

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,
BANGLORE-560009

COURT-2

Customs Appeal No. 862 of 2011

*[Arising out of the Order-in-Original No.2/2010-Cus. dated
31.3.2010 passed by the Commissioner of Central Excise,
Customs and Service Tax, Calicut.]*

Shri C. M. Abdul Razak

....Appellant

Chithalamannil House,
Karakunnu,
Thirkalangode PO
Manjeri,
MALAPPURAM DIST.

Vs.

Commissioner of Customs

....Respondent

C. R. Building,
Mananchira,
Calicut – 673 001.

AND

Customs Appeal No. 1746 of 2010

*[Arising out of the Order-in-Original No.2/2010-Cus. dated
31.3.2010 passed by the Commissioner of Central Excise,
Customs and Service Tax, Calicut.]*

Commissioner of Customs

....Appellant

C. R. Building,
Mananchira,
Calicut – 673 001.

Vs.

Shri C. M. Abdul Razak

....Respondent

Chithalamannil House,
Karakunnu,
Thirkalangode PO
Manjeri,
MALAPPURAM DIST.

Appearance:

Mr. M. Hariviswanaath, Advocate

....For Assessee

Mr. K. A. Jathin, A.R

.... For Revenue

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 02/08/2023

Date of Decision: 06/12/2023

FINAL ORDER No. 21334 - 21335 of 2023

Per R. BHAGYA DEVI:

(i) Customs Appeal No. 862 of 2011

The Air Intelligence Unit intercepted a passenger by name Mujeeb Rehman on 7.12.1994. On examination, various countries foreign currency equal to Rs.1,19,54,092/- were found concealed by him. The currency was concealed inside white cloth pouches tied around the waist, thighs and calf of the pax. They also found piece of paper containing "ALMAS EXCHANGE DUBAI 256463-256445". After detailed investigations, the Original Authority confiscated the foreign currency and imposed penalty on all the 21 noticees relevant to the case. Out of these 21 noticees, 6 noticees preferred revision application before Government of India which was rejected, the remaining noticees accepted the Order-in-Appeal except Mr. C. M. Abdul Razak, the present appellant. The appellant Mr. Abdul Razak filed an appeal before CESTAT and this Tribunal after setting aside the Order-in-Original directed the Commissioner to re-adjudicate the case. The Commissioner in the impugned order states that none of the noticees including the present appellant had claimed the ownership of the foreign currency seized and therefore, the question of confiscation of the seized foreign currency and the materials used to conceal the

same is also to be untouched. Accordingly, he proceeds with the involvement of Mr. C. M. Abdul Razak in concealing the foreign currency. After verifying the documents and statements, the Commissioner imposes a penalty of Rs.10,00,000/- on the appellant. The appellant is in appeal against this impugned order.

2. The learned counsel on behalf of the appellant submits that on the very same set of facts which was the subject matter of adjudication, the appellant was prosecuted along with others for the alleged offences under Section 135 of the Customs Act, 1962. The Trial Court on merits found no material to connect the appellant to the seizure and has passed an order of acquittal which has become final. Therefore, it is claimed that if the Criminal Court acquits the appellant on the same set of facts, the Commissioner cannot impose penalty.

3. It is further submitted that the entire case of the Revenue is on the basis of statements of the co-accused in the alleged offence. The appellants exculpatory statement should have been given due credence, which has not been done by the Commissioner in the impugned order. Reliance is placed on the following judgment:

- i. M. Paul Antony vs. Bharat Gold Mines: (1999) 3 SCCC 679*
- ii. Gopal Das Udhav Das Ahuja vs. UOI: 2004 (176) ELT 3 (SC)*
- iii. S. Duraiappa vs. Commissioner of Customs, Chennai: 2006 (202) ELT 365 (Tri.) affirmed by Hon'ble High Court of Madras in 2019 (367) ELT 628 (Mad.)*

- iv. *D. V. Kishore vs. Commissioner of Customs, Chennai: 2017 (35) ELT 527 (Mad.)*
- v. *C. Srinivas vs. Commissioner of Customs, Hyderabad: 2006 (201) ELT 379 (Tri.-Bang.)*

4. The learned counsel also submits that Mr. Mujeeb Rehman was intercepted at Calicut Airport with concealed foreign currency and a search was conducted at his house which resulted in recovery of certain documents and none of these documents implicated the appellant. The only allegation by the department is that he was instrumental in arranging alleged illicit export of foreign currencies through carriers through Calicut Airport in connivance with Mr. P. V. Syed stationed at Sharjah. These charges are based on the vague statements of some of the co-noticees.

5. The learned Authorized Representative reiterated the findings of the Commissioner in the impugned order. Referring to paragraph 14 and 15 of the impugned order, he submitted that the statements clearly show the involvement of Mr. C. M. Abdul Razak and therefore, Commissioner was right in imposing penalty under Section 114 of the Customs Act, 1962.

6. Heard both sides and perused the records. As submitted by the appellant, the Trial Court based on the same facts and circumstances has found Mr. Mujeeb Rehaman as guilty and found nothing incriminating in the statement of Mr. Mujeeb Rehaman against Mr. C. M. Abdul Razak. The trial court also observed that

there is no direct evidence against others including Mr. C.M. Abdul Razak and it held that the complainant (Revenue) has not succeeded to prove their guilt beyond reasonable doubt. The Trial Court held only the passenger Mr. Mujeeb Rehman as guilty and Mr. C. M. Abdul Razak one of the accused as not guilty and they were acquitted under Section 248(1) of CrPC. The Commissioner relying upon the decision in the case of **Gopaldas Udhavdas Ahuja vs. Union of India: 2004-TIOL-123-SC-CUS** has held that acquittal by Trial Court cannot invariably result in setting aside the orders of confiscation in adjudication proceedings. We agree with this view of the Commissioner since these proceedings are entirely different proceedings under different Section of the Customs Act, 1962. However, the apex court also held that though the proceedings are separate and distinct, it did not entitle the authorized officer to proceed arbitrarily in making an order of confiscation. Therefore, it is to be seen whether the evidences on record would require imposition of penalty under Section 114 of the Customs Act, 1962. The evidences as produced in the impugned order are in the form of statements of Mr. Somasundaram, wherein it was stated that he had got a call from Mr. C. M. Abdul Razak late in the night informing him that his man was caught by the Customs at the Airport while trying to smuggle out foreign currencies and he also informed him to contact Mr. Aslam at Dubai. Further, Mr. A.K. Nazar who owns a tours and travels, in his statement submitted that Mr. C. M. Abdul Razak made several phone calls on 7.12.1994 to him and it is seemed to be perplexed as if something bad has happened. He also informed

him that he has to meet Mr. Majeed. The same set of facts were before the Trial Court, based on which it was held that there is nothing incriminating in the statement of Mr. Mujeeb Rehman incriminating Mr. C.M. Abdul Razak and there was no direct evidence against other accused including the appellant.

7. In the case of **Francis Stanly Alias Stalin vs. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram: (2006) 13 Supreme Court Cases 210**, the Hon'ble Supreme Court held that:

“10. We make it clear that we are not of the opinion that the evidence of the accomplice can never be relied upon, since such evidence is admissible under Section 133 of the Evidence Act. However, Section 133 has to be read along with Section 114(b) of the Evidence Act, and reading them together the law is well settled that the rule of prudence requires that the evidence of an accomplice should ordinarily be corroborated by some other evidence vide *Suresh Chandra Bahri vs. State of Bihar* AIR 1994 SC 2420.”

7.1 In the case of **Gobinda Das vs. Commissioner of Customs (Prev.), Kolkata: (2023) 7 Centax 201 (Tri.-Cal)**, wherein officers of the DRI had recovered 120 pieces of gold biscuits from the possession of Shri Bishnupada Dey which was seized from his house. He could not produce any licit documents in support of possession carrying, transporting or dealing with the said gold biscuits but in his statement, he alleged that Mr. Gobind Babu was also part of the offence committed by Mr. Bishnupada Dey. In this case, the Tribunal held that “we find that the entire case of the Revenue has been built on the basis of the statement of the co-accused. There is no evidence available on record to establish that the appellant had asked him to carry the gold. The

connection between the appellant and Bishnupada Dey was the phone number which he had asked to call the appellant. The second allegation was that Mr. Govinda Das alias Gobind Babu was the proprietor of the house where 140 pieces of gold was seized.” With these evidences in the background, the Supreme Court held that the statement of the co-accused has no evidentiary value and also the statement of the co-accused has not been corroborated with any other evidence. Accordingly, the penalty imposed was held as not sustainable.

7.2 In the case of **Commissioner of Customs, Trichy vs. Duraiappa: 2019 (367) ELT 628 (Mad.)** wherein the question here arose whether on the same set of facts and evidences when the prosecution initiated by the customs authorities under Section 135 of the Customs Act, 1962 had resulted in an acquittal giving them the benefit of doubt at the hands of the competent criminal court, the penalty under Section 112b of the Customs Act, 1962 would sustain. The Hon’ble Madras High Court held that:

“11. The reason of such double jeopardy to be avoided is obvious, even though the two proceedings may operate in different fields and may have different nature. The Departmental proceeding on civil side, which is based on preponderance of probability premise based, whereas on the criminal side, it is the proof beyond the reasonable doubt, which forms the basis of conviction or acquittal, are different but the distinguishing feature to allow the two proceedings to go ahead parallelly is that the different set of facts and evidence should be available before the concerned authorities proceeding in two parallel proceedings. The same principles would apply in a taxing statute like the Customs Act, 1962, also because the ingredients sought to be satisfied for imposition of penalty as well as for prosecution of the concerned accused persons is same and identically worded, as it would appear from the quotation of the two provisions above.

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15. Therefore, in the absence of any additional or further material with the Revenue, we do not find any error committed by the Learned Tribunal to set aside the penalty under Section 112(b) of the Act on the basis of the order of acquittal by the concerned trial Court below. As a later development, we also find that the appeal of the Revenue in this regard also, has failed at the hands of this Court that further fortifies the view that the Revenue's case for prosecuting the accused/respondents persons did not have any merit. Therefore, we cannot find any fault with the order of the Learned Tribunal, setting aside the penalty in question. Consequently, the civil miscellaneous appeal filed by the Revenue would be liable to be dismissed and the same is accordingly dismissed. No costs."

Further, the Hon'ble Madras High Court also held that in the absence of any additional or further material with the Revenue, we do not find any error committed by the learned Tribunal to set aside the penalty under Section 112b of the Act on the basis of the order of acquittal by the concerned Trial Court below.

8. Similarly in the present case, we do not find any additional evidences other the statements of the co-accused produced by the Revenue other than those that have been placed before the trial court based on which the trial court has acquitted the appellant. In view of the above decisions, we do not find any merit in the impugned order and accordingly, we set aside the order to the extent of penalty imposed on the appellant under Section 114 of the Customs Act, 1962. The appeal is allowed.

(ii) Customs Appeal No. 1746 of 2010

9. The Department has also filed an appeal against the impugned order on the ground that the impugned order has not dealt with the question of confiscation of the foreign currency and other materials involved therein. The learned Authorized Representative further submits that there is legal infirmity in the impugned order in as much as the Commissioner has not dealt with the question of confiscation. It is submitted that this Tribunal has set aside the Order-in-Original 18.3.1997 on the ground that he had no jurisdiction to adjudicate the matter hence, the order became null and void. It is also claimed that in the absence of any decision by the Commissioner on the proposal made in the show-cause notice for confiscation of the currency and the vehicle, the issue of ownership of the currency and vehicle and penalty stands open. Therefore, it is submitted that the de novo proceedings are not as per the directions of the CESTAT, hence the matter should be remanded for deciding afresh.

10. This Tribunal vide its Final Order No. 1270/2003 dated 17.9.2003 had set aside the Order-in-Original dated 18.3.1997 passed by the Dy. Commissioner (Customs) on the ground that he had no jurisdiction to act as an adjudicating authority in view of the quantum in dispute. The appeal was allowed by way of remand with a direction to the jurisdictional Commissioner to adjudicate the matter. Therefore, the show-cause notice had to be freshly adjudicated in view of the above directions of the Tribunal.

As seen from the show-cause notice dated 19.5.1995, at para 53 it had proposed confiscation of the foreign currency valued at Rs.1,19,54,092/- under Section 113 of the Customs Act, 1962 along with the material objects used for concealing under Section 119 of the Customs Act, 1962 in addition to the penalty imposed on all the persons involved in the above offence. As rightly argued by the Revenue, the Order-in-Original passed by the Deputy Commissioner was set aside by CESTAT and therefore, the Order-in-Original had become null and void. Accordingly, the Commissioner in the impugned order should have dealt with all the issues that were part of the original show-cause notice in as much as the entire order was set aside by the Tribunal. Accordingly, the appeal of the Revenue has to be allowed as Commissioner has not dealt on the question of confiscation of foreign currency and other materials involved in the alleged offence. The matter is remanded to the Commissioner to decide the issue of confiscation of foreign currency and vehicle having Registration No.KRM-1911 as proposed in the show cause notice dated 19/05/1995.

11. In the result, we pass the following order:

- (a) Customs Appeal No. 862 of 2011 filed by appellant [Mr. C. M. Abdul Razak vs. Commissioner of custom, Calicut]:
- The impugned order is set aside only to the extent of penalty imposed on the appellant under Section 114 of the Customs Act, 1962.

- (b) Customs Appeal No. 1746 of 2011 filed by the Revenue [Commissioner of Customs, Calicut vs. Mr. C. M. Abdul Razak]: The matter is remanded to the Commissioner for the limited purpose of considering confiscation of foreign currency and vehicle having registration No.KRM-1911 as stated above.

(Order pronounced in open court on 06/12/2023.)

(P. A. AUGUSTIAN)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

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