In the High Court of Judicature at Madras

Dated : 07.9.2018

Coram :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.922 of 2009 & MP.No.1 of 2009

The Commissioner of Customs (Air)
Custom House, Chennai-1. ...Appellant/Respondent

Vs

1.Shri.Abdul Azeez

2.The Customs, Excise & Service Tax
Appellate Tribunal, South Zonal
Bench, Shastri Bhavan Annexe,
I Floor, No.26, Haddows Road,
Chennai-6. ...1st Respondent/Appellant

APPEAL under Section 130 of the Customs Act, 1962 against final order No.1120/2008 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai dated 30.9.2008.

For Appellant : Mr.T.R.Senthil Kumar, SSC
assisted by Ms.G.Usharani

For Respondent-1 : No appearance

Judgment was delivered by T.S.SIVAGNANAM,J

Heard the learned Senior Standing Counsel for the appellant.

2. This appeal by the Revenue has been directed against the final order passed by the Customs, Excise and Service Tax Appellate Tribunal dated 30.9.2008.

3. The appeal is admitted on the following substantial questions of law:

> "i. Whether the Tribunal was right in law by remanding the matter to the Authorities on the premise that Section 125 of the Customs Act, 1962 provides for

payment of fine in lieu of confiscation as an option to the Authority, when the Authority had felt it not expedient to provide such an option of redemption and once the Authority had passed a detailed order of confiscation on merits and on considering the redemption clause 125 ?

ii. Whether, in the facts and circumstances of the case, the Tribunal was right in following the decision in the case of P.Chinnasamy Vs. Commissioner of Customs, Chennai [reported in (2007) 220 ELT 308 (Tri-Chennai)] ? And

iii. Whether, in the facts and circumstances, the Tribunal was justified in exercising the discretion in granting an option to the first respondent to redeem the confiscated contraband gold ?”

4. The first respondent was a passenger in an Indian Airlines' flight on 22.11.1999. The said aircraft was undertaking an international run from Kuwait to Ahmedabad and from Ahmedabad to Hyderabad Sector and in the Chennai Airport, a personal check was made on the first respondent and three packets containing 80 Nos. gold biscuits with foreign markings were found concealed by the first respondent in his trousers. The first respondent did not possess any document to substantiate that the import of the gold and its possession were legal. Hence,the gold biscuits were seized on 22.11.1999.

5. A statement under Section 108 of the Customs Act, 1962 was recorded from the first respondent on 23.11.1999 wherein he stated that he boarded the flight from Hyderabad to Chennai, that during the course of his journey, he went to toilet, removed the waste basket and found three packages, which were covered by brown cellophane tapes, that he took out the packages and found them to be heavy and that he quickly kept them in his lower abdomen portion between the trousers and the body with the help of thick broad belt.

6. The Commissioner of Customs, who adjudicated the matter, vide Order-in-Original dated 18.7.2000, found that the first respondent did not dispute the fact that the gold is of foreign origin; that the first respondent did not produce any evidence to show that the gold was legally imported into the country and he discharged the duty liability; that on the other hand, he had admitted that the gold was smuggled into the country and he recovered the smuggled gold and was transporting the same for certain consideration. Thus, the Commissioner of Customs concluded that the the gold had been smuggled into India without payment of duty and ordered absolute confiscation of the gold

apart from imposing penalty on the first respondent.

7. The first respondent preferred an appeal before the Tribunal. However, he did not appear in person nor entered appearance through counsel. Hence, the Tribunal took up the appeal for consideration and after referring to its decision in the case of P.Chinnasamy Vs. Commissioner of Customs, Chennai [reported in (2007) 220 ELT 308 (Tri-Chennai)], allowed the appeal and remanded the case to the Commissioner of Customs to adjudicate the same with a view to give an option to the first respondent to redeem the gold. This order passed by the Tribunal dated 30.9.2008 has been challenged by the Revenue in this appeal.

8. Though the first respondent has been served and proof of service of notice through paper publication has been filed and also the name of the first respondent is printed in the cause list, none appears for the first respondent.

9. The short issue, which falls for consideration, in the instant case is as to whether the Tribunal could have remanded the matter to the Commissioner with a direction to exercise discretion in a particular manner especially when it has been clearly established on facts that the gold was smuggled into the country, that the first respondent was the career of the gold and that he had no documents or explanation as to how he was entitled to be in possession of the gold. In other words, the first respondent was not able to establish either before the Adjudicating Authority or before the Tribunal that he was lawfully entitled to possess the gold seized from him or in other words, he was the owner of the contraband. In such circumstances, the question would be as to whether the discretion should be exercised in favour of the first respondent.

10. This question has been answered by the Division Bench of this Court in the case of Commissioner of Customs (Air) Vs. P.Chinnasamy [CMA.No.1631 of 2008 dated 23.8.2016]. It is an appeal filed by the Revenue against the Tribunal's order, which was referred to by the Tribunal in the impugned order. The Division Bench of this Court, after elaborately considering the issue, held that the discretion ought not have been exercised in favour of a smuggler giving an option to redeem the goods and that the Tribunal ought not to have interfered with the order passed by the Competent Authority, who had denied the release of the goods.

11. At this juncture, it will be beneficial to refer to a few paragraphs of the said judgment of the Division Bench of this Court, which read thus :

"54. The power conferred on the authority without any guidelines may likely to be abused or arbitrarily exercised and in such circumstances, the guidance and the control of exercise of such power has to be gathered from the object of conferment of such power. Non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it cause for judicial interference. In Global Energy Limited and another Vs. Central Electricity Regulatory Commission reported in 2009 15 SCC 570, the Hon'ble Supreme Court held that the exercise of discretion has to be in conformity with the purpose for which, it is conferred, object sought to be achieved and reasons to be recorded.

55. Power has to be exercised with regard to the duty arising from the nature of the action to be performed by the adjudicating authority. The conditions on the basis of which the power has to be exercised and the repercussions or consequences of such exercise, in the light of the scheme of the Act, which prohibits smuggling and other acts more fully set out in Section 11 and 11A of the Customs Act, 1962, or any other law for the time being in force, should always be kept in mind, while considering either provisional release or passing an order, on the culmination of adjudicatory proceedings.

56. At the time, when discretion is exercised under Section 125 and if any challenge is made under Article 226 of the Constitution of India, the twin test, to be satisfied is "relevance and reason". In the light of the judgments of the Hon'ble Apex Court and applying the same to the facts of this case and testing the discretion exercised by the authority, on both subjective and objective satisfaction, as to why, the goods seized, cannot be released, when smuggling is alleged and on the materials on record, we are of the view that the discretion exercised by the competent authority, to deny release, is in accordance with law. Interference by the Tribunal is against law and unjustified."

12. In the light of the above factual matrix and taking note of the decision of the Division Bench of this Court in the case of P.Chinnasamy, we hold that there is no room for remanding the matter to the Commissioner for a fresh consideration, as the facts clearly show that no discretion can be exercised in favour of the first respondent.

13. It is to be noted that during the pendency of this appeal, the 80 gold bars were sold by the Department through the State Bank of India and that the amount has been credited to the account of the Government of India.

14. In the light of the above, the tax case appeal filed by the Revenue is allowed and the order passed by the Tribunal is set aside. The substantial questions of law framed for consideration are answered in favour of the Revenue. Consequently, the connected MP is closed.

s/d-
Assistant Registrar(CS-V)

True Copy

Sub-Assistant Registrar

To

The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench,No.26, Sastri Bhavan Annexe Building,
Haddows Road, Chennai-6.

+1 CC to Mr.T.R. Senthil Kumar, Advocate sr 62725.

CMA.No.922 of 2009
and MP.No.1 of 2009

RR(CO)
SP(10/10/2018)