



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2488 OF 1998

Shabir Ahmed Abdul Rehman,)
presently residing at post Ambat,)
Tal. Mahasale, Dist. Raigad,)
Maharashtra State - 402 101.)..Petitioner.

V/s.

- 1) The Union of India)
Having office at Ayakar Bhavan,)
new Marine Lines, Mumbai-20.)
- 2) The Joint Secretary to the)
Government of India, having his)
office at 3rd floor, Jeevan Deep,)
Parliament Street, Sansad Marg,)
New Delhi - 110 001.)
- 3) Commissioner of Customs (Appeals))
having his office at 1st floor,)
Air Cargo Complex, NIPT, Sahar,)
Andheri (East), Mumbai-400 099.)
- 4) Commissioner of Customs, having)
his office at Sahar International)
Airport, Mumbai-400 099.)
- 5) Deputy Commissioner of Customs,)
having his office at Air Customs)
Pool, Sahar International)
Airport, Mumbai-400 099.)..Respondents.

Mr.Sujay Kantawala with N.M.Shah, Ramesh Purwani and
Brijesh Pathak for petitioner.

Mr.R.V.Desai, senior advocate with Pradeep Jetly for
respondents.

CORAM : P.B.MAJMUDAR AND
J.P.DEVADHAR, JJ.

DATED : 3RD DECEMBER, 2008.

ORAL JUDGMENT (PER J.P.DEVADHAR, J)

1. During the pendency of an appeal filed against the confiscation order, whether the customs authorities could sell the confiscated gold and when it is ultimately held that the petitioner is entitled to redemption of the confiscated gold, whether the sale proceeds could be returned after deducting the customs duty from the sale proceeds, is the question raised in this petition.

2. In the present case, on 17/4/1997 the petitioner on his arrival from Muscat was apprehended at the Airport as he was carrying 41 gold bars valued at Rs.18,88,337/- (international market value) / Rs.23,16,500/- (local market value) concealed in a pouch. The said gold bars were seized from the petitioner on the reasonable belief that they are liable to be confiscated.

3. Thereafter, on completion of investigation, a show cause notice was issued to the petitioner on 3rd July, 1997 and by an order in original dated 11/11/1997 (despatched on 25/11/1997) it was ordered that the seized gold bars are liable to be confiscated and

penalty of Rs.3,00,000/- was also imposed.

4. Being aggrieved by the aforesaid order, the petitioner filed an appeal before the Commissioner of Customs (Appeals) who by his order dated 23/2/1998 directed reshipment of the gold in question subject to payment of reshipment fine of Rs.6,00,000/-. The Commissioner (A) reduced the personal penalty from Rs.3,00,000/- to Rs.1,00,000/-.

5. Being aggrieved by the aforesaid order, both the Commissioner of Customs as also the petitioner filed revision application before the Government of India. By the impugned order dated 21/9/1998 the Joint Secretary to the Government of India held that the petitioner is entitled to redeem the confiscated gold subject to payment of duty and also fine and penalty imposed by Commissioner (A). As the gold was already disposed off, the Commissioner was directed to return the sale proceeds subject to payment of duty, fine and penalty. Challenging the aforesaid order, the present petition is filed. The revenue has accepted the decision of the revisional authority.

6. Mr.S.N.Kantawala, learned counsel appearing on behalf of the petitioner submitted that the order in

original dated 11/11/1997 was received by the petitioner on 25/11/1997 and by a letter dated 28/11/1997 the petitioner had informed the customs authorities that the petitioner is filing an appeal against the adjudication order and the confiscated gold should not be disposed of. As per circular dated 16/11/1994, the customs authorities ought not to have disposed of the confiscated gold during the pendency of the appeal. Relying upon the decision of the Delhi High Court in the case of **Kailash Ribbon Factory Ltd. V/s. Commr. of Cus. & C. Ex., New Delhi** reported in 2002(143) E.L.T. 60 (Del.), **Collector of Customs, Madras V/s. Meena A.Bharwani** reported in 2006 (194) E.L.T. 273 (Mad.) and the decision of this Court in the case of **Girdharlal Kalyandas Advani V/s. Union of India** reported in 1992(58) E.L.T. 453 (Bom.), Mr.Kantawala submitted that the petitioner is entitled to the market value of the confiscated goods together with interest thereon at the rate fixed by this Court from the date of auction till payment.

7. Mr.R.V.Desai, learned senior Advocate appearing on behalf of the respondents, on the other hand submitted that in the present case, although the petitioner had informed by his letter dated 28/11/1997 that the petitioner would be filing an appeal against

the adjudication order, by a letter dated 5/12/1997 Advocate or the petitioner was informed that the confiscated gold had already been handed over to the basement warehouse of New Custom House for disposal. Accordingly, the gold bars in question were sold on 12/2/1998 and the sale proceeds received were in the sum of Rs.18,98,965/-. He submitted that in the light of the Notification No.42/89-Cus.(NT) dated 30th June, 1989 the customs authorities were justified in disposing off the confiscated gold.

8. Mr.Desai, further submitted that as per the order passed by the revisional authority, the amount payable to the petitioner after deducting the baggage rate of duty, redemption fine and penalty from the sale proceeds comes to Rs.2,16,724/-. Mr.Desai submitted that the respondents were ready and willing to pay the said amount to the petitioner, however, since the whereabouts of the petitioner was not known, the customs authorities could not pay the balance amount of Rs.2,16,724/-. Accordingly, Mr.Desai submitted that in the facts of the present case, since the customs authorities were always ready and willing to pay the balance amount of Rs.2,16,724/-, there is no question of paying the said amount with interest.

9. We have carefully considered the rival submissions. Admittedly, the order in original dated 11/11/1997 was despatched on 25/11/1997 and by a letter dated 28/11/1997 the petitioner had informed the customs authorities that he is filing an appeal against the order in original. No doubt that by the letter dated 5/12/1997 the customs authorities had informed the petitioner that the confiscated gold has already been handed over for disposal. Handing over the confiscated gold immediately after serving the order of confiscation itself was improper. In any event after receiving letter from the petitioner, the customs authorities ought to have stopped the auction sale of the confiscated gold. However, the gold was sold on 12/2/1998 during the pendency of the appeal filed by the petitioner before Commissioner (A). The finding recorded by the revisional authority and accepted by the revenue is that the action of the customs authorities in selling the gold during the pendency of the appeal is against the existing departmental instructions and is not in good taste. Therefore, the argument of the revenue in selling the gold during the pendency of the appeal cannot be accepted.

10. Since the petitioner seeks redemption of the confiscated gold as per the order passed by the

revisional authority, the first question to be considered is, whether the petitioner is justified in claiming market value of the said gold ? It is not in dispute that the market value of the gold was falling at the relevant time. In fact, the specific case of the petitioner before the Commissioner (A) was that the prices of the gold had fallen sharply (see page 106 of the petition). In these circumstances, the claim of the petitioner in seeking market value of the gold cannot be accepted.

11. The question then to be considered is, whether the petitioner is entitled to the sale proceeds after deducting duty, fine and penalty imposed upon the petitioner ? Since the petitioner is seeking redemption of the confiscated gold, he cannot escape payment of fine and penalty. In fact, counsel for the petitioner offered to pay fine and penalty. As regards payment of duty is concerned, in our opinion, duty would be payable only if the gold was actually allowed to be redeemed. In the present case, what is being given is the sale proceeds and not the gold as such. In such a case, the question of paying duty in respect of the sale proceeds would not arise.

12. The argument of the revenue that they were

ready to pay the balance amount of Rs.2,16,724/-, but the petitioner was not available cannot be accepted, because, firstly, nowhere in the affidavit in reply filed on behalf of the revenue it is so stated and such contention is being raised for the first time during the course of arguments. Secondly, the petitioner has filed the present petition through an Advocate in the year 1998 and nothing prevented the customs authorities in addressing a letter to the Advocate for the petitioner in that behalf.

13. In this view of the matter, in our opinion, the customs authorities are liable to return the entire sale proceeds without deducting therefrom the duty but subject to deduction of fine of Rs.6,00,000/- and penalty of Rs.1,00,000/- imposed by the Commissioner (A) with interest.

14. Accordingly, we direct the customs authorities to deduct Rs.7,00,000/- towards fine and penalty from the amount of Rs.18,98,965/- and pay the balance amount of Rs.11,98,965 with interest at the rate of 9% p.a. from the date of the revisional order dated 21/9/1998 till payment.

15. Rule is made absolute in the above terms

with no order as to costs.

(P.B.MAJMUDAR J.)

(J.P.DEVADHAR, J.)