

CASE NO.:
Appeal (crl.) 576 of 2008

PETITIONER:
Gurcharan Singh

RESPONDENT:
Directorate of Revenue Intelligence

DATE OF JUDGMENT: 01/04/2008

BENCH:
S.B. SINHA & V.S. SIRPURKAR

JUDGMENT:
J U D G M E N T

REPORTABLE

CRIMINAL APPEAL NO. 576 2008
(Arising out of SLP (Crl.) No. 7914 of 2007)

S.B. SINHA, J.

1. Leave granted.

2. This appeal is directed against a judgment and order dated 25th January, 2007 passed by a learned Single Judge of the Delhi High Court in Crl. M.C. No.4594 of 2003 dismissing an application under Section 482 of the Code of Criminal procedure filed by the appellant and three others.

3. A complaint was filed by the Intelligence officer attached to the Directorate of the Revenue Intelligence alleging that the accused named therein committed offences punishable under Sections 132 and 135 of the Customs Act, 1962 (for short the Act).

4. One A.K. Saxena figured as accused No.5 therein. He was a Customs Officer. He floated various firms in false and fictitious names. Duty drawback amount was claimed for alleged export of readymade garments by the said firms under certain assumed names to the extent of Rs.1,04,62,596/- Appellant herein alongwith others Pawan Kumar, Govind Jha, Radhey Lal made statements under Section 8 of the Act corroborating the allegations made against them that they had conspired with each other in regard to export of inferior quality of readymade garments which had been over-invoiced.

5. Cognizance of the said offence was taken by the Additional Chief Metropolitan Magistrate on 16th April, 2003. An application for discharge was filed inter alia by the appellant herein which was dismissed by the learned trial judge by his order dated 1st October, 2003.

6. An application for quashing of the said order was thereafter filed before the High Court. One of the contentions raised before the High Court was that Shri A.K. Saxena being a Customs Officer could not have been proceeded against under Section 135 of the Act and, thus, the complainant committed a serious illegality in exercising his power of arrest as against him which is not contemplated under Section 104 thereof. It was further more contended that the allegations made in the complaint petition even if taken to be correct in its entirety do not disclose an offence under Section 135 of the Act.

7. Indisputably, Section 135 of the Act was amended in the year 2003.

The High Court having regard to the explanatory notes to the legislative changes as per the Budget Bulletin 2003 opined that amendment being clarificatory in nature will have retrospective effect.

8. Dr. Ashutosh, learned counsel appearing on behalf of the appellant would submit that duty drawback having not been included in Section 135 of the Customs Act prior to its insertion in 2003, the impugned judgment cannot be sustained. It was urged that by insertion of the said provision, a new type of offence was created and thus, it cannot be held to be clarificatory in nature. It was urged that if importation of some goods are prohibited, no duty could be paid thereon and in that view of the matter the provisions of Section 135 of the Act will have no application.

9. Mr, G.S. Vahanvati, the learned Solicitor General of India, on the other hand, would submit that the allegations made as against the appellant being covered by Section 135(b)(i) of the Act, the complaint petition discloses an offence within the meaning of Section 135 of the Act.

10. Before embarking on the rival contentions raised at the Bar, we may notice the relevant provisions of the Customs Act, as they stood prior to enactment of Customs Amendment Act, 2003.

Section 2(33) of the Act defines "prohibited goods" as under :-

"2.(33) "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported, have been complied with."

Section 11 empowers the Central Government by issuing a Notification to prohibit either absolutely or subject to such conditions to be fulfilled before or after clearance as may be specified in the Notification, the import or export of goods of any specified description. The Notification can be issued for the purpose mentioned in sub-section (2).

Section 50 provides for presenting the entry of goods for exportation.

"50. Entry of goods for exportation. - (1) The exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall at the foot thereof make and subscribe to a declaration as to the truth of its contents."

Section 113 of the Act provides for confiscation of goods attempted to be improperly exported, clause (d) whereof reads as under :-

"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."

Section 135B of the Act reads :-

"135B. Power of court to publish name, place of business, etc., of persons convicted under the Act:

(1) Where any person is convicted under this Act for contravention of any of the provisions thereof, it shall be competent for the court convicting the person to cause the name and place of business or residence of such person, nature of the contravention, the fact that the person has been so convicted and such other particulars as the court may consider to be appropriate in the circumstances of the case, to be published at the expense of such person in such newspapers or in such manner as the court may direct.

(2) No publication under sub-section (1) shall be made until the period for preferring an appeal against the orders of the court has expired without any appeal having been preferred, or such an appeal, having been preferred, has been disposed of.

(3) The expenses of any publication under sub-section (1) shall be recoverable from the convicted person as if it were a fine imposed by the court."

12. By reason of the 2003 Amendment, Section 135 was amended, which reads as under :-

"135. Evasion of duty or prohibitions.- (1) Without prejudice to any action that may be taken under this Act, if any person, -

(a) is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods, or

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111 or section 113, as the case may be, or,

(c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under section 113,

he shall be punishable, -

(i) in the case of an offence relating to any of the goods to which section 123 applies and the market price whereof exceeds one lakh of rupees, with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than three years;

(ii) in any other case, with imprisonment for a term which may extend to three years or with fine, or with both.

(2) If any person convicted of an offence under this section or under sub-section (1) of section 136 is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the

judgment of the court such imprisonment shall not be for less than one year.

(3) For the purposes of sub-section (1) and (2), the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than one year namely:-

- (i) the fact that the accused has been convicted for the first time for an offence under this Act;
- (ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods which are the subject matter of such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence;
- (iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party to the commission of the offence;
- (iv) the age of the accused."

13. Section 135 (1)(a) of the Act is in two parts. The first part relates to evasion of duty. The second part relates to prohibitions, which in turn relates to "prohibited goods". The words have to be assigned the same meaning as contained in Section 2(33) of the Act. It not only takes within its sweep the goods which are prohibited under the Customs Act but also under other Acts.

14. It is difficult to accept the submissions of the learned counsel for the appellant that prohibition must have a nexus with the payment of duty and in the event some goods are imported which are prohibited goods vis-a-vis payment of duty, then and then only the rigours of Section 135 would be attracted.

As stated earlier Section 135 deals with two types of offences \026 first relates to evasion of duty and the second prohibitions. The word "or" has been used therein. It must be read disjunctively and not conjunctively. This nature of prohibition which would attract the provisions of Section 113 of the Customs Act also has been noticed by us hereinbefore. Section 113(d) uses the words "contrary to any prohibition imposed by or under this Act or any other law for the time being in force".

Clause (i) of Section 113(h) is in two parts, one is in relation to goods entered for exportation under the claim for drawback. The said words were inserted by Act 25 of 1978 w.e.f. 1st July, 1978. Clause (ii) of Section 113 (h), which is in the second part, however, refers to the claim of drawback which does not correspond in any material particular to any information furnished by the exporter or manufacturer under the Act. A wrongful claim of drawback was, therefore, covered both under clause (i) and (ii), one dealing with dutiable or prohibited goods and the other with the entry of goods which was even otherwise covered. It is in that contingency that Section 109 of the Finance Act, 2003 provided :-

"109. In Section 113 of the Customs Act, -

- (a) in clauses (c), (e), (f), (g) and (h), the words "dutiable or prohibited", wherever they occur, shall be omitted;
- (b) for clause (i) , the following clause shall be substituted, namely, -

"(i) any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the

declaration made under Section 77."

(c) in clause (k), the words "under a claim for drawback" shall be omitted. "

15. It is significant to note that clause (ii) of Section 113(h)(i), which was inserted by Finance (No.2) Act, 1991 w.e.f. 27th September, 1991 remained in the statute book. As there was a duplication, one of the clauses, namely clause (i) of Section 13(h) was sought to be substituted by the other.

16. The amendments made in Section 135 of the Act by reason of the Amending Act, 2003 must be viewed from that angle.

We have noticed hereinabove that the allegations made against the appellant in the complaint petition refer to illegal claim of drawback.

The effect of the interpretation of the words "prohibited goods" came up for consideration before this Court in Om Prakash Bhatia vs. Commissioner of Customs, Delhi : (2003) 6 SCC 161 wherein a Division Bench of this Court observed :-

"6. At the outset, we would state that the learned counsel for the appellant has not pressed for the drawback in view of the specific provision of Section 76 which inter alia provides that no drawback shall be allowed "(b) in respect of any goods the market price of which is less than the amount of drawback due thereon". Therefore, for the purpose of getting drawback, the relevant consideration is the market price of the goods prevailing in the country and not the price of the goods which the exporter expects to receive from the overseas purchaser."

The Court opined that the prohibition of importation and exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods and in the event the conditions are not fulfilled, it may amount to prohibited goods.

17. Noticing that such a Notification had been issued by the Central Government in terms of Section 18 of the Foreign Exchange Regulation Act, 1973 viz-a-viz Section 14 thereof providing for valuation of goods for the purposes of assessment, it was held :

"16. The aforesaid section would be applicable for determining the value of goods for the purposes of assessment of tariff under the Act or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value. In the present case, on export of goods in question, no duty was payable under the Act. It was, therefore, contended that there is no scope of application of Section 14 for determining the value of goods by applying the criterion laid down in the said section. In our view, this submission cannot be accepted. For determining the export value of the goods, we have to refer to the meaning of the word "value" given in Section 2(41) of the Act, which specifically provides that value in relation to any goods means the value thereof determined in accordance with the provisions of sub-section (1) of Section 14. Therefore, if the export value of the goods is to be determined, then even if no duty is leviable, the method (mode) for determining the value of the goods provided under Section 14 is required to be followed. Section 14 specifically provides that in case of assessing

the value for the purpose of export, value is to be determined at the price at which such or like goods are ordinarily sold or offered for sale at the place of exportation in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for sale. No doubt, Section 14 would be applicable for determining the value of the goods for the purpose of tariff or duty of customs chargeable on the goods. In addition, by reference it is to be resorted to and applied for determining the export value of the goods as provided under sub-section (41) of Section 2. This is independent of any question of assessability of the goods sought to be exported to duty. Hence, for finding out whether the export value is truly stated in the shipping bill, even if no duty is leviable, it can be referred to for determining the true export value of the goods sought to be exported."

The question came up for consideration again in Commissioner of Central Excise & Customs, A.P. vs. Suresh Jhunjhunwala and others : 2006 (10) SCALE 480 wherein this Court not only noticed Om Prakash Bhatia (supra) but also Commissioner of Customs (EP), Mumbai vs. Prayag Exporters Pvt. Ltd. : (2003) 155 ELT 4 (SC) to hold :-

"18. However, it appears, the same Bench considered the matter at some length in Om Prakash Bhatia (supra) and opined that the exporters were obliged to declare the value of the goods. In a detailed judgment, this Court not only took into consideration the provisions of the Customs Act, but also the provisions of Section 15 of the Foreign Exchange Regulation Act and the rules framed thereunder, as also the notifications issued by the Central Government from time to time. The Court opined that for determining the export value of the goods, it is necessary to refer to the meaning of the word "value" as defined in Section 2(41) of the Act, and the same must be determined in accordance with the provision of Sub-section (1) of Section 14, stating:

'\005Section 14 specifically provides that in case of assessing the value for the purpose of export, value is to be determined at the price at which such or like goods are ordinarily sold or offered for sale at the place of exportation in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for sale. No doubt, Section 14 would be applicable for determining the value of the goods for the purpose of tariff or duty of customs chargeable on the goods. In addition, by reference it is to be resorted to and applied for determining the export value of the goods as provided under Sub-section (41) of Section 2. This is independent of any question of assessability of the goods sought to be exported to duty. Hence, for finding out whether the export value is truly stated in the shipping bill, even if no duty is leviable, it can be referred to for determining the true export value of the goods sought to be exported.'

This Court after noticing the finding of Om Prakash Bhatia (supra) in paragraph 18, observed as under :

"20, This Court did not stop there, but also took into consideration the provision of Rule 11 of the Foreign Trade (Development and Regulation) Rules, 1993,

holding:

'Hence, in cases where the export value is not correctly stated, but there is an intentional over-invoicing for some other purpose, that is to say, not mentioning the true sale consideration of the goods, then it would amount to violation of the conditions for import/export of the goods. The purpose may be money-laundering or some other purpose, but it would certainly amount to illegal/unauthorised money transaction. In any case, over-invoicing of the export goods would result in illegal/irregular transactions in foreign currency.' "

21. It may be true that the said decision related to a matter concerning a drawback scheme, but a decision of this Court interpreting a different section by itself cannot, in our opinion, be brushed aside, only on the ground that the decision of the same bench in Prayag Exporters (supra) is applicable being related to DEPB Scheme. The question, in our opinion, has to be considered having regard to the provisions of the definition of the 'prohibited goods', 'entry of goods' together with the provisions of the Foreign Exchange Regulation Act."

The question came up for consideration yet again in Commissioner of Customs, New Customs House, Mumbai vs. M/s. Vishal Exports Overseas Limited : 2007 (3) SCALE 19 wherein one of us (Sirpukar, J) was a Member. In that case also Om Prakash Bhatia (supra) was noticed. It was, however, found that the factual scenario therein in regard to applicability of the decision had not been established.

It may also be noticed that in Sanjeev Kumar Gupta vs. Commissioner of Customs : 2001 CRI. L.J. 1963 a learned Single Judge of the Delhi High Court held :-

"A person is said to have done anything fraudulently if he does that with an intent to defraud but not otherwise. The requisite guilty knowledge or mens rea under clauses (a) and (b) of Section 135(1) of the Customs Act can be established by circumstantial evidence. Here the petitioner is alleged to have floated fictitious firms with dishonest intention to obtain the duty draw back. In my view on the facts alleged, offence under section 135 of the Act is prima facie made out."

We are not unmindful of the proposition of law that a penal statute must receive strict construction.

18. But it is also a trite law that the Court while interpreting a statute must consider the purpose for which the Act has been enacted. (See - Indian Handicraft Emporium and others vs. Union of India and others : (2003) 7 SCC 589 and Balram Kumawat vs. Union of India : (2003) 7 SCC 628.

19. At this stage the court is concerned with establishment of a prima facie case. As the allegations made in the complaint prima facie discloses an offence under Section 135 of the Act, the High Court, in our view, has correctly refused to quash the proceeding.

20. Applying the said principle to the fact of the present case, we have no hesitation in holding that the High Court has not committed any error whatsoever in passing the impugned judgment.

21. For the aforesaid reasons we do not find any merit in this appeal which is dismissed accordingly.