

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO.209 OF 2017

Shaik Mohammed Javed,
Aged 32 years,
S/o Shaik Anwar Basha,
House No.146, Abdulla Mansion,
Fatima Colony,
Alto Dabolim Goa. ... Petitioner

Versus

1. Union of India,
represented by the Secretary,
Revenue, Ministry of Finance,
North Block,
New Delhi-110001.
2. The Commissioner of Customs,
Custom House,
Marmagoa, Goa. ... Respondents

Mr. A. D. Bhobe, Advocate for the Petitioner.

Ms. Asha Desai, Standing Counsel for the Respondents

***Coram : N.M. Jamdar &
Prithviraj K. Chavan, JJ.***

Date : 9 March 2018

Oral Judgment (Per N.M. Jamdar, J) :

Rule. Rule made returnable forthwith. Respondents waive service.

2. By this petition, the Petitioner has made the following two prayers.

(i) To declare section 129E of the Customs Act ultra vires to Constitution of India since it denies fundamental rights guaranteed by Articles 14 and 21.

(ii) Issue a writ of certiorari or any other writ, order or direction to quash Ext.P1 order issued by the second Respondent herein, the order being illegal and unsustainable under law.

3. The Petitioner is a permanent resident of Goa. He was working as Assistant Manager (Operations) with Minar Travels, Dabolim Airport Goa operating Chartered Flights carrying tourists visiting Goa. A search of the Petitioner's residence was taken on 7 July 2014 and Indian currencies of ₹ 21.25 lakhs and foreign currencies viz. US \$ 10524 and Euros 975 were found. The Petitioner surrendered before the Court on 19 July 2014. According to the

Petitioner, when the Petitioner was in custody, the proceedings under Section 108 of the Customs Act were initiated and an order came to be passed on 5 January 2017. By order dated 5 January 2017, the Commissioner of Customs, Goa, after referring to the various statements and replies, imposed a penalty upon the Petitioner. In view of the findings recorded by the Commissioner that the Petitioner had violated the provisions of the Customs Act, the Commissioner directed confiscation of the gold bars, gold coins and imposed a penalty of ₹5,01,36,309/-. The Petitioner thereafter filed this present petition for a declaration that Section 129-E of the Customs Act is ultra vires of the Constitution and the order passed by the Commissioner dated 5 January 2017, be quashed and set aside.

4. The learned Standing Counsel for Respondent No.1 raised preliminary objection as regards the prayer clause (ii) whereby the order dated 5 January 2017 was sought to be challenged by the Petitioner. The learned counsel for Respondent No.1 submitted that the Petitioner has a remedy of an appeal under the Customs Act as provided under Section 129-A of the Act. The learned counsel for the Petitioner submitted that the Appeal under Section 129-A cannot be considered as an efficacious remedy as it mandates pre-deposit of the

entire amount. He submitted that such provision is not valid.

5. As far as the Constitutionality of Section 129-E is concerned, this point is no longer *res integra*. The Division Bench of this Court in *Haresh Nagindas Vora v Union of India*¹ has held that mandatory requirement under Section 129-E cannot be considered as a revenue nor it is a tax and Section is enacted in public interest. The Division Bench has reached this conclusion after relying on various decisions of the Apex Court regarding right of appeal not being absolute right. We agree with this conclusion reached by the Division Bench. In view of this position, the challenge to the Constitutional validity of Section 129-E, cannot succeed.

6. As regards the challenge to the order passed by the Commissioner is concerned, an appeal is provided under the Act. Section 129-A(1)(a) provides for an appeal from the order passed by the Commissioner of Customs as an adjudicating authority. There is no dispute at the bar that the order passed by the Commissioner of Customs- adjudicating authority is an appealable order under the Act. The self imposed rule of not entertaining a writ petition, when an

¹ 2017 LawSuit (Bom) 943

efficacious remedy is available, is well settled. Only in exceptional circumstances, the Court may deviate from this self imposed rule. Since the Constitutional validity of the Act has been upheld and the challenge to the mandatory pre-deposit has been negated, the remedy of appeal cannot be held to be not efficacious. The learned counsel for the Petitioner initially sought to contend that the remedy of appeal should not be an impediment to entertain the Writ Petition since there has been a breach of the principles of natural justice. The learned Standing Counsel for the Respondents contended that there has been no such breach and the Petitioner was not in custody when the proceedings were concluded. The learned counsel for the Petitioner, on instructions, thereupon submitted that the Petitioner will urge this point in the appeal. We, therefore, do not enter in this arena as the learned counsel for the Petitioner has not pressed this point further. In these circumstances, we do not find any justification to entertain the Writ Petition since the Petitioner can avail of the remedy of appeal.

7. The learned counsel for the Petitioner submitted that the appeal is to be filed within a period of three months and delay due to the Writ Petition be condoned. There is a power conferred under

Section 129-A(5) of the Act on the Appellate Tribunal to condone the delay in filing the appeal. This power being a discretionary power, we do not intend to prejudge the same. It is open to the Petitioner to contend that the Petitioner is entitled for condonation of delay on the ground of pendency of this Writ Petition, which the Tribunal will consider on its own merits.

8. The learned counsel for the Petitioner, on instructions, submitted that the Petitioner will file an appeal within a period of four weeks from today. The statement is accepted.

9. In view of this position, the Writ Petition is disposed of. Rule discharged. No costs.

Prithviraj K. Chavan , J.

N.M. Jamdar, J.