

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on :01.7.2014.*
Judgment delivered on :08.7.2014

+ CRL.A. 179/2006
UNION OF INDIA Appellant
Through Mr. Pramod Bahuguna and
Ms.Kavita, Advs.

versus

GULAM MOHD. FAROOQUE
..... Respondent
Through Mr. M.Z. Chaudhary, Adv.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

This appeal is directed against the impugned judgment dated 15.04.2004 vide which the respondent (Gulam Mohd. Farooque) stood acquitted under Section 132 and Section 135 (1) (a) of the Customs Act, 1962 (hereinafter referred to as the 'said Act'); the Magistrate vide his order dated 23.12.2003 had held the respondent guilty convicting him under Sections 132 & 135 (1)(a) of the said Act.

The Union of India was aggrieved by the aforementioned findings of the Sessions Judge and is in appeal before this Court.

Record reveals that on 11.01.1999, the respondent who was an NRI and having stayed for 10 months at Doha (Qatar) had arrived at the IGI airport with two checked-in baggages and one hand luggage. On arrival, he was asked that if he had any dutiable items to which he replied in the negative. He passed through green channel. At the exit gate, he was stopped by the Custom officer and was enquired whether he had any gold or silver items to which he again replied in the negative. He was diverted for X-ray examination where the metal detector beeped positive. Notice under Section 102 of the said Act was given to him. He did not opt for search either before the Magistrate or before any senior officer. On his personal search from his jacket, he was found carrying 10 gold biscuits, 4 gold bangles and two pairs of earrings valued at Rs.5,24,700/-. The respondent was unable to furnish any document of custom duty payment. The gold items and jacket were confiscated.

The prosecution in support of its case examined two witnesses; the complainant Jainendra Jain was examined as PW-1. He was the Custom Officer who had apprehended the respondent at the exit gate of the airport. He had proved various documents including the complaint Ex.PW-1/A, sanction Ex.PW-1/B, notice given to the respondent under CrI. Appeal No.179/2006

Section 102 of the said Act proved as Ex.PW-1/C. The gold purity certificate and panchnama were proved as Ex.PW-1/D and Ex.PW-1/F respectively. Ex.PW-1/E1, Ex.PW-1/E4 and Ex.PW-1/E5 were the baggage ticket, air ticket and boarding card of the respondent. Ex.PW-1/E6 was the custom declaration form signed by the passenger where the last column reflected that there was no dutiable good being imported by the respondent.

PW-2 R.K. Tyagi was the Superintendent, Customs who had issued summons to the respondent under Section 108 of the said Act proved as Ex.PW-2/B.

In the statement of the accused, recorded under Section 313 of the Cr.PC, his plea was that he has been falsely implicated in the present case; he admitted that he was an NRI and having lived in Doha for 10 months and was legally entitled to bring 10 kgs of gold. He declared the gold to the Custom Officer posted at immigration hall but inspite of his true declaration, the Custom Officer has falsely implicated him.

No evidence was led in defence.

On behalf of the appellant arguments have been addressed in detail. It is argued that the judgment of the Sessions Judge upsetting the

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view taken by the Magistrate is totally erroneous, and not relying upon the versions of PW-1 and PW-2 was legally impermissible; submission being that there was no stake of PW-1 and PW-2 in the matter; they were admittedly performing their duty in their official capacity and there was no grudge with the respondent and as such there was no reason for the false implication of the respondent. It was argued that the defence now set up is totally irreconcilable with the record. Impugned judgment is liable to be set aside.

The respondent has refuted these submissions. Learned counsel for the respondent has pointed out that the defence of the respondent all along has been that he was carrying 1100 USD and had gone to the custom declaration counter to pay the custom duty but for the reasons best known to the Department, they had refused to take the duty and had falsely implicated him. Submission being that the sum of 1100 USD which he was carrying had illegally been usurped by the Custom Department; additional submission being that there was no intention on the part of the respondent to conceal the gold as he was admittedly carrying it in his jacket pocket which clearly evidences that there was no such intention on his part to make any false concealment. Submission

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being that the Sessions Judge had rightly appreciated the fact that the respondent was coerced into writing the statement under Section 108 of the said Act and this is a case of pure false implication. There is also no explanation as to why PW-1 working in his official capacity was not in uniform; version of PW-1 and PW-2 is also contrary qua the presence of the metal detector.

Record has been perused. PW-1 is the complainant. He has proved the complaint Ex.PW-1/A. He has on oath deposed that on the fateful day i.e. on 11.01.1999, he was posted at the exit gate of the green channel at the custom arrival hall and when the respondent who was exiting out from the green channel was queried at the entry of green channel whether he was having any dutiable item he replied in the negative. At the green channel, he was intercepted by PW-1 and was again asked whether he had any gold or silver items to which he again replied in the negative. He was then asked to go through the metal detector. This gave a positive indication. Notice under Section 102 of the said Act was served upon him. From the inner pocket of his jacket, 10 gold biscuits, 4 bangles and two pairs of earrings were recovered; they were taken into possession vide memo Ex.PW-1/C. The travelling

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documents of the respondent Ex.PW-1/E1 to Ex.PW-1/E6 were also seized.

Ex.PW-1/E6 is the custom declaration form which bears his signatures in his own handwriting and the last column which is a query as to whether any dutiable goods were being imported, the passenger had recorded 'Nil'. This document was put to the accused in his evidence but no cross-examination has been effected on this document by the defence counsel. Even in the statement of the accused recorded under Section 313 of the Cr.PC, this incriminating document was put to the respondent but again his answer was that this is a matter of record making it amply clear that this document was never disputed by him. Even before this Court, this document has been shown to the respondent (present in Court) and after some scrutiny, his submission was that the last column indicating the words 'Nil' was not written in his writing but was in a different ink. This Court is not inclined to accept this submission of the respondent which is totally belied and is an afterthought and not having been so stated on earlier occasions i.e. before the Magistrate or before the Sessions Judge, it is clearly false.

Even otherwise the ink appears to be no different. This document, in the

view of this Court, is a crucial document evidencing the fact that the respondent who was a qualified Architect i.e. being an educated man and in his own handwriting has declared that he did not have any dutiable items. This document is wholly contrary to the defence set up by the respondent (which emanated in his statement recorded under Section 313 of the Cr.PC) wherein he stated that he had gone to the custom counter to pay the duty but he was not allowed to do so.

PW-2 (as noted supra) was a formal witness. He had served the summons to the accused and had recorded his statement under Section 108 of the said Act Ex.PW-2/B. This statement is in the handwriting of the respondent himself and by no stretch of imagination can it be said to be a coerced statement as it is running into six pages where certain personal informations had been disclosed by the respondent relating to his educational qualifications which was in his own personal knowhow and could not have been forced out of him.

Qua the argument on the metal detector, PW-1 has categorically stated that there was no metal detector at the immigration counter on the date of the offence i.e. on 11.01.1999 and that is why the metal detector could not detect metal (gold) which was carried by the respondent. It is

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also well known that custom officers are in plain clothes. PW-1 was accordingly in plain clothes and having been posted at the exit gate of the green channel, he had intercepted the respondent. The defence of the respondent that he was eager to pay the duty but was not allowed to do so is wholly malafide. It does not match with the version set up in Ex.PW-1/E6. Learned Magistrate has rightly convicted the respondent both under Sections 132 & 135 (1) (a) of the said Act.

Prior to the amendment of Section 135 (1) (a) (in the year 2007), there was minimum sentence of three years for a conviction under Section 135 (1) (a) of the said Act. Record shows that the respondent has undergone incarceration of about 80 days. Fine amount has since been paid. This Court has been informed that the gold articles have also been redeemed in separate adjudication proceedings and fine qua the said amount also stands paid.

In 2004 (74) DRJ 446 Kamlesh Kumari Uppal Vs. Dept. of Customs and Anr., an old lady who has crossed the green channel wearing her jewellery without declaring the same and the fine also having since been paid, her sentence was reduced to the period already undergone by her.

In 2002 (81) ECC 693 Mohd. Jamil Vs. Customs, a Bench of this Court had noted that as per the proviso of Section 135 of the Customs Act, 1962 for special and adequate reasons, a substantive sentence less than the minimum could be awarded; in that case, he having suffered a long protracted trial since the year 1989 and having a medical ailment also and having undergone incarceration of more than two months, the period of sentence already undergone by him was the sentence imposed upon him.

In this background, in the fitness of things, the sentence already undergone by the respondent, would be the sentence to be suffered by him. Respondent shall, however, pay an additional fine of Rs.20,000/- which amount shall be paid within two weeks failing which, he shall undergo SI for three months.

Appeal disposed of in the above terms.

INDERMEET KAUR, J

JULY 08 , 2014

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