

**Commissioner of Customs (P) Vs. Shri Dinesh Raysoni and Shri**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Dec-17-2004

**Reported in :** (2005)(192)ELT565Tri(Mum.)bai

**Judge :** S T S.S., T Anjaneyulu

**Appellant :** Commissioner of Customs (P)

**Respondent :** Shri Dinesh Raysoni and Shri

**Judgement :**

1. Revenue had earlier filed an appeal in the same matter against previous Order-in-Appeal No. 48/2002.BP dated 17.05.2002, which were remanded back to the lower authority to decide afresh the case taking into account goods covered Under Section 123 of the Customs Act and on hearing both sides vide its Order C-III-253 to 256 WZB/2003 dated 31.01.2003.

2. Revenue did not challenge the Order of CEGAT dated 31.01.2003 and also did not appear before C.C. (Appeals). The C.C. (Appeals) vide Order-in-Appeal No. 09/2004/APTS dated 24.02.2004, upheld the order as regards confiscation of wrist watches in appeal No. S/49-01/2004 TS worth Rs. 1,39,000/- and in case of appeal No. S/49-2/2004 IS worth Rs. 1,44,000/- and ordered to be released on payment of fine of Rs. 30,000/- and Rs. 35,000/- respectively. The remaining goods were found to be non-notified and the Order of confiscation of the same was set aside. Personal penalty was reduced from Rs. 14,000/- to Rs. 5,000/- and from Rs. 25,000/- to Rs. 10,000/-.

(i) that the Commissioner (Appeals) has erred in setting aside the order of confiscation in respect of non-notified goods on the premise that the Department has not discharged the burden of proof.

(ii) The Commissioner (Appeals) has not appreciated the fact that the Department had made sincere efforts to investigate the case to its logical end but its efforts were deliberately stalled by Shri Dinesh Raysoni by withholding vital information about the source of procurement, such as the name and address of the persons who supplied the goods to him. In this case, at the first stage of investigation itself, the party scuttled the progress of the investigation by not disclosing the identity of the suppliers. This is evident from perusal of the statement recorded on 26.6.1999 Under Section 108 of the Customs Act, 1962, wherein Shri Dinesh Raysoni, inter-alia, stated that the goods of foreign origin were either delivered to him at his shop by door to door salesman or were purchased from shops in Musafirkhana, Manish Market, etc. that the mode of payment to his supplier were through cash and no receipts/bills were given or made; that he did not know the address of the salesman or the shops in Musafirkhana; that he did not possess any Customs duty payment documents any bills/ receipts covering the goods seized, that the mistakes had happened due to his negligence and would not commit such mistakes in future. Later on, the advocate for Shri Dinesh Raysoni, while filing written submission dated 16.11.1999, inter-alia, stated that the goods cleared against the admissible free allowances available to the passengers are also eligible for sale and as such they are never covered by any licit documents/duty paying challans. Thus, the respondent also contradicted himself and changed his earlier statement by filing written submission. The conclusion drawn by the Commissioner (Appeals) could have been appreciated if the Department had failed in its duty even after Shri Dinesh Raysoni disclosed such information to the Department. In such circumstances, the Hon'ble Supreme Court in paragraph 31 of its judgment in the case of Collector of Customs, Madras, v. D. Bhoormal, [1982 (13) ELT 1546 (SC)], have held that "since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts, which are especially within the knowledge of the accused, it is not obliged to prove them as a part of the primary burden". In that case also, the accused had not given the address or sufficient particulars of the brokers, who had allegedly sold the goods to him.

(iii) The Commissioner (Appeals) has failed to appreciate the fact that the Department has fully discharged the initial burden or proving that the goods are smuggled and the party has not disclosed to the Department the details of the persons, who have supplied the impugned goods to him and thus the burden of proof is shifted to the person possessing the goods. The Hon'ble Tribunal vide its order Nos. C-I/131 & 132/WZB/04 dated 11.11.2003 in the case of Swiss Gallery and Anr. v. Commissioner of Customs (Preventive), Mumbai, held that 'even in the case of goods not notified Under Section 123 of the Customs Act, the burden of proof shifts from one to another.

The pens were not confiscated merely on the ground that they have foreign markings. The Department gave every possible opportunity to the appellants to explain as to how they came to possess them". The ratio of the said judgment is squarely applicable in this case also as Department has given every possible opportunity to Shri Dinesh Raysoni to explain as to how he came to possess the goods under seizure, but he could not give any plausible explanation for the same.

(iv) Furthermore, there is no express provision in the law placing onus on the Department to prove that the goods, are smuggled in respect of the non-notified goods Under Section 123 of the Customs Act, 1962. It is only being construed that since the onus of proof is on the owner in respect of notified goods, in respect of non-notified goods, the onus is on the Department. The scope and nature of the onus cast by Section 123 though indirectly has to be interpreted by taking into account facts and circumstances of individual cases. This view is supported by the Apex Court's verdict in D. Bhoormal's case cited in the earlier paragraph.

(v) The Commissioner (Appeals) failed to appreciate the facts and circumstances of the case while examining the burden of proof and, therefore, the Commissioner (Appeals) has failed to follow this established principle of law and hence the Commissioner (Appeals)'s order does not seem to be proper and legal.

(vi) The Department has also filed a Reference Application bearing No. 17 of 2002 before the Hon'ble Bombay High Court against CEGAT Order No. C-I/3559-66/WZB/2001 dated 8.11.2001 in the case of Shri Tayyab Yunus Khatri and Ors. v. Commissioner (Prev.) and relied upon by the Commissioner of Customs

(Appeals) in his O-in-A No. 48/2002 BP dated 17.05.2002 wherein the Department has raised the following question of law amongst others as to 'whether in the facts and circumstances of the case, Department has discharged burden of proof cast upon it in respect of the non-notified goods? If so, whether Tribunal was correct in setting aside the confiscation and penalty?'. The said Reference Application is still pending before the Hon'ble Bombay High Court.

(vii) The Commissioner (Appeals) has failed to appreciate the fact that the goods under seizure of foreign origin were in trade quantity and still cast the burden of proof on the Department.

(viii) When apparently the goods seized were of smuggled nature because of which the party could not produce any documents, the Commissioner (Appeals) ought not have glossed over the issue and on the contrary ought to have directed the party to produce evidence of their having procured the goods through licit means. The initial burden of proof of smuggled nature of the goods has been discharged by the Department.

(ix) The appellant (i.e. Revenue) hereinabove is filing this appeal before the Hon'ble Tribunal for correct determination of the following points of law arising out of the above said Order-in-Appeal passed by the Commissioner of Customs (Appeals), Mumbai.

a. Whether after taking into consideration the facts stated above and also the fact that there is no express provision Under Section 123 of the Customs Act, 1962 regarding the burden of proof in respect of non-notified goods, the said Order of Commissioner of Customs (Appeals) is legally correct or proper? b. Whether under the facts and circumstances of the case, the Department has discharged burden of proof cast upon it, in respect of the non-notified goods and if so, whether the Commissioner (Appeals) was correct in setting aside the confiscation and penalty in respect of the non-notified goods? c. Whether the Hon'ble Tribunal should pass the order Under Section 129 of the Customs Act, 1962 setting aside the order relating to non-notified goods in the Order-in-Appeal passed by the Commissioner of Customs (Appeals), Mumbai? 4. After hearing the Id. D.R. and considering the submission and material, it is found - a) No details of the stay, etc.,

if any, in the case of reference made by Revenue in the case of Shri Tayyab Yunus Khatri have been produced. This ground of Revenue is not enthralling us to uphold their appeal.

b) On non-notified goods, the contention of the Revenue, that it is for the appellant to produce the duty discharge non-smuggled nature of the goods cannot be upheld. On Reading of Section 106 of the Evidence Act and in view of five member bench decision in the case of Durga Lal v. Union of India [1983 ECR 1935 DSC], wherein, the larger bench of the Apex Court had held - "8. We cannot also accept the contention that by reason of the provision of Section 106 of the Evidence Act, the onus lies on the appellant to prove that he bought the said items of goods into India in 1947. Section 106 of the Evidence Act in turn does not apply to a proceeding under the said Act. But it may be assumed that the principle underlying the said section of universal application.

Under that section, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. This came in Shanbhu Nath Mehra v. State of Ajmer, 1956 SCR 199 after considering the earlier Privy Council decision in the interpretation of Section 106 of the Evidence Act observed at Page 204 (of SCR) thus - "The Section cannot be used to undermine the well established rule of law that save in a very exceptional class of cases, the burden is on the production and never shifts of Section 106 of the Evidence Act is applied, then by availing of the fundamental principles of criminal law prudence must equally be involved. If so, it follows that the onus to prove the case against the appellant is on the Customs authorities and they failed to discharge the sentence".

Applying the above finding and in the facts herein, it has to be held that the burden on the Customs Department to prove the case and establish at least the existence of a chain to apply the every link of chain not required to be proved as held in D. Bhoormal's case. They cannot shift the burden cast on Revenue. The non-notified goods in this case have been correctly held to be not liable to confiscation the order as regards the redemption fine on watches and the penalty is correctly upheld. We find no reason to upset the order.

c) The grounds taken by the Revenue reveal that the Respondent had disclosed ground of acquisition of the goods and in view of the liberalized imports through baggage and other means and removal of ban on sale of such imported goods, the availability in open sale has increased and in our opinion the Respondent's statement as regards procurement of the goods is sufficient and true in view of the reality that sale invoices were not a necessity in commercial world; therefore, absence of the same cannot ipso facto lead to a conclusion that the goods are smuggled. No merits are found in the present appeal filed.

5. Consequently, the appeal is to be ordered to be dismissed after agreeing with the appellant that the same was avoidable litigation.

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