CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD

REGIONAL BENCH - COURT NO. – I

Customs Appeal No. 30005 of 2024
(Arising out of **Order-in-Appeal** No.HYD-CUS-000-APP1-085-23-24 dated 31.10.2023 passed by Commissioner of Customs & Central Tax (Appeals-I), Hyderabad)

Sh Mohammed Mustafa .. **APPELLANT**
S/o Mohammed Yameen,
19-2-23/M/29/1,
Macca Colony,
Bahadurpura,
Hyderabad,
Telangana – 500 053.

VERSUS

Pr. Commissioner of Customs Hyderabad .. **RESPONDENT**
Kendriya Shulk Bhavan,
L.B. Stadium Road,
Basheerbagh, Hyderabad,
Telangana – 500 004.

APPEARANCE:
Shri R Narasimha Murthy, Consultant for the Appellant.
Shri P Amaresh, Authorised Representative for the Respondent.

CORAM: HON'BLE Mr. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE Mr. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30240/2024

Date of Hearing:08.02.2024
Date of Decision:08.04.2024

[ORDER PER: ANIL CHOUDHARY]

The issue in this appeal is whether absolute confiscation of foreign currency seized from the Appellant is justified under Section 113(d),(e) & (h) of the Customs Act and further imposition of penalty of Rs. 11,33,000/- under Section 114 and equal amount under Section 13(1) of the Foreign Exchange Management Act (FEMA) 1999.

2. The brief facts are that on 24.03.2020 the Appellant was intercepted at Rajeev Gandhi International Airport, Hyderabad by CIF officials on the plea of carrying foreign currency. After interception, the CISF officials informed the Customs Officers and handed over the Appellant with foreign currency to the Customs Officers for further proceedings. The AIU officials verified the total quantity of foreign currency in presence of the Appellant

and panchas and the same was found matching with the quantity mentioned by the CISF officials. The quantity of foreign currency found was as follows:–

Description of Foreign Currency	Denomination wise		Total	Currency Rate	Value in INR
	Denomination	No.of pcs			
UAE Dirhams	1000	136	136000	19.10	2597600
UAE Dirhams	500	306	153000	19.10	2922300
Saudi Arabian Riyals	500	457	228500	18.70	4272950
Saudi Arabian Riyals	100	97	9700	18.70	181390
US Dollar	100	62	6200	71.60	443920
Kuwait Dinar	20	57	1140	232.45	264993
Kuwait Dinar	10	41	410	232.45	95305
Kuwait Dinar	5	30	150	232.45	34868
Bahrain Dinar	20	12	240	186.00	44640
Oman Riyal	50	7	350	188.51	65979
Oman Riyal	20	5	100	188.51	18851
Qatar Riyal	500	40	20000	19.30	386000
				Total	1,13,28,795

3. On being questioned by the Officers as to whether the Appellant had obtained any authorisation/permission from Reserve Bank of India to carry the foreign currency and whether he had obtained the same from any Authorised exchange dealer, in answer, the Appellant replied in the negative. The Customs Officers (AIU) seized the aforementioned foreign currency under panchanama dated 24th March 2021 on the reasonable belief that the same was attempted to be smuggled out of India in contravention of the provisions of the Customs Act read with the Foreign Exchange Management Act, 1999 and the RBI guidelines issued in pursuance of the said Act, and thus is liable for confiscation.

4. Statement of the Appellant was recorded on the same date, wherein, he inter alia stated that he had received the subject foreign currency from one Mr. Abu Baker, who is friend of his brother-in-law Md. Bin Jabeer, with direction to handover to Md. Bin Jabir at UAE, who was a UAE national. He further stated that he did not have any document with regard to the currency.

5. After investigation, show cause notice dated 16th September 2021 was issued alleging that the foreign currency seized equivalent to Rs. 1,13,28,795/-, which was found concealed in sweet packets in the baggage, seized from the Appellant, is liable for confiscation under Section 113(d),(e) and (h) of the Customs Act, read with the provisions of Foreign Exchange Management (Export and Import of currency) Regulations 2015, as

amended. Further alleged that the Appellant did not declare the foreign currency and knowingly concealed it by carrying and dealing in foreign currency, which is liable for confiscation under Section 113 of the Act and liable for penalty under Section 114 of the Act.

6. The Appellant in his attempt to smuggle foreign currency has done violation of Sections 3, 4, 6 and 7 of Foreign Exchange Management Act 1999 and Regulation 5 and 7 of Foreign Exchange Management (Export and Import of currency) Regulations 2015 and Foreign Exchange Management (Possession and Retention of foreign currency) Regulations 2015, has rendered liable for imposition of penalty under Section 13(1) of FEMA 1999.

7. Accordingly, the show cause notice proposed confiscation of the aforementioned seized currency under Section 113(d), (e) & (h) of the Act with proposal to impose penalty under Section 114 of the Customs Act and also under Section 13(1) of Foreign Exchange Management Act.

8. The SCN was adjudicated on contest and the foreign currency in question was confiscated absolutely under Section 113(d), (e) & (h) of the Customs Act read with the provisions of Foreign Exchange Management (Export and Import of currency) Regulations 2015 made under the FEM Act 1999. Further penalty was imposed Rs.11,33,000/- each under Section 114 of the Customs Act and Section 13(1) of the FEM Act 1999.

9. Being aggrieved, the Appellant preferred appeal before the Commissioner (Appeals) interalia on the grounds that there was no ground for confiscation of foreign currency under the Customs Act, when in fact the Appellant have admittedly not entered into Customs area. Admittedly, Appellant was intercepted by the CISF Officers before he could enter the airport and approach the airline counter for boarding pass. The Appellant produced the copy of travel status of his ticket which shows – 'no show', from the website of the airline – Indigo. Thus, the whole case have been made out by the Customs Officers on assumption on presumption, as admittedly Appellant was intercepted by the CISF Officers before he could enter the airport. It is only after a passenger obtains the boarding pass from the concerned airline and thereafter proceeds for security check and emigration clearance, only then the person or passenger enters the customs area and he is required to declare the goods he is carrying if required by law. Thus, in the facts of the present case the Customs Officers had no jurisdiction on the assumed plea of non-declaration of foreign currency.

10. It was further urged that the adjudication order is vitiated as the same is not based on factual evidence. It have been held by Hon'ble Supreme Court in the case of Gianchand Vs State of Punjab [1862 AIR 496 SC], that police officers are not the customs officers. The seizure by the police officer and delivery to customs does not amount to seizure by customs officers.

11. The interception of the Appellant outside the airport by the CISF officers is also supported by the deposition of the punch witnesses, in Adjudication proceedings. Admittedly, the Punch witnesses were not present at the time of interception by the CISF, but were later on called by the customs officers at the stage of drawing of panchanama.

12. It was further urged that Section 16(3) of Foreign Exchange Management Act provides that no Adjudication Authority shall hold an enquiry under sub-section (1) except upon a complaint in writing made by any officer(s) authorised by a general or special order by the Central Government; that in terms of Notification S.O.1156E dated 26.12.2000 issued under Section 38 of FEMA, the officers not below the rank of Deputy Commissioner of Customs and Central Excise have been authorised to exercise the powers conferred under the Act for the contravention referred to in Section 6(3)(g) and 7(1)(a) of the said Act. In the instant case the investigation was conducted by Superintendent of Customs and thus the same is without jurisdiction and further the procedure prescribed under Section 102(1), (2) and (3) was not followed and thus the entire proceedings are ab initio void. The Appellant have placed reliance on the ruling of Tribunal in Commissioner of Customs, Trichy Vs L. Rajkumar [2014 (312) ELT 99 (Tri-Chennai)].

13. It is further urged that Section 113(d) & (e) of the Act are not invokable for confiscation of foreign currency, as the Appellant did not bring the foreign currency within the limits of any Customs area, since he was intercepted and detained outside the airport. The Appellant, as he had not entered the customs area, did not have any opportunity to make any declaration as required under Section 77 of the Customs Act, which fact is supported by the admitted fact that the Appellant had not even obtained boarding pass to enter the International area/Customs area, warranting filing of declaration under Section 77. Thus Section 113(h) is also not invokable.

14. The Appellant had also requested for cross-examination of the punch witnesses during the course of personal hearing. However, the Commissioner (Appeals) observed that the punch witnesses have already been examined during adjudication proceedings and their re-examination is not going to serve any purpose and accordingly the same was rejected. He further held that the offence in the facts of the present case have been committed in the airport and in the customs area and the Superintendent of customs is the proper officer for investigation and seizure, reflected under the Customs Act, though provisions of FEM Act were also invoked. The Commissioner (Appeals) was pleased to dismiss the appeal.

15. Being aggrieved, the Appellant is in appeal before this Tribunal interalia on the grounds that Section 100 provides for power to search a person who has landed or about to board, or is on board a foreign going vessel/craft. Admittedly, in the facts of the present case the Appellant had not entered into International/Customs area, as he had not even obtained the boarding pass. The status of the Appellant's ticket on the website of the airline shows – 'no show'. Further, the Appellant has neither done web check in nor approached the airline counter for obtaining the boarding pass inside the airport.

16. The Appellant further draws attention to the cross examination of the Punch witnesses – Md Ismail and Md. Niazuddin. Both have stated that they were not present when the Appellant was intercepted by CISF and foreign currency was recovered from him. Thus, there is no evidence adduced by the Customs to show that the Appellant had entered International customs area.

17. It is further urged that there was no scope to conduct personal search under Section 101 of the Customs act, as currency is not a notified item, nor any special Order has been issued for conduct of search as required under the said Section. Therefore the search and seizure of foreign currency is not legal and proper. Thus, the whole proceedings are vitiated.

18. Section 77 of the Customs Act requires the owner of any baggage shall, for the purpose of clearing it, make a declaration of the contents to the proper Officer. This provision indicates that a declaration under Section 77 of the Act is required to be filed only when the owner proposed to clear the baggage. In the instant case, since the Appellant did not even obtain the boarding pass, the question of filing currency declaration form, does not

arises. Thus there being no violation of the provisions of Section 77 of the Act, the allegation on this count is fit to be set aside.

19. Further the allegation that foreign currency was concealed in sweet boxes in the baggage, is also a bald allegation as the Appellant had not even entered the customs area. Merely because the foreign currency was kept in sweet boxes it cannot be considered as concealment. For this, reliance is placed on the ruling of this Tribunal in the case of United States Lines Agency Vs Commissioner of Customs(P), Mumbai [1998 (101) ELT 602 (Tri-Mumbai].

20. The Appellant further urges that since he did not enter the customs area, the question of treating the said foreign currency in question as 'prohibited goods' under Section 2(33) of the Customs Act, is wholly irrelevant and misplaced.

21. As required under Section 113 (d) of the Act, confiscation is attracted of any goods attempted to be improperly exported or brought within the limits of any customs area for the purpose of being exported, contrary to any provision under the Customs Act or any other law for the time being in force.

22. Further urges that the provisions under Section 113(e) are not attracted as the goods have not been found concealed in any container in the customs area for the purpose of exportation and further the provisions of Section 113(h) are also not attracted in absence of any appropriate declaration under Section 77, as the occasion for declaration or stage for declaration had not arisen.

23. It is further urged that in the facts of the instant case, foreign currency was not brought within the limits of customs area. Further, customs area is defined in Section 2(11) of the Act – "customs area means the area of customs, station or a warehouse and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities".

24. In the facts of the present case, there is no scope to contend that the goods were attempted to be exported, as admittedly the appellant had not entered the customs area and not reached the stage to file the declaration as required under Section 77. Thus, in the facts and circumstances, there is no scope to contend that the goods were attempted to be exported. Further

urges that attempt is quite different from preparation and any assumed preparation cannot be treated as attempt to export.

25. It is further urged that the proceedings are also ab initio void as search and seizure done by at the end of Customs is wholly without jurisdiction. It is also urged that foreign currency cannot be confiscated absolutely. Reliance is placed on the ruling of the Bombay High Court in Commissioner of Customs Vs Rajinder Nirula reported at [2017 (346) ELT 9 (Bom)] wherein Hon'ble High Court held -

> *The Hon'ble High Court held – we do not find any merit in the learned counsel's argument that the course adopted by the tribunal was impermissible. The definition of goods includes currency and negotiable instruments under Section 2(22)(d). When the power of redemption is exercised, what the law postulates is that there is an option to pay fine in lieu of confiscation. Section 125 (1) of the Customs Act 1962 provides that whenever confiscation of any goods is authorised by this act, the officer adjudicating it may, in the case of any goods, the importation of exportation where of his prohibited under this act or any other law for the timing in force, and shall, in the case of any of the other goods, give to the owner of the goods or where such owner is not known, the person from whom or whose possession such goods have been seized, an option to pay, in lieu of confiscation, such fine as the said officer thinks fit.*
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> *It was further held by High Court – we do not find that there was any error or lack of power. The seized currency was released and by imposing fine and penalty. In the present case, the Tribunal, therefore was justified in holding that since the foreign currency is redeemed on payment of fine, the penalty also deserves to be scaled-down or reduced. This is essentially a finding of fact rendered after consideration of the materials on record. We do not find that the tribunal was in error in adopting the course it has adopted. Accordingly the High Court dismissed the appeal of revenue.*

26. Learned AR for Revenue opposes the appeal and relies on the impugned order.

27. Having considered the rival contentions, we find that admittedly Appellant was intercepted by the CISF officials outside the customs area. The Appellant had admittedly not approached the Airlines counter. This fact is supported by the no-show status of the ticket of the Appellant on the website of the airline. In the circumstances, the Appellant had not entered the customs area, nor there is any failure on the part of the Appellant to make appropriate declaration as required under Section 77 of the Customs Act. Under these circumstances, we find that the provisions of Section

113(e) and (h) are not attracted. At best, there is only a case of intention or attempt to export, as the Appellant was approaching the airport with intention to travel outside India, he was also having a valid ticket. We agree with the conclusion of the Adjudicating Authority that foreign exchange or currency is prohibited goods and therefore liable for confiscation. However, we do not agree that it is correct to deny redemption of the same under Section 125 of Customs Act as the discretion is to be exercised having regards to all relevant facts and cannot be arbitrary. Considering the whole factual nature of seizure and mitigatory facts, this confiscation should not have been absolute. An intention to smuggle prohibited goods cannot be equated with attempt to export prohibited goods.

28. In view of aforementioned findings, we find that there is only venial breach of the provisions of Section 113(d) of the Act. In this view of the matter, we set aside the Order of absolute confiscation under Section 113(e) and (h) of the Act. However, we hold that the foreign currency in question is liable for confiscation under Section 113(d) of the Act, though we set aside the Order of absolute confiscation.

29. We further hold that the seized foreign currency can be redeemed by the Appellant from whose possession it was recovered, on payment of redemption fine of Rs. 10 lakhs. Further, the penalty imposed under Section 114 of the Act is also reduced to Rs. 1 lakh, and penalty under Section 13(1) of FEM Act is set aside.

30. Thus, the appeal is allowed in part with consequential benefits to the Appellant.

(Order Pronounced in open court on 08.04.2024)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

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