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hjs5(hjs5s5¦[D&&š^ð Â @È:CžÐbÙ/hZ\$$:::>:::&&&&&&ÿÿÿÿTHE HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO CRIMINAL APPEAL Nos.1203 and 1204 of 2005 COMMON JUDGMENT: Crl.A.No.1203 of 2005 is filed questioning the judgment dt.28.06.2005 in Crl.A.293 of 2003 reversing the judgment dt.07.07.2003 in C.C.No.8 of 2000 of the Special Judge for Economic Offences, City Criminal Courts, at Hyderabad and acquitting respondent Nos.1 and 2/Accused Nos.4 and 5 in the above C.C. of offences punishable under Sections 135 (1) (b) (i) and 135 (1) (b (ii) of the Customs Act, 1962 and Section 13(2) read with Section 71 (3) of the Foreign Exchange Regulation Act, 1973 (for short 'FERA'). Crl.A.No.1204 of 2005 is filed questioning the judgment dt.28.06.2005 in Crl.A.No.298 of 2003 of the Metropolitan Sessions Judge, City Criminal Courts, Hyderabad reversing the judgment dt.07.07.2003 in C.C.No.8 of 2000 of the Special Judge for Economic Offences, at Hyderabad, and acquitting respondents therein/Accused No.s 1 to 3 of offences punishable under Section 135 (1) (b) (i) of the Customs Act, 1962. The appellant in both appeals is the Deputy Commissioner, (Legal) Customs and Central Excise, Hyderabad-II, Commissionerate, Hyderabad. The brief history of the case is as under : - On specific intelligence that a Dubai based person was sending 30 kgs of gold through A.1 to A.3 who were traveling by Indian Airlines Flight No.IC.592 from Sharjah to Hyderabad, and that arrangements were made to pay the foreign currency towards duty payable for clearance of the said gold through A.4 and A.5 (who were officers of the State Bank of India manning the Departure and Arrival Lounges at Hyderabad Airport) on 29.08.1997, the Officers of Directorate of Revenue Intelligence, Hyderabad, had conducted simultaneous searches at the SBI Branches at Departure and Arrival lounges of Hyderabad Airport arrival hall on arrival of IC 592 from Sharjah. They seized from A.4, US $ 12,530 which was wrapped in a newspaper inside the cubicle counters of the office drawer. It is alleged that when the SBI Branch at the departure lounge was visited by the customs officials, they found A.4, and when they questioned him whether he was in possession of any foreign currency other than the official daily transactions, he is alleged to have admitted that over and above the daily bank transactions, he was in possession of the above foreign currency. It is alleged that when the officers questioned him about source of the foreign currency, he revealed that the said foreign currency is for payment of customs duty on behalf of the three passengers arriving by IC 592 flight with 10 kgs of gold each; that the said currency along with a chit containing the names of five passengers with their passport numbers were given to him by one person by name Nusrat on the night of 28.08.1997 with a request to provide assistance to them; that the said Nusrat had earlier told him to accommodate five passengers, but in the night, he confirmed that only three passengers were coming; and since he was on duty at the departure lounge, he took into confidence his colleague, A.5, who was Assistant Manager of State Bank of India and was on duty at arrival lounge and handed over to him US $ 18,795 with special instructions to pay customs duty for the three passengers as mentioned in the slip containing the names of passengers and passport details. To a specific question, A.4 is alleged to have answered that he does not have any special sanction from the Reserve Bank of India to keep the unaccounted foreign currency of US $ 12,530 and he also handed over a slip of paper with details of five passengers, viz., (i) M. Abdul Rehman (A.3) with Passport No.V225813, (ii) Syed Mazher Ali with Passport No.A2054885 (deleted), (iii) Mohammed Saleem (A.2) with passport No.V434816, (iv) Mohmed Osman (A.1) with Passport No.N552207, and (v) Syed Bin Hasan Sharbi with Passport No.V774761 (deleted). The officers recovered the said slip for investigation. On reasonable belief that the said foreign currency is liable for confiscation under the Customs Act, 1962 r/w Foreign Exchange Regulation Act, 1973, they seized US $ 12,530 including the newspaper used for wrapping, in the presence of two independent witnesses under a Panchanama. It is alleged that another team of officers found A.5 at the SBI Branch at the Customs Arrival Hall. On being questioned whether he was in possession of any foreign currency other than the official daily transactions, he is said to have produced a paper bundle containing US $ 18,795. It is alleged that he had produced a slip containing the names of A.1 to A.3 with their passport numbers mentioned above. A.5 is alleged to have informed Customs Officers about the said foreign currency and is also alleged to have stated that the slip was given to him by A.4 informing him that the three passengers, who were coming by IC 592 flight from Sharjah with 10 kgs of gold each, will approach him for payment of customs duty on the gold brought by them; he had to accept the baggage receipt produced by them; and adjust the currency in US $ given by him as if the passengers themselves had paid the duty amount for the gold in convertible foreign currency. It is alleged that A.5 informed the customs officers that he accepted this request without knowing the implications to oblige A.4 as he is his colleague officer. On further questioning, A.5 is alleged to have replied that he was not having any authorization to possess foreign currency from Reserve Bank of India. Then the customs officers, on reasonable belief that the foreign currency and the slip containing the names of first three accused are liable for confiscation under the Customs Act, 1962 read with Foreign Exchange Regulation Act, 1973, seized them under a Panchanama in the presence of two independent witnesses. It is alleged that at about 0200 hours on 29.08.1997 the Indian Airlines Flight No.IC 592 from Sharjah arrived at Hyderabad. After the arrival of passengers and the scheduled immigration check in the customs baggage hall, the customs officers are said to have identified and intercepted A.1 to A.3. On preliminary enquiry, A.1 to A.3 are said to have accepted that they were importing ten kgs of gold each, but they did not have the requisite foreign currency to pay the customs duty to make the gold imported by them licit. It is alleged that on enquiry as to whether they were planning to pay customs duty on the foreign marked gold which they were bringing in to the country, they are said to have replied that they were instructed at Sharjah before boarding the aircraft that the required customs duty in foreign currency would be paid in India by an employee of the State Bank of India at the Airport in the Arrival Lounge and their names and foreign currency were already given to the Bank employees. They are alleged to have claimed that they were told that it was the responsibility of the bank employee, i.e., A.4, to pay the customs duty with the help of foreign currency in his possession against the names already given. They are alleged to have also stated that their earnings were just enough to feed their families in India. When asked to furnish their Non-Resident External bank account, if any, maintained by them, A.1 to A.3 are alleged to have replied that they neither have any account in India which could be operated in foreign currency nor they had sufficient balance in India rupees. It is alleged that the Customs Officers then produced A.4, A.5 and the panchas before the three passengers and then the identity of the bank officers was made known to the passengers and the panchas. The Customs Officers are said to have explained to the passengers A1-A3 that they seized US $12,530 from A.4 and US $ 18,795 from A.5 along with a chit containing their names with passport numbers. The said chit was allegedly shown to A.1 to A.3 and also the panchas. It is further alleged that the officers also explained to A.1 to A.3 that A.4 and A.5 had given the facts which were corroborated in the factual version of paying of customs duty by locally acquired foreign currency. It is alleged that the officers inspected the checked in baggage as well as cabin baggage of A.1 to A.3 and found one pouch in the baggage of each of the passengers containing 85 FMG Bars weighing 9915.25 grams each having a market value of Rs.45,47,500/-. It is alleged that the officers secured the presence of Sri Gopal Agarwal, Proprietor of M/s. Balaji Jewellers and Exports, Hyderabad who confirmed that the gold was of 999.0 purity of total weight 29,745.75 grams having local market value of Rs.1,36,42,500/-. It is also alleged that when the customs officers enquired them separately as to how they could afford those FMG Bars from abroad, A.2 and A.3 are alleged to have stated that at Sharjah, a person with whom they have no previous acquaintance met them, and instructed them to carry 10 kgs of FMG Bars each as per the Government of India notification since they satisfied the entitlement criteria; they were specifically instructed by the said person to follow A.1 who would direct them to the person waiting outside Hyderabad Airport; they were directed to jointly deliver the FMG Bars to the person who would approach A.1, identifying him by means of his checked in soft luggage over which yellow adhesive tape was wrapped on the blanket and covered with plastic cover; and for doing this, he promised them certain monetary benefit. It is also alleged that the said person emphasized the importance of approaching the employee at State Bank of India who would pay the customs duty on their behalf through foreign currency in his possession. They admitted allegedly that they have indulged in that activity for monetary gain and confirmed that they would not claim ownership of gold which they have brought along with them from Sharjah. Then the Officers seized them in the presence of two independent witnesses. The independent witnesses who acted as mediators for the mahazar drawn at S.B.I. Departure Lounge were PW.6, who was Senior Catering Assistant at Airport Lounge, and one Sri Mallikarjun, Salesman of Book Style at Airport Lounge, Hyderabad Airport. The mediators for the mahazar held at Departure Lounge of Customs Baggage Hall were PW.7, who was working as Manager (Vigilance) Indian Airlines, Hyderabad and Sri A. Mutthu, Assistant Manager (Catering) Indian Airlines, Hyderabad. The complainant also alleged that the statements of A.1 to A.5 were recorded by securing their presence affecting service of summons under Section 108 of the Customs Act, 1962. Ex.P.46 is the statement of A.1 in Urdu scribed by one Bakesh on 29.08.1997 and Ex.P.47 is its translation. Ex.P.34 is the statement of A.2 recorded on 29.08.1997 by PW.2. Ex.P.44 is the statement of A.3 dt.29.08.1997 recorded by PW.3 and Ex.P.45 is

its translation. Ex.P.35 is the statement of A.4 dt.29.08.1997 recorded by PW.2 under Section 108 of the Customs Act, 1962 and subsequently A.4 gave another statement Ex.P.10 on 18.11.1997 in his own handwriting. Ex.P.36 is the statement of A.5 dt.29.08.1997 recorded by PW.2. He also subsequently gave another statement Ex.P.38 on 10.11.1995. In the statement of A.1 he is alleged to have stated that after disembarking from the Aircraft he proceeded to the immigration counter where he had submitted immigration form along with his passport to the immigration officer; after verification, when he was about to proceed to the screening machine, he was intercepted by the Customs Officers; they enquired him whether he was carrying any gold for which he replied affirmatively; and on further enquiry he informed that the amount required to be paid towards customs duty was already procured locally and kept with the people of State Bank of India at the Airport. He also allegedly stated that he did not buy the gold brought by him out of his earnings or out of any borrowings and the said gold was not also gifted to him by anybody. He allegedly admitted that he was not the owner of the gold, that he was only a carrier for a consideration of Rs.13,000/-, and that on arrival at Hyderabad Airport he was having only 200 Dirhams and Rs.2,000/-. He mentioned that the gold was handed over to him by one Siddiqui allegedly residing at Deira. A.2 also allegedly stated that he was told by Siddiqui that he would be paid some consideration for carrying ten kgs of gold; after getting down from the aircraft and after completion of immigration formalities, when he was about to proceed to the screening machine, he was intercepted by the Customs Officers. A.2 claimed that he was introduced to Siddiqui by his friend by name Shadulla. A.3 also allegedly stated on the same lines as A.2, except that A.1 introduced Siddiqui to him. He allegedly claimed that he was promised payment of 1500 Dirhams and that on arrival he was in possession of 130 Dirhams and Rs.2,000/-. The accused were arrested on 29.08.1997, produced before the Court and were remanded to judicial custody till 09.09.1997. They were released on bail on 10.11.1997. Later a Charge sheet in CC No.8 of 2000 was filed against A1 to A5 and another (A-6) before the Special Judge for Economic Offences, Hyderabad by the Deputy Commissioner (Legal), Customs and Central Excise, Hyderabad-II Commissionerate, Hyderabad (for short 'the complainant'). Proceedings against A-6 were quashed on 20.11.2000 in Crl.P.No.2081 of 2000 of this Court. The complainant alleged that in terms of Notification No.171/94 Cus. Dated 30.09.1994, as amended, gold can be imported by eligible passengers on payment of Rs.220/- per Kilogram subject to complying the conditions namely – (i) the duty shall be paid in convertible foreign currency; (ii) the quantity of gold should not exceed ten kgs; and (iii) such gold is carried by eligible passengers at the time of arrival in India or is imported by him within 15 days of his arrival in India. The appellant/complainant referred to Section 77 of the Customs Act, 1962 which deals with declaration of baggage and contended that such declaration can only be by owner; and since A.1 to A.3 just carried the gold for some monetary gain, and are couriers, they are not entitled to declare the gold belonging to Siddiqui, who was not entitled to import 30 Kgs of gold. The complainant further alleged that A.4 and A.5 committed the importation of gold which is liable for confiscation under Section 111(d) of the Customs Act, 1962 and also for contravention of the provisions of the Foreign Exchange Regulation Act, 1973 and thereby rendered themselves liable for penalty under Section 112 of the Customs Act. It was also alleged that the foreign currency arranged by Nusrat alias Amir is liable for confiscation under Section 111 (d) of the Customs Act, 1962 read with Sections 13 and 67 of the Foreign Exchange Regulation Act, 1973. Show-cause notice in OR.No.2/98 (Adjn.) Customs dt.11/12.02.1998 was issued to A.1 to A.3 and A.4 and A.5 with different contents. Thereafter, after obtaining necessary under sanction under Section 137 of the Customs Act, 1962, the appellant filed the complaint. A.1 to A.5, on their appearance were furnished with copies of documents on which the prosecution was based. Evidence was recorded under Section 244 Cr.P.C. After satisfying himself that there was prima facie case against A.1 to A.5, charges were framed against them under Section 246 Cr.P.C by the Special Judge. THE CHARGES FRAMED AGAINST THE ACCUSED The following are the charges were framed against A.1 to A.5: "FIRSTLY : That on 29.08.1997 you A.1 along with Mohd. Saleeem and Abdul Rehman arrived at Hyderabad Airport by Flight IC 592 from Sharjah at about 2.00 hours and after the scheduled immigration check, the officers intercepted you, Mohd. Saleem and Abdul Rehman and your passport Nos.N-552207, V-434816 and V-225813 and on the preliminary enquiry you have admitted that you were in possession of 10 kgs. Gold biscuits, but you did not have the requisite foreign currency to pay the customs duty to make the gold imported by you licit and thereafter the officers inspected the checked in baggage as well as cabin baggage of yourself and other two viz., Mohd. Saleem and Abdul Rehman and found one hand pouch with band consisting of 85 Foreign Marked Gold bars weighint 116.65 grams each and all the gold biscuits containing markings "SWISS BANK CORPORATION 10 TOLAS" with purity marking of 999.0 and the market value of the same is Rs.45,47,500/- and the officers seized the said gold under the cover of panchanama Ex.P.15. Thus, you were acquired possession of or dealing with the said gold which you knew or had reason to believe is liable for confiscation under Section 111(m) and (o) of the Customs Act, 1962, and for the contravention of Section 77 of the said Act and thereby committed an offence punishable under Section 135(1)(b)(i) of the Customs Act, 1962 and within my cognizance; SECONDLY: That on 29.08.1997 you A.2 along with Mohd.Osman and Abdul Rehman arrived at Hyderabad Airport by Flight IC 592 from Sharjah at about 2.20 hours and after the scheduled immigration check, the officers intercepted you, Mohammed Osman and Abdul Rehman and your passport Nos.V-434816, N-552207 and V-225813 and on the preliminary enquiry you have admitted that you were in possession of 10 Kgs. Gold biscuits, but you did not have the requisite foreign currency to pay the customs duty to make the gold imported by you licit and thereafter the officers inspected the checked in baggage as well as cabin baggage of yourself and other two viz., Mohammed Osman and Abdul Rehman and found one hand pouch with band consisting of 85 Foreign Marked Gold bars weighing 116.65 grams each and all the gold biscuits containing markings "SWISS BANK CORPORATION 10 TOLAS" WITH PURITY MARKING OF 999.0 and the market value of the same is Rs.45,47,500/- and the officers seized the said gold under the cover of panchanama Ex.P.15 for contravening the provisions of Customs Act. Thus you were acquired possession of or dealing with the said gold which you knew or had reason to believe is liable for confiscation under Section 111(m) and (o) of the Customs Act, 1962 and for the contravention of Section 77 of the said Act and thereby committed an offence punishable under Section 135(1)(b)(i) of the Customs Act, 1962 and within my cognizance. THIRDLY : That on 29.08.1997 you A.3 along with Mohammed Osman and Mohammed Saleem arrived at Hyderabad Airport by Flight IC 592 from Sharjah at about 2.00 hours and after the scheduled immigration check, the officers intercepted you, Mohammed Osman and Mohammed Saleem and your pass-port Nos.N-552207, V-434816 and V-225813 and on the preliminary enquiry you have admitted that you were in possession of 10 Kgs. Gold biscuits, but you did not have the requisite foreign currency to pay the customs duty to make the gold imported by you licit and thereafter the officers inspected the checked in baggage as well as cabin luggage of yourself and other two viz., Mohammed Osman and Mohammed Saleem and found one hand pouch with band consisting of 85 Foreign Marked Gold bars weighing 116.65 grams each total weight comes to 9915.25 grams and all the gold biscuits containing markings "UNION BANK OF SWITZERLAND (UBS) 10 TOLAS" with purity marking of 999.0 and the market value of the same is 45,47,500/- and the officers seized the said gold under the cover of panchanama Ex.P.15 thus you were acquired in possession of or dealing with the said gold which you knew or had reason to believe is liable for confiscation under Section 111(m) and (o) of the Customs Act, 1962 and for the contravention of Section 77 of the Customs Act and thereby committed an offence punishable under Section 135(1)(b)(i) of the Customs Act, 1962 and within my cognizance; FOURTHLY : That on 29.08.1997 at 2.30 A.M. the officers of D.R.I. visited the S.B.I., Counter Departure lounge and at that time you A.4 were present at the counter and the officers expressed their intention to search the counter and you have opened the door and they entered the counter and asked you whether you were in possession of foreign currency in excess of the official amount, for which you have admitted of having in possession of excess foreign currency and produced the said foreign currency containing in two bundles wrapped in old newspapers and on opening the newspapers the officers found 10,000 United States $ in one bundle and 2,530 United States $ in the second bundle (M.Os.15 and 16) and further you have given a slip (Ex.P.41) containing five names and out of these five names two names were stricken out and other three names are Abdul Rehman, Mohammed Saleem and Mohammed Osman and you have also handed over 18,795 United States $ to A.5 for payment of customs duty and the said foreign currency was seized under a cover of panchanama Ex.P.42 as you were not having any valid permission from the Reserve Bank of India to possess the foreign currency in excess of the official amount contravening the provisions of Section 13(2) of Foreign Exchange Regulation Act R/W Section 71(3) of the said Act and thus you have acquired possession of or concerned yourself with carrying or dealing with the said foreign currency which you knew or had reason to believe is liable for confiscation under Section 111(d) of the Customs Act and thereby committed an offence punishable under Section 135(1)(b)(ii) of the Customs Act, 1962 and within my cognizance; FIFTHLY : That on 29.08.1997 at 2.30 AM the officers of Customs visited the S.B.I. counter arrival lounge and at that time you A.5 were present at the counter and they expressed their intention to search the counter and you have opened the door and they entered the counter and asked you whether you were in possession of foreign currency in excess of the official amount. For which you have admitted of having in possession of foreign currency and produced voluntarily the foreign currency containing in one paper bundle and on opening the paper it is found that there was 18,795 U.S. $ in different denominations which is marked as M.O.13, and further you have given a slip containing the names of Abdul Rehman, Mohammed Saleem and Mohammed Osman and the said foreign currency was seized under a cover of a panchanama Ex.P.4 as you were not having any valid permission from the Reserve Bank of India to possess the foreign currency over and above the official amount of Rs.15,000/- in Indian currency contravening the provisions of Section 13(2) of foreign Exchange Regulation, 1973 R/W Section 71(3) of the said Act and thus you have acquired, possession of or concerned yourself with carrying or dealing with the said foreign currency which you knew or had reason to believe is liable for confiscation under Section 111(d) of the Customs Act and thereby committed an offence punishable under Section 135 (1)(b)(ii) of the Customs Act, 1962 and within my cognizance. SIXTHLY : That on 29.08.1997 at 2.30 A.M. you A.4 when the officers entered your S.B.I. counter departure lounge, Begumpet Airport for search, were in possession of 12,530 United States $ in excess of the official amount, and you also handed over 18,795 United States $ to A.5 as detailed in Charge No.4 in order to assist the A.1 to A.3 for payment of customs duty for the importation of 30 Kgs. Gold licit and further in the same transaction you have handed over a slip containing the names of A.1 to A.3 which corroborated your motive to assist A.1 to A.3, hence you are also liable for punishment along with A.1 to A.3 under Section 135(1)(b)(i) of the Customs Act, 1962 and within my cognizance; SEVENTHLY : That you A.5 on 29.08.1997 at 2.30 AM when officers entered your S.B.I. counter at arrival lounge of the Begumpet Airport you have handed over 18,795 United States $ to the officers which is in excess of over and above the official amount and further you have given a slip containing the names of A.1 to A.3 given by A.4 in order to assist A.1 to A.3 for payment of customs duty for importation of 30 Kgs. gold licit by A.1 to A.3 which corroborates your motive to assist A.1 to A.3, hence you are also liable for punishment along with A.1 to A.3 for the offence under Section 135(1)(b)(i) of the Customs Act, 1962 and within my cognizance." The charges were explained to A.1 to A.5, but they denied them and claimed to be tried. The accused marked Exs.D.1 to D.5. Exs.X.1 and X.2 were marked through PW.8. After closure of the evidence of prosecution witness, the accused were examined under Section 313 Cr.P.C. on 23.09.2002 and the incriminating circumstances appearing in the evidence of prosecution witnesses were explained to them through interpreters but they denied the same. They also filed individual written statements along with certain documents. THE JUDGMENT OF TRIAL COURT By judgment dt.07.07.2003, the Special Judge for Economic Offences, Hyderabad, convicted A.1 to A.3 under Section 135(1)(b)(i) of the Customs Act, 1962. He also convicted A.4 and A.5 under Sections 135(1)(b)(i) and 135(1)(b)(ii) and Sec.13(2) of the Foreign Exchange Regulation Act,1973. In para.114 of his judgment the Special Judge/trial court took the view that A.1 to A.3 were only carriers of the gold and they were not its owners. He held that although Section 77 allows for declaration of contents of baggage by the owner of the baggage, A.1 to A.3 are not entitled to make such a declaration because they are not owners of the gold which was contained in their baggage. He held that the option under Section 80 of the Customs Act, 1962 (for a passenger to request that the gold brought by him be returned to him on his leaving India if he is unable to pay the duty thereon at the time of his arrival in India) also cannot be exercised by A.1 to A.3. He rejected the plea of A.1 to A.3 that they were intercepted prior to their approaching the customs counter to either declare the gold or to exercise the option under Section 80 and they had, therefore, not committed any offence. He held that Section 135(1)(b)(i) of Customs Act,1962 makes it an offence, if any person acquires possession of goods which are liable for confiscation under Section 111 thereof; Section 111(m) & (o) thereof deal with confiscation of improperly imported goods; and Section 111(m) is automatically attracted since there is a contravention of Section 77 of the Act; and therefore, A.1 to A.3 have committed the offences punishable under Section 135(1)(b)(i) of the Customs Act, 1962. He sentenced them for R.I for three years each and also to pay a fine of Rs.5,000/- each. He held that A.4 and A.5 abetted the commission of offence under Section 135(1)(b)(i) of the Customs Act, 1962 of the Act by A.1 to A.3 and they are also liable to be punished likewise. He further convicted A.4 and A.5 under Section 135 (1)(b)(ii) of the Act on the ground that they acquired possession of foreign currency in violation of Section 111(d) of the Act. He also referred to Section 13 and Section 71(3) of the Foreign Exchange Regulation Act, 1973. He sentenced A.4 and A.5 to undergo rigorous imprisonment of one year each and to pay a fine of Rs.1000/-. He further directed that the period of sentence of rigorous imprisonment be inflicted on A.4 and A.5 and both counts shall run concurrently. THE JUDGMENT OF THE LOWER APPELLATE COURT Challenging the said judgment dt.07.07.2003 in C.C.No.8 of 2000 of the Special Judge for Economic Offences, Hyderabad, A.1 to A.3 filed Crl.A.No.298 of 2003 before the Metropolitan Sessions Judge, Hyderabad while A.4 and A.5 filed Crl.A.No.293 of 2003 also before the same court. By a common judgment dt.28.06.2005, both appeals were allowed by the Metropolitan Sessions Judge and the conviction and sentence imposed on all the accused were set aside. The lower appellate Court took the view that the complainant had not alleged that A.1 to A.3 concealed the gold and they themselves disclosed that they were getting 10 Kgs. of gold each. Therefore, they did not smuggle the gold; that as per rules the person who brought the gold had to pay import duty in foreign currency at the time of his arrival to take the said gold along with him; there is specific provision under Section 80 of the Customs Act stating that if a person who brought the gold failed to pay import duty, the said gold can be retained by Customs Officers and the said person can take it back when he is leaving the country; and therefore, customs officers are not empowered to confiscate the gold on the ground that person who brought the gold did not pay the import duty in foreign currency. It also held that the investigating officer did not examine the other two persons whose names were found in the chit handed over by PW.4 and also did not state whether they traveled in the said Flight IC 592 or not. It held that it is not difficult for the investigating officer to trace the person who sent the gold but the investigation was not done to apprehend such a person. It held that the prosecution failed to show that the gold belongs to somebody else and A.1 to A.3 were not its owners and that since the gold was found in the possession of A.1 to A.3, they are presumed to be the owners. It also held that as per law prevalent at that time one can bring 10 Kgs of gold from foreign countries and since A.1 to A.3 were owners of the gold, the D.R.I. Officials mischievously got written in the statements of A.1 to A.3 that they were not owners of the gold and they have no capacity to acquire the gold and were only mere carriers. It held that the investigating officer had to make a further enquiry as to who is the actual owner of the gold and prove that A.1 to A.3 were not its owners and somebody else was the owner. It held that A.1 to A.3 had stated in their Section 313 Cr.P.C. statements that they had purchased the gold under invoices and the gold belongs to them and the invoices were also filed along with the respective statements. It further held that US $ 31,325 were purchased at Dubai on 26.08.1997 through invoices which were put to PW.2 and the said invoices were also filed along with written statements of A.1 to A.3 in their Section 313 Cr.P.C. examination. It accepted the explanation of the defence counsel that passengers who bring gold would also get the foreign currency required for payment of customs duty from Dubai particularly when US $ were cheap there and available in plenty in the open market. Coming to A.4 and A.5 the lower appellate Court held that the investigating officer had failed to produce evidence about the person who gave US $ 31,325 to A.4 and also chit containing the names of the persons who are getting gold to India, and who asked A.4 to adjust the said US $ towards import duty for the said gold. It therefore held that the evidence on record was not sufficient to come to the conclusion that A.4 and A.5 committed the offences under Section 135 (1) & (ii) as contended by the prosecution. THE PRESENT APPEAL Aggrieved thereby, these appeals have been filed by the Deputy Commissioner (Legal), Customs and Central Excise, Hyderabad II Commissionerate. Heard Sri U.L.N. Sudhakar, Counsel for the appellant and Sri.P.V.Rama Sarma for A-1 and A-3 and Sri A.Hariprasad Reddy for A-4 and A-5. None appears for A-2 even though notice in Crl.A.No.1204 of 2005 is served. THE CONSIDERATION BY THIS COURT Section 135 of the Customs Act, 1962 as it stood at the time when the incident in question occurred, stated : "135. Evasion of duty or prohibitions (1) Without prejudice to any action that may be taken under this Act, if any person – (a) is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods, or (b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reasons to believe are liable to confiscation under section 111, he shall be punishable, (i) in the case of an offence relating to any of the goods to which section 123 applies and the market price whereof exceeds one lakh of rupees, with imprisonment for a term which may extent to seven years and with fine : Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than three years; (ii) in any other case, with imprisonment for a term which may extent to three years, or with fine, or with both." Clauses (d), (m) and (o) Sec. 111 of the Customs Act,1962 state: "111. Confiscation of improperly imported goods, etc. The following goods brought from a place outside India shall be liable to be confiscation: (a) … … (b) … … (c) … … (d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force; … … (m) [any goods which do not correspond in respect of value or in any other articular] with the entry made under this Act or in the case of baggage with the declaration made under section 77 [in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;] (o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is observed unless the non-observance of the condition was sanctioned by the proper officer;" Sec.77 of the Customs Act,1962 states: "77. Declaration by owner of baggage- The owner of any baggage shall, for the purpose of clearing it, make a declaration of its contents to the proper officer." Sec.80 of the Customs Act,1962 states: "80. Temporary detention of baggage- Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India [and if for any reason, the passenger is not able to collect the article at the time of his leaving India, the article may be returned to him through any other passenger authorized by him and for leaving India or as cargo consigned in his name]." Sec.13(2) of the FERA states: "13. Restrictions on import and export of certain currency and bullion – (1) …. …. (2) No person shall, except with the general or special permission of the Reserve Bank or the written permission of a person authorized in this behalf by the Reserve Bank, take or sent out of India any Indian Currency or foreign exchange other than foreign exchange obtained by him from an authorized dealer or from a money-changer" Sec.71(3) of the FERA states: "71. Burden of proof in certain cases- .… …. …. .... If any person is found or is proved to have been in possession of any foreign exchange exceeding in value [fifteen thousand rupees], the burden of proving that the foreign exchange came into his possession lawfully shall be on him." As regards A.1 to A.3, their defense was that they are owners of the gold and had purchased the foreign currency in question for payment of customs duty; alternatively, it is contended that even if they are not owners of gold, they had a right to declare the gold to the appropriate Officer under Section 77 of the Customs Act, 1962; and even if convertible foreign currency has to be utilized for payment of duty, and they did not have it, they could have exercised the option under Section 80 of the said Act to request the Customs Officials to detain the gold and take return of it while returning back to Sharjah. Their plea is that their interception prior thereto deprived them of this opportunity and does not amount to commission of any offence by them either under the provisions of the Customs Act or under the provisions of the FERA. I am not going into the question whether A.1 to A.3 are owners of the gold although the said point was argued before me. In my opinion, even the alternative plea raised by them has considerable force and is required to be accepted. The trial Court at para-114 had taken the view that A.1 to A.3 do not have any right to declare the gold in question under Section 77 of the Customs Act, 1962 since they were only carriers of the gold. Section 77 of the Customs Act, 1962 entitles the owner of any baggage to make a declaration of its contents to the proper Officer for the purpose of clearing it through Customs. Section 80 of the Customs Act states that if the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under Section 77, the proper Officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India; and if for any reason, the passenger is not able to collect the article at the time is of his leaving India, the article may be returned to him through any other passenger authorized by him and leaving India or as cargo consigned in his name. The finding of the trial Court in para-114 of its judgment that A.1 to A.3 cannot be allowed to declare the gold under Section 77 since they were only the carriers, in my opinion, cannot be accepted. In M/s.Associated Cement Companies Limited Vs. Commissioner of Customs, the Supreme Court considered Sec.77 of the Customs Act,1962 and held: "60. Under the said Section baggage declaration forms have been prescribed which inter alia require the owner of the baggage to disclose the description of the goods as well as the value in respect thereof. It is as owner of the baggage containing the drawings and other technical literature and manual etc. that the couriers cleared the goods. They may not be the owners of the drawings etc. but for the purpose of clearance of the baggage, containing the said articles, the courier was the owner of the baggage. The Tribunal has held, and in our opinion correctly, that the sender as well as the receiver were aware of the value of the goods. The courier acted as the conduit or the agent and would only have declared such value in respect of the goods imported as must have been instructed by the sender and or receiver. The declaration by the courier of the value of the drawings in the Leela Ventures case and other technical material in the case of other appellants must have been done by the courier either at the behest of the sender or the receiver or at his own behest. In either case the declaration of the value of the drawings as being very nominal was clearly a mis-statement or a mis-representation of facts. According to the baggage declaration forms it is for the passenger to give value of the goods being brought in by him. When the value of the goods which were dutiable in the present cases was shown as only nominal, while in actual fact the correct value was much more, there was clearly an attempt on the part of the passenger, namely, the courier, to have the goods cleared through customs authorities by grossly undervaluing the value thereof. The courier gave a specific value of one dollar in respect of the drawings when both the sender and the appellants knew fully well as to how important and valuable these goods were. In the case of Leela Ventures it was on the basis of the architectural drawings that the renovation etc. was to take place whereas the technical material made available to the other appellants was necessary for their purpose. We have already held that the value of the goods so imported was not merely the cost of the price of the media but also the intellectual input on the media as represented by architectural drawings or users manuals etc. The value of architectural drawings was not merely the cost of the paper and the ink but would be much more. In some of the cases we were informed that the appellants had themselves volunteered that about one-third of the total amount payable to the collaborators should be taken as a figure representing the transaction value of the technical material so imported." The Supreme Court, in the above decision, has thus categorically accepted that the declaration has to be filed by the owner of the baggage and it is not necessary that he should be owner of the contents of the baggage. No decision taking a contra view was placed before me by the Counsel for the appellant. So even if it assumed for the sake of argument that the accused Nos.1 to 3 were only carriers and not owners of gold, they are entitled to file a declaration under Sec.77 of the Customs Act because they are undoubtedly owners of the baggage in which the gold was carried by them. Admittedly they were intercepted before they had an opportunity to file declaration under Sec.77 of the Customs Act. So even if they did not have convertible foreign currency for payment of customs duty on the gold brought by them, they would have the option under Section 80 of the Act to retain the said gold with the Customs counter and take it back when they return to Sharjah. Had they been given an opportunity to file a declaration under Sec.77 of the Act, they would have also had a choice to exercise the option under Sec.80 of the Customs Act. It is not disputed that they were intercepted prior to their making declaration under Section 77 of the Act. After preventing A.1 to A.3 from making declaration under Sec.77 and exercising the option under Sec.80 of the Act, which they were entitled to as per law, it is not open to the officials of the Customs Department/ the appellant to contend that the A.1 to A.3 have committed an offence under the provisions of the Customs Act,1962. It is not disputed that as per law prevalent at that time one can bring 10 Kgs of gold from foreign countries. So Sec.111 (d) of the Customs Act is not attracted. Admittedly they did not conceal the gold when intercepted and they themselves disclosed that they were getting 10 Kgs of gold each. Thus the gold they brought in, is not liable for confiscation u/s.111 (m) or (o) of the Customs Act. In this view of the matter, I am of the opinion that A.1 to A.3 cannot be held guilty of the charge under Section 77 or Section 135 (1)(b)(i) of the Customs Act, 1962. Coming to A.4 and A.5, who are employees of State Bank of India, the charges against them are under Section 135(1)(b)(i) and (ii) of the Customs Act. Admittedly they were found to be in possession of U.S. $ currency. No doubt foreign currency is also goods as per the definition of "goods" contained in Section 2(22) of the Customs Act, 1962 as per clause (d) thereof. According to the prosecution case, the amount has been handed over to them by one Nusrat. It is not the case of prosecution that the foreign currency in question found in the possession of A.4 and A.5 had been brought by A.4 and A.5 from a place outside India. Section 135(1) (b), as it stood at the relevant point of time, required that the person to be punished thereunder should have possession of or is in any way concerned with the goods (currency here) by carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing it, and he should have known or had reason to believe that such currency is liable for confiscation under Section 111 of the said Act. For Sec.111(d) to be attracted the goods must have been brought within Indian customs waters contrary to any prohibition imposed by or under the Customs Act or any other law for the time being in force. This requirement is not fulfilled because it is not even the case of prosecution that the foreign currency found in the possession of A.4 and A.5 has been brought by them within the Indian customs waters from a place outside India. Therefore, it is not liable for confiscation under Section 111 at all. Consequently, A.4 and A.5 cannot said to have committed the offences under Sections 135(1)(b)(i) and (ii) of the Act. Coming to the charge under Section 13(2) of the FERA against A.4 and A.5, the basis of the prosecution of A.4 and A.5 under the said Act are the statements recorded under Section 108 of the Customs Act, 1962 by the Customs Officers from A.1 to A.5. The learned counsel for A.4 and A.5 contended that the FERA is a special law which prescribes a special procedure for investigation of breaches of foreign exchange regulations; the Customs Act, 1962 has a different ambit, scope and intendment; and therefore, statements recorded under the provisions of the Customs Act, 1962 can at best be used to prosecute persons for violation of the provisions of the Customs Act,1962, but they cannot be used to prosecute persons under the FERA. He pointed out that Section 40 of the FERA contains provisions empowering the Gazetted Officials of Enforcement to summon persons to give evidence and produce documents under the FERA and on the basis of statements recorded under Section 108 of the Customs Act, a prosecution for violation of provisions of the FERA cannot be initiated. He placed reliance on the judgment in K.T.M.S. Mohd. and another Vs. Union of India. In the above case, there was prosecution launched for perjury against the appellant therein on the basis that he made a statement before an Enforcement Officer under the FERA, which he subsequently retracted. He was sought to be prosecuted under the provisions of Indian Penal Code (Section 120-B IPC r/w Section 193, Section 120-B r/w Section 277 of the Income Tax Act,1961 and Section 193). The complainant was an Income Tax Officer. The Supreme Court held that authorities under the Income Tax Act cannot launch prosecution for perjury on the basis of a statement recorded by the Income Tax Officer under FERA Act; and even the Enforcement authority cannot also launch a prosecution for perjury on the basis of inculpatory statement recorded by the Income Tax officials. It observed: “16. ….. ….. Coming to the FERA, it is a special law which prescribes a special procedure for investigation of breaches of foreign exchange regulations. Vide Shanti Prasad Jain Vs. The Director of Enforcement [1963(2) S.C.R. 297]. The proceedings under the FERA are quasi-criminal in character. It is pellucid that the ambit, scope and intendment of these two Acts are entirely different and dissimilar. Therefore, the significance of a statement recorded under the provisions of FERA during the investigation or proceeding under the said Act to as to bring them within the meaning of judicial proceeding must be examined only qua the provisions of the FERA but not with reference to the provisions of any other alien Act or Acts such as I.T. Act. 17. If it is to be approved and held that the authorities under the I.T. Act can launch a prosecution for perjury on the basis of a statement recorded by the Enforcement Ofifcer then on the same analogy the Enforcement authority can also in a given situation launch a prosecution for perjury on the basis of any inculpatory statement recorded by the Income Tax Authority, if repudiated subsequently before the Enforcement authority. In our opinion, such a course cannot be and should not be legally permitted.” From the above it is clear that for a prosecution under the provisions of FERA, the investigation under that Act by the Enforcement Officer under that Act should be a condition precedent. The investigation by Customs Officer under Section 108 of the Customs Act and statement recorded by such Officer under that provision of law cannot be used to prosecute the accused under the provisions of the FERA. This legal position is not disputed by counsel for the appellant. Admittedly, in the present case, no investigation under Section 40 of the FERA has been done. The entire basis for prosecution of A.4 and A.5 under the provisions of the FERA is the statements recorded by the Customs Officials under Section 108 of the Customs act. Therefore, prosecution of A.4 and A.5 under Section 13(2) of the FERA cannot be sustained. Therefore, A.4 and A.5 are entitled to be acquitted of the charges under the FERA also. Therefore I do not find any infirmity in the common judgment dt.28.6.2005 in Crl.Appeal Nos.293 of 2003 and 295 of 2003 acquitting the accused. In this view of the matter, I do not find any merit in the appeals filed by the appellants, and the same are dismissed. As a sequel, the miscellaneous petitions, if any pending, shall stand closed. ___________________________________ JUSTICE M.S. RAMACHANDRA RAO Date : 02-06-2015 Vsv/* AIR 2001 SC 862 1992(2) SC (Crimes) 314 PAGE PAGE 13 MSR,J Crl.A.Nos.1203 and 1204 of 2005

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