

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

REGIONAL BENCH – COURT NO.1

Customs Appeal No.313 of 2010

[Arising out of Order-in-Original No.02/2009/CUS/C, dt.24.12.2009 , passed by the CCE & C, Nagpur]

Renuka W/o. Vasant Khakkar
G-01, 24, Vedant Residency, Cement Road,
Shivaji Nagar, Nagpur 440 010

.....Appellant

VERSUS

CCE Nagpur
Kendriya Utpad Shulka Bhavan,
Telangkhedi Road, Civil Lines, Nagpur

.....Respondent

WITH

Customs Appeal No.314 of 2010

[Arising out of Order-in-Original No.02/2009/CUS/C, dt.24.12.2009 , passed by the CCE & C, Nagpur]

Vasant Kumar Khakkar
G-01, 24, Vedant Residency,
Cement Road, Shivaji Nagar,
Nagpur 440 010

.....Appellant

VERSUS

CCE Nagpur
Kendriya Utpad Shulka Bhavan,
Telangkhedi Road, Civil Lines, Nagpur

.....Respondent

Appearance:

For Appellants : Shri Vishal Agarwal, Shri Ramnath Prabhu - Advocates
For Respondent : Shri Ramesh Kumar, AC (AR)

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.A/86768-86769/2019

Date of Hearing: 01.04.2019
Date of Decision: 27.09.2019

PER: DR.D.M. MISRA

These appeals are filed against Order-in-Original No.02/2009/CUS/C, dt.24.12.2009, passed by the CCE & C, Nagpur.

2. Briefly stated the facts of the case are that the Appellant Shri Vasant Kumar Khakkar, holding Passport No.F6434608 entered into Nagpur International Airport for proceeding to Sharjah and during the course of screening of his baggage, Indian currency of Rs.22,50,000/- contained in 11 pouches was noticed by CISF Personnel. On their information to Customs authorities, consequently, the said currency was seized by the Customs and after investigation, notice was issued to him on 16.09.2009 for confiscation of the seized currency under Section 113(d) and (e) of Customs Act, 1962 read with Regulation 3 of FEMA (Export & Import Currency) Regulation, 2007, penalty proposed under Section 114 of Customs Act, 1962 against him and his wife Smt.Renuka Vasant Khakkar. On adjudication, the Indian currency of Rs.22,50,000/- was directed to be absolutely confiscated and penalty of Rs.45.00lakhs imposed on Shri Vasant Kumar Khakkar and penalty of Rs.22,50,000/- on Mrs. Renuka Vasant Khakkar under Section 114 of Customs Act, 1962. Hence, the present appeals.

3. At the outset, the learned Advocate Shri Vishal Agarwal for the Appellants has submitted that on 18.05.2009, the Appellant Shri Vasant Kumar Khakkar entered the Nagpur Airport to board the Air Arabia Flight No.G-9-410 to travel to Sharjah. He went to the baggage screening counter to have these bags screened and for sealing the same so that he could proceed to the airlines counter for

check-in and handing over the baggage. While screening the baggage, CISF officers noticed Indian currency in the said baggage and on being asked, the Appellant Shri Vasant Kumar Khakkar informed that it was being carried to purchase jewellery from Sharjah for the wedding to be held in his family. On being informed by CISF about such currency, which is in excess of Rs.5,000/- and not supposed to be carried out of India, without proper approval from RBI, the Appellant Shri Vasant Kumar Khakkar expressed his desire to return without travelling on that date. However, CISF Officers, in the meanwhile, called upon the Customs officers to seize the currency on the ground that the Appellant had illegally attempted to export the Indian currency. The learned Advocate for the Appellant has submitted that there was no attempt on their part for export of the Indian currency inasmuch as the baggage which contained Indian currency was screened by CISF personnel and such Indian currency was not in any manner concealed inside the bag. After screening and putting necessary tag, the next step was to approach the second counter to collect the boarding pass from the airlines. It is their contention that the immigration counter and the Customs counter were to be approached for ultimate boarding the flight after obtaining necessary boarding pass from the airlines and scrutiny check. Therefore, there was no attempt on their part to export Indian currency without proper permission from RBI.

4. The learned Advocate submitted that at the most the said action on the part of the Appellant be called as an act of 'preparation to export' and not an 'attempt to export' Indian currency. In support, the learned Advocate refers to the judgment of Hon'ble

Supreme Court in the case of Narayandas Bhagwandas Madhavdas Vs State of West Bengal – 1999 (110) ELT 85 (SC) and Tribunal's judgment in the case of Vijay Hemantdas Java Vs CCE Airport – 2005 (192) ELT 796 (Tri-Mum). In the said case, the Tribunal followed the principle laid down by Hon'ble Supreme Court in the case of Malkiat Singh Vs State of Punjab – AIR 1970 SC 713. Applying the tests laid down in the aforesaid judgment to the facts of the present case, it can be sated that the Appellant Shri Vasant Kumar Khakkar has not reached the Customs counter and was intercepted only at the stage of baggage screening itself. Therefore, he has no opportunity to declare the currency found in his possession. Secondly, the Appellant had not made any attempt to conceal the currency carried by him in the bag and offered explanation when it was detected by CISF officers on screening of the baggage. Further, the Appellant had not proceed with the currency for allegedly illegal export of Indian currency by continuing with the journey but expressed his desire to go back with the currency and obtain necessary approval from the concerned authorities before such currency was seized by the Customs officers. Hence, the allegation of attempting illegal export of Indian currency is not sustainable against the Appellant.

5. Further, the learned Advocate has submitted that penalty imposed on Mrs. Renuka Vasant Khakkar, wife of Shri Vasant Kumar Khakkar is totally un-tenable as there is no evidence on record to show that she had in any manner contravened the provisions of Section 114 of Customs Act, 1962. The Appellant Mrs. Renuka Vasant Khakkar, in her statement, even though disclosed that

Rs.22,50,000/- Indian currency was obtained by sale of jewellery and to be carried by her husband on his visit to Sharjah but categorically stated that she was unaware of the permission required to be obtained from RBI or whether her husband obtained any such permission. Thus, mere knowledge on the part of the Appellant Mrs. Renuka Vasant Khakkar that her husband was carrying the Indian currency would not render her liable for penalty under Section 114 of Customs Act, 1962. In support, he has referred to the decisions in the case of B. Chellapan Vs CCE, Tiruchirapalli – 1995 (79) ELT 236 (Tri.) and R.P. Narayana Vs CC, Madras – 1997 (94) ELT 174 (Tri). Further, the learned Advocate submitted that the penalty imposed on the Appellant is quite disproportionate to the allegations and being irrational liable to be set aside.

6. Per contra, the learned A.R. for the Revenue reiterates the findings of the learned Commissioner (Appeals). The learned A.R. submitted that there is no dispute about the fact that the Appellant was carrying Indian currency of Rs.22,50,000/- in contravention of various regulations. It is his contention that once the Appellant Shri Vasant Kumar Khakkar with Indian currency entered into the airport and submitted the baggage for screening, it could be construed that ultimately it was his intention to carry the Indian currency out of India. It is his contention that as the Appellant has already purchased the ticket and about to board the flight after obtaining boarding pass from the respective airline counter and at the Customs, had not intercepted him after receiving information from CISF Personnel about the presence of huge Indian currency in his baggage, the Appellant Shri Vasant Kumar Khakkar would have in a

routine manner, boarded the flight and carried the Indian currency in violation of the provisions under FEMA 1999 and Customs Act, 1962. The learned Commissioner, after analysing the evidences, particularly the Panchnama dated 18.05.2009 and the statements of Shri Vasant Kumar Khakkar and his wife Mrs. Renuka Vasant Khakkar, recorded a categorical finding that the Appellant Shri Vasant Kumar Khakkar had attempted to carry Indian currency illegally and accordingly observed that provision of Section 113(d) are attracted. Further, he has submitted that imposition of penalty on Mrs. Renuka Vasant Khakkar is also justified as she has actively abetted in smuggling of Indian currency out of India and accordingly liable to penalty under Section 114 of Customs Act, 1962.

7. The learned A.R. for the Revenue submits that for the purpose of commission of an offence, there are two things – one ‘mens-rea’ and another ‘physical act for commission’. It is his contention that in the present case, both the elements are present. After being intercepted by the CISF Personnel, the Appellant Shri Vasant Kumar Khakkar decided to go back which itself indicates his mental condition that he had no intention to declare the currency to the Customs. It is his contention that in the event, he has intention to declare the currency to the Customs and declare the same which could have been verified by the Customs at the time of making declaration. Besides, the Appellant had not carried with him any proof relating to source of procurement of such currency and the same should have been kept with him for production of demand. Therefore, the plea that he has not reached the Customs counter for declaration of the currency has no substance. In support of his

submission, the learned A.R. for the Revenue refers to the judgment of Hon'ble Supreme Court in the case of State of Maharashtra Vs Mohd. Yakub & Others – 1993 (13) ELT 1637 (SC). Applying the ratio laid down in the said judgment, it is clear that there is an intention to carry the Indian currency outside India is established and attempt to commit the said offence is also evident when the Appellant bought a ticket to travel to Sharjah after arranging the Indian currency by selling the gold, for exportation and entered the International Airport at Nagpur. Therefore, imposition of penalty and directing confiscation of the seized currency by the Commissioner is in accordance with the law, hence sustainable.

8. Heard both sides and perused the records. The short question involved for determination is whether the Indian currency seized from the Appellant Shri Vasant Kumar Khakkar is liable for confiscation and penalties on both the Appellants are justifiable under Section 114 of Customs Act, 1962. The undisputed facts are that the Appellant Shri Vasant Kumar Khakkar entered into Dr. B.R. Ambedkar International airport, Nagpur with Indian currency of Rs.22,50,000/- on 18.05.2009 on his way to Sharjah by taking on Flight No.G-9-410. It is pleaded by the Appellant that while screening of the baggage by CISF, the Indian currency was detected and on information to the Customs Department, the same was seized. Thus the argument by the learned Advocate for the Appellant that since the Appellant has not taken their boarding pass by checking-in, nor completed the security and reached the Customs counter, hence detection of currency at the stage of screening of the baggage could at best be considered as 'preparation' but not an

'attempt' to export of the Indian currency out of the country. Precisely, it is their argument that unless the stage of preparation is crossed and the stage of 'attempt' to export is reached, the goods are not liable for confiscation under Section 113(d) of Customs Act, 1962. Further, it is their contention that since the Indian currency was kept in their Bag and presented for screening, not in any manner concealed, therefore, Section 113(e) is also not attracted. To examine the said plea, the relevant provisions are produced below:-

"Section 113. Confiscation of goods attempted to be improperly exported, etc.

The following export goods shall be liable to confiscation:-

(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation."

9. A plain reading of the aforesaid provisions makes it clear that any goods attempted to be exported or brought within the limits of Customs area for the purpose of being exported, contrary to the any prohibition, would result into confiscation. In the present case, the goods have been brought into the airport by the Appellant Shri Vasant Kumar Khakkar with an intention to take the same to Sharjah. However, on being detected while screening the baggage by CISF, it is their argument that he has expressed his desire to return back instead of continuing his journey, but the customs authorities seized the same. Therefore, their plea that the action of

the Appellant has remained at the stage of 'preparation' only and no attempt has been made to export the Indian currency out of India.

10. There is no quarrel on the issue that the Indian currency when attempted to be exported out of India beyond the prescribed limit is liable to confiscation in view of the principle laid down by the Larger Bench of this Tribunal in the case of *Peringatie Hamza Vs CC (Airport), Mumbai – 2014 (306) ELT 332 (Tri-LB)*.

11. The dispute centres around the fact that there has been no attempt on the part of the Appellant to export the Indian currency out of India; it is their argument that it could be at best a preparation. Therefore it is relevant to understand the meaning and scope of the words 'preparation' and 'attempt'. The said words have been explained by the Hon'ble Supreme Court in the case of *State of Maharashtra Vs Mohd. Yakub & Others – 1993 (13) ELT 1637 (SC)*.

Their Lordships observed as below:-

"12. At the outset, it may be noted that the Evidence Act does not insist on absolute proof for the simple reason that perfect proof in this imperfect world is seldom to be found. That is why under Section 3 of the Evidence Act, a fact is said to be 'proved' when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This definition of 'proof' does not draw any distinction between circumstantial and other evidence. Thus, if the circumstances listed above establish such a high degree of probability that a prudent man ought to act on the supposition that the appellant was attempting to export silver from India in contravention of the law, that will be sufficient proof of that fact in issue.

13. Well then, what is an "attempt"? Kenny in his "Outlines of Criminal law" defined "attempt" to commit a crime as the "last proximate act which a person does towards the commission of an offence, the consummation of the offence being hindered by circumstances beyond his control". This definition is too narrow. What constitutes an "attempt" is a mixed question of law and fact, depending largely on the circumstances of the particular case. "Attempt" defies a

precise and exact definition. Broadly speaking, all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate overt steps to commit the offence. Such overt act or step in order to be 'criminal' need not be the penultimate act towards the commission of the offence. It is sufficient if such an act or acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence. As pointed out in *Abhayanand Mishra v. State of Bihar*, (1962) 2 SCR 241, there is a distinction between 'preparation' and 'attempt'. Attempt begins where preparation ends. In sum, a person commits the offence of "attempt to commit a particular offence" when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence."

12. From the statements furnished by the Appellant Shri Vasant Kumar Khakkar it reveals that the Indian currency was carried in his baggage with an objective to take the same out of India. The same facts also confirmed by his wife Smt. Renuka Khakkar that the said amount of Indian Currency was obtained by selling her jewellery by her husband to carry with him to Sharjah. Thus the intention of the Appellant to take the Indian Currency to Sharjah after procuring the same on sale of his Wife's jewellery was clear. The second step also completed, when he took the Indian currency to Air port the customs notified area for his onward journey to Sharjah. It is his contention that when it was detected on screening by the CISF Personnel and was made aware of that he could not carry more than Rs.5,000/- Indian currency, he decided to return back and obtain necessary permission for such currency to be carried. Revenue disputed the argument of the Appellant on the ground that since he was a

frequent traveller and in past visited other countries, admitted to having knowledge of the limit of Rs.5000/- Indian currency that could be taken abroad, therefore, the Indian currency was carried bonfidelly/ignorantly cannot accepted. We find force in the argument of the Revenue. The evidence brought on record reveals that stage of preparation was over and the Appellant Shri Vasant Kumar Khakkar made an attempt to export the Indian currency.

13. Besides, we find that sub-sections (d) of Section 113 consists of two independent alternative situations viz. (1) the goods attempted to be exported and (2) or brought within the limits of any Customs area for the purpose of being exported. In the present case, undisputedly, both the conditions are present. the second situation prescribed under sub-section (d) is satisfied, inasmuch as both Shri Vasant Kumar Khakkar and Smt. Renuka Vasant Khakkar, in their respective statements submitted that the Indian currency was obtained by selling their jewellery by Shri Vasant Kumar Khakkar to Sharjah and for said purpose on 18.05.2009, the Indian currency was brought to Nagpur International airport a notified Customs area. Therefore, the confiscation of the Indian Currency of Rs.22.50 lakhs under Section 113 (d) of the Customs Act, 1962 is justified. However, we find that the currency were kept in the pouches not concealed in special cavity or in any manner so as to escape easily without coming to the notice of the Customs authorities; but had been kept in the baggage in routine manner and easily submitted for screening, hence invoking of sub-section (e) of Section 113 is not correct.

14. With regard to the imposition of penalty on the Appellant Shri Vasant Kumar Khakkar, we find there are enough material/evidence to come to the conclusion that Shri Vasant Kumar Khakkar has contravened the provisions of the Customs Act, 1962 and aware of the law being a frequent traveller that the Indian currency was carried by him in violation of Provisions of Section 113(d) of the Customs Act, 1962 read with Regulation 3 of Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 framed under Section 6(3)(g) read with Section 47 of Foreign Exchange Management Act, 1999.

15. However, we find that imposition of penalty of Rs.45.00 lakhs under Section 114 of Customs Act, 1962 on Shri Vasant Kumar Khakkar is too harsh and keeping in view the circumstances under which the said currency has been detected and seized, it would meet the ends of justice if the penalty is reduced to Rs.5.00lakhs. On the issue of imposition of penalty on Smt. Renuka Vasant Khakkar, we do not find any justification for imposition of penalty on her only on the ground that she was aware that her husband Shri Vasant Kumar Khakkar would be carrying Rs.22.50 lakhs to Sharhah, when she was no way concerned in obtaining permission nor in any manner associated to carry the said Indian currency without seeking necessary permission from the appropriate authorities in compliance of various provisions of law necessary to carry huge amount of Indian currency to Sharjah. Therefore, penalty on Smt.Renuka Vasant Khakkar is liable to be set aside and is set aside.

16. The impugned order is modified accordingly to the extent recorded as above. Consequently, the Appeal filed by Shri Vasant Kumar Khakkar are partly allowed to the extent of reduction of penalty to Rs.5.00 lakhs and the Appeal filed by Smt.Renuka Vasant Khakkar is allowed.

(Order pronounced in the open court on 27.09.2019)

(Dr. D.M. Misra)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

Bahalkar