

**IN THE HIGH COURT OF ALLAHABAD**  
**Criminal Appeal U/S 378 CR.P.C. No. 1 of 2019**

**THE DEPUTY COMMISSIONER CUSTOMS**  
**(PREVENTIVE)**

**Vs**

**DEEPAK BAJAJ**

**Siddharth, J**

**Dated: March 29, 2019**

**Appellant Rep by: Parv Agarwal**

**Respondent Rep by: Rajive Ratn Singh, Ajay Kumar, A.P. Mathur**

**Cus - The prosecution case is that the respondent, Deepak Bajaj, is a holder of British passport and he entered into India on 02.04.2014 from Nepal through Sonauli border - The officers of S.S.B. searched him and found 4320 gms of gold of foreign origin in his pockets of jeans, jacket and shoes - The gold recovered from him was confiscated on the ground of being gold of third country origin, import whereof was absolutely prohibited as per Notfn 09/1996 - Had the intention of respondent been fair, he would have taken the confiscated gold in his baggage and would have declared the same after reaching Nepal from U.K. at the Airport itself or at Sonauli border - Then benefit of Section 79 or 80 of Customs Act could have come to his rescue - The respondent never stated anything about his intention of declaration in his statement under Section 108 of Customs Act - While the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case - Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation - It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion - It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused - Capacity of accused to pay which constitutes an important aspect of any order Under Sec. 357 Code of Criminal Procedure would involve a certain inquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so - Such an inquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family - Conviction of respondent is confirmed as per trial court's order - The Appellate court's order is set aside and the remaining sentence of two months required by the respondent to be served is converted into fine of Rs. 15,000/- - In case the respondent deposits the aforesaid fine along with fine of Rs. 75,000/-, if not already deposited as per judgment of the trial court, he shall be released**

**forthwith and his bond and surety shall be discharged - In case of failure to deposit the fine he will undergo his remaining sentence: HC**

**Appeal partly allowed**

**Case law cited -**

***Assitt. Commissioner of Central Excise & Customs, Thrissur vs. Rajendra Prabhu, 2018 (361) E.L.T. 491 (Ker.).....Para 9***

***Hari Kishan v. Sukhbir Singh, (1988) 4 SCC 551.....Para 19***

***Ankush Shivaji Gaikwad v. State of Maharashtra (2013) 6 SCC 770.....Para 22***

***K.A. Abbas H.S.A. v. Sabu Joseph, (2010) 6 SCC 230.....Para 24***

### **JUDGEMENT**

**Per: Siddharth:**

**1. Heard Sri Parv Agarwal, learned counsel for the appellant, Sri A. P. Mathur, learned counsel for the respondent and perused the lower court record.**

**2. The criminal appeal has been filed on behalf of the appellant/complainant against the judgment and order of acquittal of the respondent/accused dated 09.07.2018 passed by Additional Sessions Judge, Varanasi, in *Criminal Appeal No. 173 of 2017*, arising out of the judgment and order dated 20.07.2017 passed by Special Chief Judicial Magistrate, Varanasi in Criminal Complaint Case No. 765 of 2014, under Section 135(1)(i) of the Customs Act, 1962.**

**3. The prosecution case is that the respondent, Deepak Bajaj, is a holder of British passport and he entered into India on 02.04.2014 from Nepal through Sonauli border. The officers of Sashashtra Seema Bal (S.S.B.) searched him and found 4320 gms of gold of foreign origin worth Rs. 1,09,12,590/- in his pockets of jeans, jacket and shoes. He was produced before the Custom Officers and ultimately the gold recovered from him was confiscated on the ground of being gold of third country origin, import whereof was absolutely prohibited as per Notification No. 09/1996 dated 22.01.1996.**

**4. The proceedings of seizure were challenged before the Commissioner (Appeals) which was dismissed on 13.01.2016. The aforesaid order was challenged before Customs, Excise and Service Tax Appellate Tribunal, Regional Branch, Allahabad which by the order dated 22.02.2018 accorded benefit of Section 80 of the Customs Act to the respondent and directed the Customs Authorities to return the passport of the respondent and release the seized gold. The order dated 22.02.2018 of the Tribunal was challenged before this court by way of *Custom Appeal No. 08 of 2018*, under Section 130A of the Customs Act, 1952 by the Commissioner Customs (Preventive).**

**5. This court by the order dated 19.12.2018 set aside the order dated 22.02.2018 of the Tribunal upholding the confiscation of the gold of the respondent and penalty of Rs. 25,00,000/- imposed on him by the Custom Authorities on the ground that since the respondent did not make declaration under Section 77 of the Act declaring that his baggage contains dutiable article or such article import whereof is prohibited and it is mandatory to return such article, therefore the benefit of Section 80 of the Customs Act accorded to the respondent is incorrect.**

**6. Simultaneously criminal proceedings under Section 135 (1)(b) of the Customs Act, 1962 was also initiated against the respondent by way of criminal complaint before the Special Judicial Magistrate, Varanasi who by his order dated 20.07.2016 convicted and sentenced the respondent for a period of one year and imposed fine of Rs. 75,000/- on him.**

**7. The trial court considered the witnesses for the prosecution and the defense statement of the respondent under Section 313 Cr.P.C. and also after going through the documentary evidence on record found that since that import of goods of the third country is prohibited by the Notification No. 09 of 1996 dated 22.01.1996, therefore even after declaration the respondent could not have brought the gold recovered from him in India which was purchased from United Kingdom. The trial court further found that the accused has admitted in his statement under Section 108 of the Customs Act that he is aware that gold of third country cannot be brought into India through Nepal therefore the offence alleged against the respondent stands fully proved. The trial court has recorded the finding that act of the respondent was absolutely illegal and he is liable to be punished.**

**8. The respondent preferred Criminal Appeal No. 173 of 2017 before the Additional Sessions Judge, Court No. 5, Varanasi who has allowed his appeal on the ground of Section 79 and 80 of the Customs Act. The Lower Appellate Court has recorded the finding that the respondent is entitled to benefit of Section 79 of the Customs Act since he was carrying the gold for the purpose of making jewellery for marriage of his daughter and he was not smuggling the same therefore his punishment by the trial court relying on his statement under Section 108 of the Customs Act is not correct.**

**9. Counsel for the appellant has submitted that the order of the court below is absolutely illegal since the intention and conduct of the respondent was not bonafide and while entering in India he had hidden the gold in waist, jacket and shoes and he had no intention to declare the possession of gold to the Customs Authorities at Sonauli. In view of the notification no. 09 of 1996 dated 22.01.1996 he was not entitled to bring in India, the gold of third country origin through Nepal which was prohibited as per the aforesaid notification. Learned counsel for the appellant has relied upon judgment of Kerala High Court in the case of *Assitt. Commissioner of Central Excise & Customs, Thrissur vs. Rajendra Prabhu, 2018 (361) E.L.T. 491 (Ker.)*, wherein the High Court held that in prosecution under Section 135 of**

**the Customs Act, the proceedings of relating to confiscation has nothing to do. The findings of the case of confiscation proceedings are not relevant for deciding the criminal prosecution. In proceedings under Section 135 of the Customs Act, it is to be decided whether the respondent was having mens rea on the basis of which sentence can be imposed is to be considered.**

**10. Per contra, counsel for the respondent has submitted that the notification no. 09 of 1996 dated 22.01.1996 is not applicable to the case of the respondent. Admittedly gold in question was not imported from Nepal to India nor it was exported from U.K. to Nepal. It was exported from U.K. to India since the respondent landed at Nepal on 02.04.2014 and left for India on the same day. He was caught by the S.S.B. and therefore he did not any chance to declare the seized goods to the Custom Authorities.**

**11. He has further submitted that the Customs Department has relied upon only part of the statement of the respondent under Section 108 of the Customs Act wherein he stated that he was aware that the gold cannot be imported in India if the same has been exported to Nepal but they have not relied upon the other part of his statement wherein he stated that he purchased the gold for the marriage of his daughter from U.K. and was coming to India via Nepal after worshipping at Pashupati Nath Mandir before giving the gold to goldsmith for manufacturing ornaments as per Gujarati tradition. The other part of his statement proves his bonafide intention.**

**12. He has finally submitted that the respondent has already undergone 10 months of sentence and he is in India for last about 5 years and has not been able to visit U.K. where his family resides. His business as come to a naught. He has not met his family members on account of implication in this case and has reached the stage of starvation in India since he has no work to do. His passport has been deposited before the trial court.**

**13. After hearing the rival contentions this court finds that after being apprehended by the S.S.B. the respondent was taken before the Custom Officer. He was not carrying the gold seized from him, in any baggage but was hiding the same in his clothes and shoes. Had the intention of the respondent been fair, he would have taken the confiscated gold in his baggage and would have declared the same after reaching Nepal from U.K. at the Airport itself or at Sonauli border. Then benefit of Section 79 or 80 of the Customs Act could have come to his rescue. In the present case the respondent never stated anything about his intention of declaration in his statement under Section 108 of the Customs Act.**

**14. The counsel for the appellant has placed before the court the judgment of division bench of this court on 19.12.2018 passed in Custom Appeal No. 08 of 2018, under Section 30-A of the Customs Act, 1962 wherein also the same issue of extension of benefit of Section 80 was considered by this court and it was held that since there was no declaration by the respondent**

under Section 77 of the Act therefore no benefit of Section 80 should have been granted to him by the Tribunal.

15. The counsel for the appellant has relied upon the judgment in the case of Assist. Commissioner (Supra) wherein the Kerala High Court has held that the proceedings of confiscation and proceedings under Section 135 of the Customs Act stand at different footing, but in that case the consideration of material for the confiscation proceeding was different as stated in paragraph 5. In the present case the grant of benefit of Section 80 to the respondent was an issue in proceedings of confiscation and it is also the only issue in the present proceedings.

16. Therefore the judgment of the lower appellate court dated 20.07.2018 giving benefit of section 79 to the respondent is not in accordance with law and is hereby set aside.

17. A perusal of the record of the court below shows that the respondent was in jail since 03.04.2014 and was enlarged on bail by this court on 28.01.2015 in *Crl. Misc. Bail Application No. 18332 of 2014 and was finally released from jail 03.02.2015*. Therefore he has already undergone 10 months of sentence out of the sentence of one year awarded to him.

18. The counsel for the respondent has submitted that no useful purpose would be served by sending the respondent to jail again. He has not been able to meet his family at U.K. for about 5 years and has already deposited fine of Rs. 25,00,000/- in confiscation proceedings. His business at U.K. has come to an end and in India he is on the verge of starvation.

19. The Hon'ble Supreme Court has urged all the Courts time and again to exercise the power under Section 357 Cr.P.C. liberally which was intended to reassure the victim that he or she is not forgotten in the criminal justice system and to meet the ends of justice in a better way. In *Hari Kishan v. Sukhbir Singh, (1988) 4 SCC 551* the Supreme Court urged all courts to exercise their power under Sec. 357 Cr.P.C. liberally to safeguard the interests of the victim. In this case, the victim and his relatives were attacked by seven persons in the field. The victim received severe head injuries which impaired his speech permanently. The accused were convicted by trial court under Sec.s 307, 323 and 325 of IPC read with Sec. 149 and sentenced to imprisonment for three to four years. On appeal, the High Court acquitted two accused and quashed the conviction of other five accused under Sec. 307/149 IPC, but maintained their conviction under Sec. 325/149 IPC. The accused persons were granted probation and each was directed to pay compensation of Rs.2500/- to victim. On appeal, the Supreme Court did not disturb the sentence of imprisonment but ordered the accused persons to jointly pay a total compensation of Rs.50,000/- to the victim under Sec. 357(3) Cr.P.C. recording following reasons:

20. It is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing judgment of conviction. In addition

to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way.

**22. In *Ankush Shivaji Gaikwad v. State of Maharashtra (2013) 6 SCC 770*, the Supreme Court went a step further and observed that the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case.**

**23. While the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order Under Sec. 357 Code of Criminal Procedure would involve a certain inquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an inquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family.**

**24. In *K.A. Abbas H.S.A. v. Sabu Joseph, (2010) 6 SCC 230*, the Apex Court made it clear that the whole purpose of the provision is to accommodate the interests of the victims in the criminal justice system. Sometimes the situation becomes such that no purpose is served by keeping a person behind bars. Instead directing the accused to pay an amount of compensation to the victim or affected party can ensure delivery of total justice. Therefore, this grant of compensation is sometimes in lieu of sending a person behind bars or in addition to a very light sentence of imprisonment.**

**25. Having considered the above authorities of the Apex Court and after overall consideration of fact situation, conviction of the appellant is confirmed as per trial court's order. The Appellate court's order is set aside and the remaining sentence of two months required by the respondent to be**

**served is converted into fine of Rs. 15,000/-. In case the respondent deposits the aforesaid fine along with fine of Rs. 75,000/-, if not already deposited as per judgment of the trial court, he shall be released forthwith and his bond and surety shall be discharged. His passport shall also be released by the trial court and he would be free to leave the country, if not required in any other case. In case of failure to deposit the fine he will undergo his remaining sentence.**

**26. Appeal stands partly allowed.**

**27. The office is directed to send back the record of the court below within three days along with copy of this judgment for necessary compliance.**