BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 01.12.2022

Pronounced on : 27.01.2023

CORAM:

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P.(MD).No.198 of 2020
and
W.M.P.(MD).No.126 of 2020

Smt.G.K.Shanmuga Priya ... Petitioner

Vs.

1.The Principal Commissioner & Ex-Officio,
Additional Secretary to the Government of India,
Ministry of Finance, Department of Revenue, 8th
Floor, World Trace Centre, Centre – I,
Cuffe Parade, Mumbai – 400 005.

2.The Commissioner of Customs and Central Excise,
(Appeals). No.1, Williams Road, Cantonment,
Trichy – 620 001.

3.The Joint Commissioner of Customs,
(Airport), No.1, Williams Road,
Trichy – 620 001. ...Respondents.

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records in and connected with Order No.838/2018-Cus. (SZ)/ASRA/Mumbai dated 24.09.2018 made in F.No.373/107/B/2018RA/2158 dated 29.11.2018 of the 1st Respondent, quash the same and consequently direct the Respondents to re-adjudicate the revision application of the petitioner dated April, 2018, after affording opportunity of hearing and taking into consideration all the contentions raised by the petitioner.

For Petitioner : Mr.B.Satish Sundar

For Respondents : Mrs.L.Victoria Gowri [R1]
Assistant Solicitor General of India
Mr.R.Nanda Kumar [R2 and R3]
Sr. Standing Counsel
Assisted by Mrs.S.Ragaventhare
Jr.Standing Counsel

ORDER

The writ petition is filed challenging the order of 1st Respondent dated 24.09.2018 with a prayer to quash the same and consequently direct the Respondents to re-adjudicate the revision application filed by the petitioner after affording an opportunity of hearing.

2. **Brief Facts of the Case:-**

i) The petitioner is a native of Tiruchirappalli. The petitioner arrived at Tiruchi International Airport from Malaysia by Air India Express Flight

IX682 on 18.08.2016. The Officers of the Directorate of Revenue Intelligence, Chennai Zonal Unit had specific intelligence that some of the passengers arriving by the said flight were smuggling foreign origin/marked gold bars/cut gold bars/jewellery and the same was meant to be handed over to unknown persons outside the airport, thereby clearing the gold of foreign origin without declaring and paying Customs Duty. Pursuant thereto, the Officers of DRI –CZU identified the passengers and followed them discreetly. The petitioner and six other passengers were intercepted in the presence of independent witnesses. While it is submitted by the Revenue that they were intercepted at/about the Green Channel, it is the case of the assessee that they were intercepted at the Airway Bridge.

ii) There was also intelligence that some of the passengers had abandoned the Gold inside the Aircraft while dis-embarking. In view of the above intelligence the entire flight was rummaged and six packets containing gold which were covered with black adhesive tapes were found/ recovered. The seven passengers including the petitioner were escorted to the Air Intelligence Unit at Customs Arrival Hall and on enquiry it is stated that all the seven passengers including the petitioner accepted carrying foreign origin gold bars/cut gold bars. The quantity of gold recovered from the petitioner by way of jewellery weighed 1147.2 Gms and the same was valued at Rs.35,48,651/-. It was also alleged that the passengers including the petitioner admitted that they had smuggled the gold bar/jewellery for monetary consideration and were not the actual owner of the same. Thereafter, the purity/origin and value of the said gold bars were examined by Govt. Approved Appraiser.

iii) Statements were obtained from the petitioner and the other passengers under Section 108 of the Customs Act, 1962 (hereinafter referred to as "the Act"). The petitioner allegedly stated that due to her family situations/problems and with a view to meet out her children's educational expenses, she was involved in smuggling activity and that the gold was handed over by one Mani who asked her to hand it over at Trichy, to his mother for which she was promised a commission of Rs.30,000/-. She also submitted that she had not submitted the Customs Declaration Form with regard to the gold which she was carrying and that she was aware that smuggling of gold is an offence. The petitioner was arrested and granted bail under Section 104 (3) of the Act on furnishing surety/security.

iv) Thereafter, a show cause notice dated 15.02.2017 was issued proposing to confiscate the gold seized under Sections 111 (d) and 111 (i) of the Act, on the premise that the petitioner was the carrier and not the owner of the smuggled goods and had indulged in smuggling activity. That the petitioner was not in possession of any documents to show legal possession/import of the said seized gold. It was thus found that the attempt was to smuggle the gold into India without declaring to the Customs Authorities and thereby evading payment of Customs Duty.

3. The petitioner submitted detailed objection vide his letter dated 02.03.2017 *inter alia* highlighting the following:-

(a). That she was intercepted, while she was walking/crossing the Airway Bridge and the allegation that she was intercepted while she was walking through the Green Channel is contrary to facts. In this regard reference was also made to the statement recorded under Section 108 of the Act, to show that the petitioner had always maintained that she was intercepted at the Airway Bridge.

(b). That she had informed the Officers that she purchased the gold from Gold Aachari in Singapore and the same was brought to India for her personal and family use. It was submitted that she had also expressed her willingness to pay the Customs Duty to the officers, which was refused.

(c). The gold which was seized were gold jewellery which was owned by the petitioner at the time of her interception and they were of 22 Carat purity and not 24 Carat purity as found/reported by the Appraiser.

(d). It was also submitted relying upon the statement that a reading of the same would reveal that the petitioner had in fact declared that she had brought gold and thus the case of non-declaration was unfounded and contrary to facts.

(e). It was further submitted that gold was not prohibited, mere non-declaration of the gold by itself would not render the same as being prohibited and thus invoking Section 111 (d) of the Act was clearly unjustified.

(f). It was further submitted that in terms of Section 125 of the Act, the Authority ought to, grant the option of paying fine in lieu of confiscation in the case of goods other than prohibited gold, while in the case of prohibited goods the Officer may extend the above option exercising its discretion. It was thus submitted that the petitioner ought to be granted/extended the option to pay fine in lieu of confiscation as gold is not prohibited goods.

4. The order in original came to be passed by the 3rd Respondent, after considering the objection confirming the proposal while rejecting the request for grant of option to pay fine in lieu of confiscation in terms of Section 125 of the Act *inter alia* on the following grounds:-

(i). That all the seven passengers including the petitioner were intercepted at the Green Channel and in response to an oral enquiry as to whether any gold bar/cut bars were in their possession all of them replied in the negative. The entire proceedings commencing with the interception was conducted in the presence of independent witnesses.

(ii). That the intention of all the seven passengers including the petitioner was to exit the arrival hall without declaring the goods imported which was evident from the fact that they proceeded to the Green Channel, nor was there any oral declaration even on enquiry.

(iii). That import of gold without complying with the regulations/conditions/guidelines stipulated for such import renders the goods viz., gold in the present case prohibited. In this regard reliance was placed on Section 2 (33) of the Act, which defines prohibited goods and the judgment of the Supreme Court in Om Prakash Bhatia reported 155 ELT 423 (SC). Reliance was also placed on the provisions of the Foreign Trade (Development and Regulation) Act, 1992 and the Rules framed thereunder which would show that import of gold had conditions attached and violation/non-compliance thereof would result in the same being treated as prohibited and thus liable for confiscation.

(iv). While dealing with the petitioner's request for being permitted to pay fine in lieu of confiscation after setting out various parameters which requires to be examined rejected the request of the petitioner on finding that there is reason to believe in the absence of valid evidence in regard to source of fund for the seized gold that they were being smuggled. Reliance was placed on the judgment of this Court in *Swaminathan Murugaesen* reported in *247 ELT 21 (Mad.)*

5. On the basis of the above reasons, the proposal was confirmed and the 3rd Respondent ordered absolute confiscation of the gold and packing material seized invoking Section 111 (d) and 111 (i) of the Act. The order also imposed penalty of Rs.7,20,000/- under Section 112 (a) & (b) of the Act.

6. Aggrieved by the same the petitioner filed an appeal before the 2nd Respondent in Order in Appeal.No.69/2018-(Try) Cus, *inter alia* raising the following grounds:-

(a). That gold is not a prohibited item and thus the petitioner ought to have been extended the benefit of the option of paying fine in lieu of confiscation under Section 125 of the Act. That the Adjudicating Authority failed to appreciate the distinction between prohibition and restriction and distinguished the Judgment in *Om Prakash Bhatia.*

(b). That she was intercepted at the Airway Bridge and not at the Green Channel as alleged by the Respondents and submitted that the point of interception is crucial.

(c). That she had declared the gold to the Officers and the

Respondents erred in assuming non-declaration of gold.

(d). That in similar cases, the Commissioner of Customs Appeal had rejected the case filed by the Revenue and reliance was placed on the above to suggest that the department must be consistent. Reliance was also placed on the order of the revisional authority in similar circumstances wherein re-export was permitted. Reliance was placed on the following:

(i).F.No.373/43/B-Cus RA dated 16.04.2008 and also the instructions of CBEC vide letter F.No.495/3/94-Cus-VI dated 02.03.1994.

(ii). To suggest that ownership is not a relevant criteria the appellant further submits that the Revision Authority has passed an order in JABBAR ILYAS and others in F.NO.373/6, 8-11, 23-25, 28-29/8/07-RA ORDER NO. 212- 221/07 DATED 27.04.2007 and reduce the personal penalty and redemption fine reasonably.

(iii). E.No.380/57/B/16-RA/1015 dated 31.01.2018.

(e). That the issuance of common proceedings of the petitioner along with six other passengers without any material/evidence to connect the petitioner with the other passengers would reveal non-application of mind.

7. The 2nd Respondent/Appellate Authority confirmed the order of the 3rd Respondent on the premise that the appellant in her Statement has admitted that the impugned gold jewellery were given to her by one Mani for being handing over to his mother and that she were to receive Rs. 30,000/- for the same, thus the appellant's criminal intent to evade Customs duty was clearly established. The relevant portion of the 2nd Respondent order is extracted hereunder:

> *"7. I have carefully gone through the records of the case. I find that, the appellant brought 1147.200 grams of gold jewellery valued at Rs.35,48,651/- which is of commercial quantity. The appellant in her Statements given before the officers has admitted that the impugned gold jewellery were given to her by one Shri Mani and his uncle Shanmugam and the same would be handed over to the mother of Shri Mani at Trichy for which act she will receive Rs.30,000/- as monetary consideration.*
>
> *Appellant is a carrier and the confiscated gold was not owned by her as admitted by her in the Statement. The appellant being a frequent traveller who has returned after a short visit to India is not eligible to import gold as passenger baggage. The appellant's criminal intent to smuggle gold into India by way of non-declaration and evading of payment of Customs duty due to the Government has been clearly established by the officers. The case laws quoted by the appellant do not come to her rescue as they are irrelevant to this case.*
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> *8. In the light of above, I find that the lower authority is correct in confiscating the gold items absolutely and imposing*

penalty on the appellant. However, I am inclined to reduce the penalty imposed by the LAA to Rs. 3,50,000/-, in the interest of justice.

9. In view of the above, I pass the following order."

8. The matter was carried by way of the revision to the Central Government under Section 129 (D) of the Act, reiterating the grounds raised before the First appellate authority. The 1st Respondent affirmed the orders of the lower authorities stating that the appellant had admitted to being a part of a smuggling plan and the submission/assertion that she has purchased the gold was only an afterthought. It was found that from the facts it was evident that the petitioner had no intent of declaring the gold and intended to evade the payment of Customs duty. The relevant portions of the First appellate order is extracted below:-

"*7. The Government has gone through the case records it observed that the seizure in this case was on the basis of specific intelligence of the Officers of DRI. The rummaging of the aircraft has resulted in the recovery six packets of gold in primary form totally weighing 1047.9 grams, examination of each the 6 Applicants resulted in the recovery of 1791.8 grams of gold in primary form. The Applicants examination resulted in the recovery of 1147.200 gms of gold jewellery valued at Rs. 35,48,652/-(Rupees Thirty five lakhs Forty Eight thousand and Six hundred and Fifty two). The Applicant in her statements has admitted to being a part of smuggling plan so as to* *smuggle gold into the country. The Applicant has admitted that the gold was given to her by one Shri Mani and his uncle Shri Shanmugam to be handed over to his mother in India, for which she would be monetarily compensated. It is evident that the applicant intercepted in the above operation is a carrier and not the owners of the smuggled gold, who used to frequently visit Kuala Lumpur and indulge in smuggling activity for monetary gains. The Applicants assertions that she had purchased the gold from Kuala Lumpur appears to be an after thought attempted to gain the release of the gold. Further, the Applicant is a frequent traveller and is fully aware of the Customs laws and procedure. In her statement she has also admitted to smuggling of gold in her previous visits abroad. In view of the above, it is clear that there was no intention on her part of declaring the confiscated gold to the authorities and if it was not intercepted, the gold would not suffer payment of customs duty and would entail monetary gains to her. There is no doubt about the fact that the provisions of Customs Act, 1962 has been contravened by her in this process and therefore, the seized gold is liable for absolute confiscation. In view of the above mentioned observations the Government is inclined to agree with the Order in Appeal and holds that the impugned gold has been rightly confiscated absolutely so as to deter such passengers from such activities in the future. Hence the Revision Application is liable to be rejected."*

9. The learned counsel for the petitioner would submit that the Respondents had erred in treating the gold as prohibited on account of non-compliance of certain conditions/regulations including filing of declaration. Further the Authorities below had failed to appreciate that while in the case

of gold which is not prohibited, the option to pay fine in lieu of confiscation was mandatory. Assuming gold is prohibited for non-compliance of import conditions, the authorities below ought to have seen that in the case of prohibited goods there is a discretion with the above authority to extend/grant the above option. There is no reason set out by both the 1st and the 2nd Respondents for refusal to exercise of discretion of granting the option to the petitioner. The orders of the 1st and the 2nd Respondents do not even deal with the petitioner's contention that under similar circumstances the option under Section 125 of the Act has been extended/granted by various authorities/ bodies/courts i.e., Commissioner Appeals, Tribunals as well as High Courts, non-application of mind to the above aspect would vitiate the entire proceedings for failure to take into account relevant factors.

10. To the contrary, it was submitted by the learned counsel for the Respondents by relying upon the counter and the written submissions and the typed set of papers filed, that the orders of the Respondents do not warrant interference as the appellate authorities have considered the

grounds raised by the petitioner and emphasis was also placed on the fact that the petitioner had in her statement under Section 108 of the Act admitted and has chosen to come up with a different version after a lapse of six months vide letter dated 02.03.2017. That any import of gold against the regulations/conditions stipulated for legal import would result in the goods falling under the category of "prohibited goods". That once it is prohibited goods it becomes a matter of discretion vested with the appropriate authority to grant/extend the option of payment of fine in lieu of confiscation under Section 125 of the Act or not to do so.

11. Heard both sides, perused the materials on record.

12. I find that both the appellate as well as the Revisional authority has not addressed the primary question raised by the petitioner as to whether gold is not prohibited goods but at the highest only restricted goods and mere non-compliance with the conditions attached to import in the form of submission of declaration form would not result in the metamorphosis of goods which are restricted goods into prohibited goods. The above question

ought to have been addressed for it would have an impact with regard to the complexion of the right of the petitioner, with regard to the option to pay fine in lieu of confiscation under Section 125 of the Act. It is beyond doubt that while in the case of goods which are not prohibited, the option under Section 125 of the Act is a matter of right, while in the case of prohibited goods, the authority is vested with a discretion to either extend the above option or not. The 1st and the 2nd Respondents ought to have seen that the power with regard to prohibited goods being discretionary, and thus assuming the goods are prohibited in the circumstances of the case, nevertheless, they ought to have examined if the exercise of discretion has been made by the Adjudicating Authority keeping in mind that the power exercised by the officer under Section 125 of the Act is a quasi-judicial power.

13. This Court finds that the language of Section 125 of the Act confers discretion on the adjudicating authority. The adjudicating authority is obliged to address the question as to whether the discretion should be exercised in favour of the assessee having regard to the facts and

circumstances of the case. ***In Har Govind Das K Joshi v. CC*** reported in ***1992 (61) E.L.T. 172 (S.C.),*** the Supreme Court held that the adjudicating authority, before ordering confiscation, must first address itself on the question of exercising its discretion to give an option of redemption to the assessee. The twin tests for exercise of discretion under Section 125 are "relevance" and "reason". The discretion has to be exercised in conformity with the purpose for which it has been conferred and the object which it seeks to achieve. Reasons must be recorded in support of it. In the exercise of discretion, non-consideration or non-application of the mind to the relevant factors would not only render the exercise manifestly erroneous, but would also warrant judicial interference. The power to give an option to the importer to redeem the prohibited goods upon payment of fine is a power coupled with the duty and in any event it should be exercised fairly and reasonably and not arbitrarily and capriciously, there must be at least an application of mind to the discretion in terms of Section 125 of the Act.

14. On a reading of the orders of the 1st and 2nd Respondents, it appears to me that there is non-application of mind to the discretion that

ought to be exercised even assuming that the imported gold have to be treated as prohibited goods.

15. Secondly, I find that there is no reference whatsoever to any of orders which according to the petitioner was passed by the Respondents herein under similar circumstances wherein the benefit of the option under Section 125 of the Act was extended to similarly placed importers. While it is true that the Appellate Authorities may or may not agree with the submissions of the petitioner, it is rudimentary that quasi-judicial authorities ought to apply their mind to the issues raised and material on record before arriving at a conclusion. I am afraid that the 1st as well as the 2nd Respondents had passed orders without applying their mind to the issues raised in particular, whether non-compliance of the conditions attached to the restricted goods, the same would be treated as prohibited goods nor to the orders relied upon to suggest that under similar circumstances the discretion has been exercised in the favour of the importer by granting the option. It appears to me that consistency in fiscal matters is important. The 1st and the 2nd Respondents by not dealing with the submission as to the

nature of gold imported viz., non-compliance would result in the same being treated as prohibited and not restricted goods, for it has a direct impact on the nature of right available under Section 125 of the Act. The 1st and 2nd Respondents have not dealt with the orders passed under similar circumstances nor the case laws relied upon, thereby vitiating the order.

16. In view of the above, the impugned order is set aside and the matter is remanded back to the 1st Respondent to re-adjudicate the revision application filed by the petitioner as expeditiously as possible, after affording an opportunity of hearing to the petitioner. The writ petition stands disposed of with the above direction. No costs. Consequently, connected miscellaneous petition is closed.

27.01.2023

Index: Yes/No
Speaking order/Non-speaking order
nst/mka

MOHAMMED SHAFFIQ, J.

nst/mka

To:
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Additional Secretary to the Government of India,
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