

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
CUSTOM APPEAL NO. 2 OF 2009

Mr. Michael John Holyoake
Colonia Braganza,
Behind Plantain Leaf Restaurant,
Naika Vaddo,
Calangute, Bardez, Goa.

.... Appellant.

Versus.

The Commissioner of Customs &
Central Excise, Goa, Ice House,
EDC Complex, Patto Plaza,
Panaji, Goa.

..... Respondent.

Mr. Vallabh D. Pangam, Advocate for the Appellant.

Ms. Asha Dessai, Senior Central Govt. Standing Counsel for the Respondent.

***Coram : M.S. Sonak &
C.V. Bhadang, JJ.***

Date : 2nd December, 2019.

ORAL JUDGMENT : (Per M.S. SONAK, J.)

Heard Mr. V. Pangam for the Appellant and Ms. Asha Dessai for the Respondent.

2. This Appeal was admitted on 12th January, 2010 on the

following issues :

(1) Whether the provisions of Customs Act, 1962 are applicable in the facts of the case or as to whether the provisions of Foreign Exchange Management Act, 1999 are applicable in respect of the penalty imposed on the appellant ?

(2) Whether the authorities concerned validly imposed penalty on appellant in the facts of the case ?

3. Mr. Pangam, learned Counsel for the Appellant submits that the arrival card which was handed over to the Appellant upon his arrival in India, made no reference to declaration of currency. He submits that such a requirement was introduced by Notification of 24th February, 2011. Accordingly, he submits that the Appellant cannot be faulted for failure to declare currency amount which he was carrying.

4. Mr. Pangam, without prejudice to the aforesaid, submits that there is absolutely no prohibition or bar to bring in foreign currency in India. He, therefore, submits that there was no breach of the Customs Act, 1962. He submits that if at all there was any breach of the Foreign Exchange Management Act, 1999 (FEMA) then, it was for the authorities under the FEMA to initiate action in the matter. He submits that the penalty and the fine imposed by the Custom Authorities is totally without jurisdiction.

5. Mr. Pangam, without prejudice, submits that in the present case, there was no breach of the provisions of Section 77 of the Customs Act, 1962. He submits that Section 2(3) defines '*baggage*'. He submits that Section 2(22) defines '*goods*' to include, *inter alia*, baggage and currency. He submits that from this it is clear that '*baggage*' and '*currency*' are different and distinct. In the present case, he submits that there was no requirement of making any declaration and consequently, there was no breach of Section 77 of the Customs Act, 1962.

6. Mr. Pangam finally submits that in somewhat similar situation the Authorities have imposed a token fine or fines which were not comparable to the fines and the penalty imposed in the present case. He submits, without prejudice, that at the highest, there is some technical breach in not making the declaration in Currency Declaration Form (CDF). He submits that in these circumstances, the fine and the penalty imposed upon the Appellant are quite excessive and warrant interference. He points out that bonafides are quite writ large in the present matter, because the Appellant went by the advice by Bank of England. He submits that the Appellant was carrying traveller's cheques and, therefore, believed that there was no requirement of any declaration under the Customs Act. For all these reasons, Mr. Pangam submits that the fines and the penalties are

required to be substantially reduced.

7. Ms. Dessai, learned Counsel for the Respondent defends the impugned orders on the basis of the reasoning reflected therein. She points out that the Tribunal has already reduced the fines and the penalties imposed upon the Appellant. She pointed out that the Appellant had failed to produce proper documentation in respect of the foreign exchange which he was carrying and which was confiscated and the confiscated foreign exchange has already been released in favour of the Appellant. In these circumstances, there is no case made out to interfere with the redemption fine and the penalty imposed upon the Appellant. On these grounds, she submits that this Appeal may be dismissed.

8. Rival contentions now fall for our determination.

9. In this case, it is necessary at the outset, to refer to the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000. Regulation 6 relates to import of foreign exchange into India and provides that a person may bring into India from any place outside India, without limit foreign exchange, other than unissued notes. The proviso to this regulation, *inter alia*, provides that bringing of foreign exchange into India under clause (b), which is the clause with which we are precisely concerned, shall

be subject to the condition that such person makes, on arrival in India, a declaration to the Custom authorities in the CDF annexed to these Regulations. The second proviso, however, further provides that it shall not be necessary to make such declaration where the aggregate value of the foreign exchange in the form of currency notes, bank notes or traveller's cheques brought in by such person at any one time, does not exceed US\$ 10,000 or its equivalent and/or the aggregate value of foreign currency notes brought in by such person at any one time, does not exceed US\$ 5,000 or its equivalent. The format of the CDF is annexed to the regulation and there is really no ambiguity in such format. The regulation itself provides that the declaration in the CDF has to be made to the Custom authorities. The form also contemplates the stamp and the signature of the Customs Officer.

10. At this stage, it is not possible to accept the Appellant's case that the Appellant was required to fill in some form which had no reference to the declaration of currency. Such a complaint was not even made by the Appellant in response to the show cause notice issued to him. In any case, the Regulations referred to above are quite clear and that such declarations have to be made in the CDF. Accordingly, we are unable to accept Mr. Pangam's first contention.

11. Similarly, we are unable to accept Mr. Pangam's second contention that all these are matters which have to be dealt with by the authorities under the FEMA. The Regulations refer to import and export of Indian currency and currency notes. The issue relating to export and import pertains to the domain of the Custom authorities. It is for these reasons that even the Regulations require that the declaration be made to the Custom authorities.

12. This is also not a case where we can say that there is no breach of Section 77 of the Customs Act, 1962. This section requires the owner of any baggage, for the purpose of clearing it, to make a declaration of its contents to the appropriate officer. What is relevant is not mere the '*baggage*', but the contents of the baggage. The definition of '*goods*' under Section 2(22) of the Customs Act, includes both, baggage as well as the currency and negotiable instruments. Thus, the currency and negotiable instruments are specifically included in the definition of '*goods*' under the Customs Act, 1962. Under the Regulations referred to above, the Appellant was obliged not to import the currency or the traveller's cheques, without making the declaration to the Custom authorities in the CDF. In this case, the Appellant clearly failed to make such a declaration. Rather, the Appellant attempted to import into India the currency, as well as the negotiable instruments, without making

such declaration as was required under law. In these circumstances, there was violation of Section 77 of the Customs Act, 1962.

13. Finally, we come to the issue of redemption fine and the penalty. Mr. Pangam has referred to certain decisions of the CESTAT where, in similar circumstances, fines and penalties were imposed, but the same were not as excessive as are to be found in the present case. No doubt, such decisions turn on their own peculiar facts and, therefore, cannot be read as any precedents, at least before this Court.

14. However, in the peculiar facts of the present case, we find that the Appellant had pleaded that he was advised by the Bank of England that there was absolutely no restriction to carry currency into India. The Appellant, in the present case, had carried currency of about 8,000 GBP in cash and an amount of GBP 60,000 by way of traveller's cheques. From this, it is clear that the bulk of the amount which the Appellant attempted to be imported, was in the form of traveller's cheques. The reason as to why the Appellant required such an amount is not so relevant. The Appellant has stated that he wished to purchase some immovable property in India. This is a case of default on the part of the Appellant in not declaring this in the CDF. However, there is nothing on record to conclude that the action of the Appellant was *ex facie mala fide* or

intended to deliberately evade the legal provisions which were attracted.

15. Upon consideration of the aforesaid aspects, we do agree with Mr. Pangam that the redemption fine and the penalty imposed upon the Appellant is excessive. Rather than remanding the matter at this stage to the Appropriate Authorities for redetermination of the redemption fine and the penalty, upon taking into consideration the facts and circumstances cumulatively, we find that the redemption fine of Rs.2,00,000/- and the penalty of Rs.1,00,000/- would be appropriate in this matter.

16. Accordingly, we modify the impugned order and reduce the redemption fine from Rs.5,00,000/- to Rs.2,00,000/- under Section 125 of the Customs Act, 1962 and the penalty from Rs.2,00,000/- to Rs.1,00,000/- under Section 112(a) of the Customs Act, 1962. This means, in all, the Appellant will have to pay an amount of Rs.3,00,000/- to the Respondent.

17. Mr. Pangam, learned Counsel for the Appellant points out that the fine and the penalty in terms of the impugned orders totaling to Rs.7,00,000/- has already been paid by the Appellant. In view of our aforesaid order, therefore, the Respondent will have to refund to the Appellant the amount of Rs.4,00,000/-. This shall be done by

the Respondent within a period of six weeks from the date the Appellant furnishes his bank details, in writing, to the Respondent. If the amount is not refunded within the period of six weeks from said date, then, the same shall carry simple interest at the rate of 6% per annum, to be computed from date of expiry of six weeks from said date.

18. Mr. Pangam, learned Counsel for the Appellant states that the Appellant will furnish necessary Bank details to the Respondent for effecting refund within a period of four weeks from today.

19. The Appeal is partly allowed with the aforesaid terms. There shall be no orders as to costs.

C.V. Bhadang, J.

M.S. Sonak, J.