurisdiction u/s 130 of the Customs Act is not an Appellant jurisdiction, and therefore, if an issue is not raised and not decided, such an issue cannot be said to arise out of the order of the Tribunal so as to seek Reference u/s 130 of the Customs Act. It was submitted that if the Revenue wanted to agitate the correctness or otherwise of the Tribunal''s decision then it could be done by filing an Appeal and not by way of Reference. As an alternative submission, the Counsel for the Respondents submitted that when the goods in question were seized from the custody of the Respondents and the show cause notices have been issued to the Respondents, it could not be said that the Respondents were not aggrieved persons u/s 129A of the Customs Act.

11. We have heard Counsel on both sides. From para 4 and 5 of the order of the Tribunal dated July 9, 1998 (Exhibit - ''B'' to the petition), it is seen that the revenue had no objection to the Respondents filing Appeal against the levy of penalty. The only grievance of the Revenue was that the Respondents could not have filed appeal challenging the confiscation of the Indian currency because according to the Revenue, there is clear admission on the part of the Respondents that the seized currency did not belong to the Respondents and that the said currency represented sale proceeds of smuggled gold and silver which is liable to be confiscated u/s 121 of the Customs Act. It was the contention of the Revenue that the statements recorded u/s 108 of the Customs Act, even though retracted belatedly, binds the Respondents. Under these circumstances it was the contention of the Revenue that when the Respondents have admittedly not title to the confiscated currency and the alleged owners of the currency had chosen not to participate in the adjudication proceedings and claim the currency, the Respondents could not have challenged the order of confiscating the currency. Without assigning any reasons as to why the above admission/statement of the Respondents recorded u/s 108 of the Customs Act cannot be accepted in evidence, the Tribunal held that the Revenue has filed to establish that the confiscated currency represented sale proceeds of the smuggled goods and accordingly set aside the order of confiscation of the currency and

imposition of penalty.

12. Thus, from the order of the Tribunal, it is clear that the Revenue objected to the confiscation of the currency being set aside at the instance of the Respondents, mainly on the ground that (in light of statement u/s 108).

a) admittedly the confiscated currency did not belong to the Respondents.

b) admittedly the said currency represented the sale proceeds of smuggled Gold and Silver.

c) that CM Bankers and MP Bankers to whom the said currency allegedly belonged did not object to the confiscation of the currency.

13. On reading the order of the Tribunal as a whole, it is clear that the Tribunal set aside the order of confiscation on the ground that the admission of the Respondent No. 2 that the seized currency represented sale proceeds of smuggled gold and silver is only presumption. When there was unequivocal statement of the Respondent No. 2 to the affect that the seized currency represented the sale proceeds of smuggled gold and silver, that the Respondents were not the owners of the seized currency and further the fact that the actual owner of the currency has not come forward to claim the confiscated currency, whether the Tribunal was justified in setting aside the confiscation order, is a question of law, which does arise out of the order of the Tribunal. In other words, the admission of the Respondents was a valuable price of evidence and on the face of such evidence whether the Tribunal could have held that the questions raised by the Revenue did not arise out of the order of the Tribunal is a question which requires consideration. However, the questions as framed by the Revenue is not happily worded and does not specifically bring out the real controversy sought to be raised by the Revenue. We, therefore, reframe the question as under:
"Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in quashing the order of confiscation and releasing the confiscated currency to the Respondents, even though the said currency represented the sale proceeds of smuggled Gold/Silver and admittedly the said currency did not belong to the Respondents and moreover the owners of the currency had chosen not to claim the currency and thereby allow the said currency to be confiscated ?"

14. Accordingly, the Customs Applications is allowed and the Tribunal is directed to draw up the statement of the case by raising the aforesaid reframed question for the opinion of this Court. As and when such a statement of the case forwarded by the Tribunal is taken up for hearing by this Court, it will be open to the Respondents to raise all contentions including the contention that even though the Respondents are not the owners of the Indian currency, they are entitled to challenge the confiscation of the seized currency and that in view of the retraction, the statement recorded u/s 108 of the Customs Act, 1962 cannot be relied upon.

The Reference Application is allowed in the above terms, with no order as to costs.