

Commissioner Of Customs, New Customs ... vs Pawan Kant on 5 October, 2023

Author: Yashwant Varma

Bench: Yashwant Varma, Dharmesh Sharma

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IN THE HIGH COURT OF DELHI AT NEW DELHI
CUSAA 3/2023

COMMISSIONER OF CUSTOMS, NEW CUSTOMS HOUSE,
NEW DELHI

..... Appellant

Through: Mr. Anurag Ojha, Sr. Standing
Counsel along with Mr. Vipul
Kumar and Mr. Deepak
Somani, Advs.

versus

PAWAN KANT

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE DHARMESH SHARMA

ORDER

% 05.10.2023

1. The Commissioner of Customs, the appellant herein, seeks to assail the final order dated 28 March 2022 handed down by the Central, Excise and Service Tax Appellate Tribunal¹, allowing the appeal preferred by the respondent and which in turn had impugned the order dated 30 July 2021 passed by the Commissioner of Customs (Appeals).

2. The appeal is pressed on the following questions of law: -

"1. Whether in the facts and circumstances of the case, the Learned Tribunal has committed an error in interpreting the legislative edicts manifested in first proviso to section 129A of the Act by misreading of the terms „goods and „baggage defined in the Customs Act, 1962, to arrogate its jurisdiction?

2. Whether in the facts and circumstances of the case, the Learned CESTAT This is a digitally signed order.

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by scanning the QR code shown above. The Order is downloaded from the DHC Server on 07/10/2023 at 23:02:20 Tribunal has not accorded proper interpretation to the expression „beneficial owner defined in section 2(3A) of the Customs Act,1962?

3. Whether in the facts and circumstances of the case, the Learned Tribunal has failed to appreciate that the ultimate beneficiary of the foreign currency would be the Respondent herein and not SEMPL, thereby failing to notice the form and substance of the transaction?

4. Whether in light of the facts and circumstances, the impugned order dated 28.03.2022 passed Learned CESTAT is unsustainable in law?"

3. The dispute itself emanates from a Show Cause Notice² dated 17 July 2019, which had been issued to M/s Salt Experience and Management Pvt. Limited³ and various other individuals, including the respondent herein. The SCN related to the seizure of foreign currency amounting to approximately Rs. 81 lakhs which was seized from the hand baggage of one Mr. Amit Bali, an employee of SEMPL.

4. The aforesaid individual, while tendering his statement under Section 108 of the Customs Act, 1962⁴, disclosed that the said recovered currency belonged to the respondent and was handed over to him by Mr. Hemant Dahiya, a Director in SEMPL, to take care of the expenses of the respondent whose business engagements were being managed by the said agency.

5. The Order-in-Original, has, while noticing the statement made by Mr. Amit Bali, captured the essence thereof in the following terms:-

"(iii) he received the said foreign currencies at his office i.e. M/s.

Salt Experience 86 Management Pvt. Ltd., Mudit Square Building, 2nd Floor, Plot No. 24, Institutional Area, Premपुरi, Sector- 32, Gurgaon from Mr. Hemant Dahiya, Director of the firm on 19.08.2018 but Mr. Hemant Dahiya did not give any receipt for the said currencies which he kept with him in his hand-baggage"

SCN SEMPL The Act This is a digitally signed order.

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6. Insofar as the respondent is concerned, the gist of his statement, as reproduced in the Order-In-Original dated 19 November 2019 is reproduced hereinbelow:-

"4. Mr. Pawan Kant Munjal, the Chairperson, Managing Director and CEO of M/s. Hero MotoCorp Ltd (HMC), who was also travelling with Mr. Amit Bali to London by the same British Airways flight no. BA-256 on 20.08.2018, from New Delhi, was off-loaded from the said flight because Mr. Amit Bali stated that the said foreign currency belonged to Mr. Pawan Kant Munjal. Statement of Mr. Pawan Kant Munjal (hereinafter also referred as Mr. P. K. Munjal / Mr. Pawan Munjal / Mr. Munjal / Mr. Pawan Kant) was recorded before the Air Customs Superintendent (Preventive), IGI Airport, New Delhi under Section 108 of the Customs Act, 1962 on 20.08.2018 wherein he, apart from giving his personal details, stated, inter-alia, that:

(i) the purpose of his visit to London on 20.08.2018 was to attend meetings with some business clients at London and thereafter, he had plans to visit Baltimore for some business meetings; that Mr. Amit Bali was assisting him during his business travel to London and that Mr. Amit Bali was known to him for about five to six years; that Mr. Amit Bali was introduced to him by Mr. Hemant Dahiya, Director of M/s Salt Experience 86 Management Pvt. Ltd. located at Gurugram, who looked after most of the event management work of M/s. HMC; that he had provided his tour programme to M/s. SEMPL;

(ii) he was not aware that Mr. Amit Bali was carrying any Foreign Currency; that he used to visit once or twice a month to foreign countries and most of the time, Mr. Amit Bali accompanied him in those foreign trips; that last time Mr. Amit Bali had accompanied him to FIFA World Cup, held in Russia;

(iii) he did not have any knowledge whether Mr. Amit Bali had carried Foreign Currency in his earlier visits; that he (Mr. Munjal) carried foreign currency during his foreign visits as per the Forex Regulations of the Government of India and he usually travelled with his cards to meet out his personal expenses during his foreign visits."

7. On due consideration of the statements and other material that was gathered in the course of investigation, the Order-in-Original came to record the following conclusions: -

"58.14 Mr. Amit Bali; from whose possession forex was recovered, This is a digitally signed order.

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(i) In reply filed by the Noticee No. 1, 3 & 4 it has been admitted that Mr. Amit Bali was entrusted the foreign exchange with the direction that before undertaking the tentative journey the foreign exchange be converted into the permissible / legalised mode. There is no evidence on record to show that any such directions were given to Mr. Bali. In fact, these averments smack of afterthought, especially since evidence produced by the department brings out a well-organized attempt by M/s SEMPL to purchase forex within individual ceilings and subsequently pooling them or their events. This betrays close knowledge of the nation's forex laws and procedures, not the contrary.

Failure of Mr. Dahiya and Mr. Raman is managerial in not ensuring compliance with relevant laws, as discussed above.

(ii) In the reply filed by Noticee No. 2, it has been admitted that the alleged foreign currencies were handed over to the Noticee No. 2 by M/s SEMPL with the direction that before departing the same should be converted in permissible mode, which the Noticee No 2 because of the out of sheer lapse of memory could not do so within time prior to the departure. Further, in terms of paragraph 5.6 it has been admitted that the alleged foreign currencies in question were not for any personal use of anyone but was to be utilized strictly for business purposes (i.e. event bookings and travel related business expenses). Noticee No. 2's defence of amnesia is laughable. This is, one may note in passing, a considerable debility for someone routinely entrusted with large sums of money for carrying the same out of the country and tendering an account of the same upon his return. Mr. Bali's averment that these sums were for utilization for business purposes are more believable. M/s HMC is a multi-national company and can be expected to host event globally to keep channel partners and clientele loyal to their brands and products. However, none of this excuses Mr. Bali attempting to take out foreign exchange beyond permissible limits out of India or admitting to having done so on several occasions in the past.

(iii) In the statement of Noticee No.5, recorded on 27.03.2019, it has been submitted that the Noticee No. 5 has always This is a digitally signed order.

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"Question 12 Did you always carry foreign currency in cash form with you while travelling abroad. If yes, how much foreign currency in cash was carried by you in cash and from where the same was procured? Answer 12: Yes, I always used to carry foreign currency in cash form which used to be upto USD 3000 along with some travellers cheque and credit card. I used to get these foreign currency from my company. I am herewith submitting the details of the foreign currency issued to me by my company during the last five years."

(iv) In reply to the show cause notice filed by the Noticee No. 5, it has been submitted that M/s SEMPL is an independent third party service provider and neither Noticee No. 5 nor HMC has any direct or indirect financial control / shareholding interest in M/s SEMPL. In fact, in paragraph no. 15 of the reply to the show cause notice filed by the Noticee No. 5 it has been stated as under:

"...M/s SEMPL has been used by HMC as one of the specialist Indian third party service providers for the purpose of arranging travel, event management and logistics arrangements, and that SEMPL, is an independent third party service provider and neither HMC nor Noticee No. 5 have any shareholding / financial interest in the SEMPL either directly or indirectly. That all transactions between SEMPL and HMC are on arms-length basis, and have been audited by the statutory auditors of HMC as per Indian law."

(v) That Noticee No. 5 / HMC is a client of M/s SEMPL i.e. mere a recipient of services provided by M/s SEMPL (which, at the cost of repetition, is an independent third party service provider) and against the provisions of such services provided by M/s SEMPL to HMC, HMC settles all the invoices raised by M/s SEMPL in INR in India. There is no evidence that the Noticee No. 5 or HMC exercise any financial / shareholding interest in M/s SEMFL or exercises effective control of M/s SEMPL. In absence of any financial / shareholding interest / effective control of Noticee No. 5 in / over M/s SEMPL, Noticee No. 5 being the CEO and Chairman of HMC, to whom the services have been provided by M/s SEMPL, cannot be said to become This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 07/10/2023 at 23:02:21 the "beneficial owner" of M/s SEMPL in any which way.

(vi) Even in other enactments the word "beneficial owner" is not considered as exhaustive. In this regard, in the case of Sunil B. Naik Vs Geowave Commander reported in (2018) 5 SCC 505, the Hon ble Supreme Court of India while dealing with the concept of the beneficial use distinguished the concept of charter than the beneficial use, in paragraph 59 the Hon ble Supreme Court of India held that mere possession of the ship, however, complete and whatever be extent of the control was not found good enough to confer the state of the ownership. The beneficial use of a chartered ship would not ipso facto converted the status of a charterer into a "Beneficial Owners". A similar provision under section 2(22)e of the Indian income Tax Act-1961 as amended in 1988, with regard to beneficial owner in the case of National Travel Services Vs Commissioner of Income Tax has been referred to the larger bench."

8. Upon finding that the seized currency was liable to be confiscated, the Additional Commissioner of Customs proceeded to pass appropriate orders for confiscation as well as for imposition of penalty upon SEMPL and its employees. The Additional Commissioner, however, for reasons aforesaid, dropped all proceedings against the respondent.

9. Aggrieved by the aforesaid order, the Department is stated to have instituted an appeal. The Commissioner of Customs (Appeals) after considering the material on record and insofar as the

present respondent is concerned, observed as follows: -

"6.4 The Respondent in his defence has mainly relied upon the argument that the concept of beneficial owner does not apply in this case. In terms of Section 2(3A) of the Customs Act, 1962 beneficial owner means any person on whose behalf the goods are being imported or exported or who exercises effective control over the goods being imported or exported. From the facts of this case and statement of various persons it is clear that the Mr. Amit Bali and/or other employees of SEMPL did not carry the subject foreign currencies for their own benefit or to further the business of SEMPL but the same were exported from India for use and on behalf of the Respondent. The Respondent has cited the judgment of Sunil B. Naik vs. Geowave Commander 2018 (5) SCC 505 to distinguish the requirements for being a beneficial owner.

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10. It accordingly proceeded to allow the appeal in the following terms:-

"7.0 In light of above discussion and findings, the Appeal filed by the Assistant Commissioner (Review), IGI Airport, New Delhi is allowed. The Order in original no. 270/Adjn./2019 dated 19.11.2019 is modified to the following extent-

a.) In respect of foreign currency equivalent to Rs 81,01,421/- seized from Sh. Amit Bali, penalty of Rs. 21,00,000/- is imposed under Section 114(i) of the Customs Act, 1962 read with Section 13 of the Foreign Exchange Management Act, 1999 on Sh. Pawan Kant Munjal, being the beneficial owner. b.) In respect of illicit export of currency equivalent to Rs. 3,72,64,700/-, details of which were found in pen drive recovered from the office of M/s SEMPL, fine of Rs. 9.25 lakhs under Section 125 of the Customs Act, 1962 and penalty of Rs. 95,00,000/- under Section 114(i) of the Customs Act, 1962 are imposed on Sh. Pawan Kant Munjal, being the beneficial

owner.

c.) In respect of illicit export of currency equivalent to Rs. 21,35,25,172/- through travel cards issued in the name of various employees of M/s SEMPL and carried by Sh. Amit Bali, fine of Rs 50,00,000/- under Section 125 of the Customs Act, 1962 and penalty of Rs 5,35,00,000/- under Section 114(i) of the Customs Act, 1962 are imposed on Sh. Pawan Kant Munjal, being beneficial owner.

d.) In respect of illegal export of foreign currency equivalent to Rs. 13,90,20,897/- carried by Mr. Amit Bali in past, fine of Rs. 35,00,000/- under Section 125 of the customs Act 1962 and penalty of Rs. 3,50,00,000/- under Section 114(i) of the Customs Act, 1962 are imposed on Sh. Pawan Kant Munjal, being beneficial owner."

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11. As would be manifest from the above, the Appellate Authority proceeded to invoke the principles of "beneficial owner" as flowing from Section 2(3A) of the Act and consequently found the respondent liable to be penalized under Section 114(i) of the Act. It is the aforesaid findings as returned by the Appellate Authority, which constrained the respondent to approach the CESTAT.

12. CESTAT in terms of the order impugned before us has come to record the following conclusions:-

"27. The aforesaid statements made under section 108 of the Customs Act give credence to the factual averments made by the appellant regarding the contractual arrangement between HMC and SEMPL and the fact that the foreign currency did not belong to the appellant and in fact belonged to SEMPL, which currency was in the possession of Amit Bali for meeting the expenses to be undertaken. It also transpires that SEMPL would raise invoices for such expenses together with its service charge and thereafter payments were made by HMC. The actual owner of the foreign currency having been identified, the concept of „beneficial owner“ does not arise. The Commissioner (Appeals), therefore, was not justified in reversing the finding recorded by the Additional Commissioner that the concept of „beneficial owner“ would not arise in the facts and circumstances of the case.

28. It further transpires that HMC had arranged SEMPL as the service provider for the event management outside India and it was the responsibility of SEMPL to acquire foreign exchange which was acquired by SEMPL and handed over to Amit Bali for discharge of the contractual obligation of organising and arranging meetings. The Commissioner (Appeals) has merely on conjectures and surmises assumed the liability of the appellant in relation to the export of foreign currency.

29. The foreign exchange for corporate purposes has wrongly been treated as personal expenses merely because the appellant is the Chairman and Managing Director of HMC, which had organized, through SEMPL, events and meetings as part of its marketing and promotional activities. The meetings and events would benefit SEMPL and its business and it would not be correct to hold the appellant as the „beneficial owner ."

It was on the basis of the aforesaid principal conclusions that the appeal of the respondent came to be allowed.

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13. Assailing the aforesaid decision, Mr. Ojha, learned counsel for the appellant has firstly questioned the assumption of jurisdiction by CESTAT and submitted that since the subject matter of the appeal pertained to goods imported or exported as baggage, the same could not have been entertained by CESTAT in light of the Proviso to Section 129A.

14. In order to appreciate the submission which is addressed, we deem it apposite to extract the Proviso which stands placed in Section 129A(1) and which reads thus:-

"129A. Appeals to the Appellate Tribunal (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

(a) a decision or order passed by the [Principal Commissioner of Customs or Commissioner of Customs] as an adjudicating authority;

(b) an order passed by the [Commissioner (Appeals)] under section 128A;

(c) an order passed by the Board or the [Appellate Commissioner of Customs] under section 128, as it stood immediately before the appointed day;

(d) an order passed by the Board or the [Principal Commissioner of Customs or Commissioner of Customs], either before or after the appointed day under section 130, as it stood immediately before that day:

[PROVIDED that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to,-

(a) any goods imported or exported as baggage;

(b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;

(c) payment of drawback as provided in Chapter X, and the rules made thereunder:

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(i) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 125; or

(ii) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(iii) the amount of fine or penalty determined by such order, does not exceed [two lakh rupees]."

15. We find ourselves unable to sustain the aforesaid submission bearing in mind the clear import and tenor of the SCN. The SCN did not affect the seizure of the foreign currency on the ground of a violation of the Baggage Rules or the declarations that are liable to be made by a traveler. The SCN itself invoked Section 113(d) of the Act as opposed to clause (h) of that provision. Clauses (d) and (h) of Section 113 read as follows: -

"113. Confiscation of goods attempted to be improperly exported, etc. The following export goods shall be liable to confiscation:

XXXX XXXX XXXX

(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;

XXXX XXXX XXXX

(h) any [xxx] goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;"

16. Apart from the above, we are of the considered opinion that while the expression „goods“ as contained in Section 2(22) of the Act, includes baggage as well as currency, the exclusion contemplated under Section 129A clearly appears to be restricted to a seizure of This is a digitally signed order.

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17. The clear intent of clause (a) of the Proviso appearing in Section 129A(1) would appear to be intended to remove from the jurisdiction of the CESTAT only such matters which may pertain to violations of the Baggage Rules and declarations that are liable to be made in connection therewith. In any case and once the respondent themselves had asserted that the goods in question were liable to be confiscated in terms of Section 113(d), the objection taken to the maintainability of the appeal would not sustain.

18. That takes us to the principal question, namely of whether the Appellate Authority was justified in invoking the principles enshrined in Section 2(3A) and whether the respondent could justifiably be held to be the beneficial owner of the currency which was confiscated.

19. The CESTAT in its judgment has found on facts that the respondent was undertaking the travel by virtue of being the Chairman and Managing Director of Hero MotoCorp. Ltd⁵ and was proceeding on an official engagement. Undisputedly, the journey in the course of which the seizure was affected was not a personal visit of the respondent but was to attend to various business meetings and events for and on behalf of HMC and which meetings and events were being managed by SEMPL. It is in the aforesaid background that the Tribunal has come to the conclusion that the respondent could not be held to be the beneficial owner of the seized currency.

20. We further note from the various statements made in the course of investigation and the facts that stood recorded in the Order-in-

HMC This is a digitally signed order.

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entity to Mr. Amit Bali. While Mr. Ojha had sought to contend that in the past SEMPL employees are allegedly stated to have admitted to carrying currency which was utilized to meet the personal expenses of the respondent, the same is clearly immaterial since the proceedings emanating from the SCN in question stood restricted to the business travel of the respondent while acting as a Managing Director of HMC.

21. We find that the issues which were canvassed for our consideration by the appellant essentially require us to re-appreciate the evidence and the material that formed part of the proceedings as drawn. That cannot possibly be undertaken since the appeal itself would have to be restricted to a question of law.

22. On an overall consideration of the aforesaid, we find that no substantial issue of law stands raised.

23. The appeal shall consequently stand dismissed.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

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