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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-18-2006

Judge : M Ravindran

Appellant : Phoola Ram

Respondent : Commissioner of Customs

Judgement :

1. These appeals are directed against order in appeal dated 13th July, 2004 that upheld the order in original vide which the foreign gold biscuits were absolutely confiscated and currency was also confiscated besides imposition of penalties on all the appellants. Appeal No. Name of the Appellant Penalty imposed 1) C/725/04 Phoola Ram S/o Shiv Lal Bishnoi Rs. 5,000/- 2) C/726/04 Shiv Ratan Soni S/o Gopi Ram Soni Rs. 1,00,000/- 3) C/727/04 Shiv Ratan Soni S/o Mohan Lal Soni Rs. 1,00,000/- 4) C/728/04 Satya Narain Soni S/o Mohan Lal Rs. 1,00,000/- 5) C/729/04 Manak Chand S/o Badri Ram Soni Rs. 5,000/- The relevant fact that arise for consideration are the Customs authorities while conducting road patrolling during the intervening night of 22/23-10-1997 intercepted a jeep carrying about 15 passengers.

The Customs authorities recognizing appellant No. 2', asked him to present himself for search, which he informed the authorities that he is carrying some valuables in his canvas bag and hence he should be taken to a safe place for search. The Customs authorities on his request took him to the Customs office at Bikaner, along with driver and khalasi of the intercepted jeep. On detailed search

and examination of the canvass bags and of his person, the authorities drew a Panchnama on the spot vide which they recovered 5 foreign marked gold biscuits of 10 tola each and Indian currency of Rs. 5,10,366/- (Rupees Five Lakhs Ten Thousand Three Hundred and Sixty Six only). The appellant '2' could not produce any evidence regarding the gold being in his licit possession. Hence seizure of the currency and gold biscuits were effected. Statements of appellant '2' were recorded and in the statement, he stated that the gold biscuits were smuggled and the currency is in respect of the sale proceedings of smuggled silver. The appellant '2' also stated that he was an employee of appellant '4'. The authorities further conducted search of the business and residential premises of appellant No. '4' but nothing incriminating was recovered.

After recording statements of all the appellants, the authorities issued a show cause notice proposing to confiscate the seized foreign marked gold biscuits and the Indian currency. The appellants contested the show cause notice on the ground that the department has not adduced evidence indicating that the gold biscuits were of smuggled nature and that Indian currency was for the payment to be made for purchase of agricultural land. The adjudicating authority did not agree with the contentions and absolutely confiscated the foreign marked gold biscuits and absolutely confiscated the Indian currency as being sale proceeds of smuggled foreign marked silver. He also imposed penalties on the appellants as indicated. On an appeal by the appellants, the learned Commissioner (Appeal) also concurred with the views of the adjudicating authority and upheld the order in original.

4. The learned advocate appearing on behalf of all the appellants submits that the statements as given by appellant '2' were retracted by him on the first instance when he was produced for bail before the Chief Judicial Magistrate. It was also his submission that the appellant had produced the licit possession of the gold by producing bill '12' dated 17-10-97 issued by M/s. Dhan Cholia Sons, Delhi before the Chief Judicial Magistrate and before the authorities on 19-12-1997.

It was also submitted that the prosecution launched by the authorities against appellant '2' and '4' has culminated in acquittal of appellant '2' and '4', hence the

current proceedings should not have been continued by the authorities. It is also his submission that the gold is freely available in the country and has been purchased by the appellant from Delhi. As regards, the confiscation of Indian currency, it is his submission that the said Indian currency is not sale proceeds as per the provisions of Section 121 of Customs Act, 1962. It was submitted that the confiscation of the Indian currency being sale proceeds of smuggled silver is without any basis as the department has not proved any sale or purchase of smuggled silver and nothing is brought on record to justify the confiscation of Indian currency. It was his submission that the said Indian currency is for the payment of the agricultural land purchased by the appellant 'V' and was to be handed over to appellant '5'. Since appellant '5' is related to appellant '4', the said amount was handed over to be given to appellant '1' 5. The learned DR on the other hand submits that the recovery of the gold biscuits with foreign marking was done by a proper Panchnama on 22/23-10-97 on which date no documentary evidence was produced. The documentary evidence is produced for the first time on 19-12-97, which is definitely an after thought. If this bill was available with the appellant '4', he should have given at least a photocopy of the same to the appellant "2! while carrying, foreign marked gold biscuits on his person. It is his submission that the bill which was produced by the appellant '4' does not indicate any description of the gold biscuits while the seized gold biscuits were bearing some unique marking. Due to this, there is no co-relation that could be established by the appellant, as regards licit possession of seized gold biscuits. As regards, the confiscated Indian currency, it is his submission that if the appellant had legal documents, as regards sale and purchase of the land by appellant 'V' from appellant '5', they should have produced it immediately which they failed to do so. Hence, the sale and purchase of the land is just a cover story.

5. Considered the submissions made at length by both sides and perused records. I also gave anxious reading to the case laws submitted by both sides on this issue. The issue before me is whether the five numbers foreign marked gold biscuits are liable for absolute confiscation and whether the Indian currency is also liable for confiscation under Section 121 of the Customs Act, 1962 and whether imposition of penalty is according to law.

6. On the perusal of the records, I find, that the seizure of the gold biscuits was made on 23-10-97 and the statement of appellant No. '2' recorded on the spot which categorically indicates that, appellant No.'2' was an employee of appellant No. '4' and he was carrying the gold biscuits and the Indian currency, as per instructions of appellant No.'4'. The statement of appellant No. '2' also indicates that he informed the authorities that these gold biscuits were of smuggled nature. The authorities, during the search of appellant No. '2' did not come across any documentary evidence regarding licit possession of the gold biscuits. It was argued by the advocate for appellant that the appellant No. '2' had in his possession the photocopy of bill '12' dated 17-10-97 but the authorities refused to take cognizance of such bill. To my mind, this is not correct statement, in as much as that when appellant No. '2' was arrested and produced before the Chief Judicial Magistrate, no documents were produced nor there is any averment of the presence of the photocopy of the bill '12'dated 17-10-97. Further, I find that the appellant No. '2' had moved a bail application on 25-10-97, in which also he had not disclosed presence of the bill '12' dated 17-10-97 to indicate the licit possession of the gold biscuits. The appellant No. '2' also did not indicate in his bail application that the amount of Indian currency was towards part payment of the purchase of agricultural land. In the absence, of any such averments on the first instance, the statements recorded by the authorities of appellant No. '2' on 23-10-97 indicates that the appellant No. '2' was carrying smuggled foreign marked gold biscuits and the Indian currency, which was sale proceeds of smuggled silver.

Further, I find that appellant No. '4' had claimed the ownership of the seized foreign marked gold biscuits and Indian currency. It was the contention of the appellant No. '4' that he had legally purchased these gold biscuits from M/s Dhan Cholia Sons, Delhi vide bill '12' dated 17-10-97. I find from records that the authorities had visited the residential/business premises of the appellant No. '4' in Bikaner on 24-10-97. On that date, appellant No. '4' was not available but his son was present in the residence/business premises. The search of the business premises did not reveal any sale or purchase of the gold and nor did son of appellant No. '4' produce any record regarding the purchases of foreign marked gold biscuits and the currency being in possession for sale and purchase transaction of agricultural land. I find from records that the appellant No. '4' did not

attend summons which were issued by the authorities to him till 19-12-97. The authorities had issued 6 summons to the appellant No. '4' to cooperate in the investigation which was not attended to by the appellant No.'4', but on 19-12-97, bill '12' dated 17-10-97 of M/s. Dhan Cholia Sons, Delhi and some agreements regarding the sale and purchase of agricultural land were produced. If these documents were in the possession of the appellant No. '4', he should have produced these documents at the first instance when he was issued first summons by the authorities. The learned advocate could not point out from records why the appellant No. '4' did not respond to the summons issued by the authorities till 19-12-97. The non-cooperation of appellant No. '4' with the investigating authorities from 24-10-97 to 19-12-97 is enough to draw an adverse inference against the appellant No. '4'. Since appellant No. '4' could not justify the non-production of the bill of M/s. Dhan Cholia Sons, Delhi and other documents regarding the sale and purchase of agricultural land, prior to 19-12-97, it is very evident that the appellant No. '4' had embarked upon a massive cover up operation to give legitimacy to the whole issue. I find that appellant No. '2' being an employee of the appellant No. '4', could not have given any statement which is wrong and which can be inculpatory against his own employers, unless and until it is a tact. The statements recorded of appellant No. '2' on the spot do not indicate any duress or coercion which can be noticed from the fact, that on request from appellant No. '2', the authorities took him to a safe place i.e. the Division Office of the Customs Authorities in Bikaner for search and examination of his bag. I find from the records that the bill No. '1.2' dated 17-10-97 as issued by M/s. Dhan Cholia Sons, Delhi only talks about sale of 5 gold biscuits but does not indicate any marks which were found on the gold biscuits seized from appellant No. '2'. It is a common knowledge that the gold biscuits with foreign marking, if legally imported, carry unique markings on them, which is generally reflected on the invoices which are issued for sale of such gold biscuits. Learned advocate was not able to show from the records that the markings which were found on the gold biscuits tallied with the markings as indicated on the invoices on M/s. Dhan Cholia Sons, Delhi.

In the absence of any direct evidence regarding the licit possession of 5 foreign marked gold biscuits in the hands of appellant No. '2' and appellant No. '4', the absolute confiscation as ordered by the lower authorities is correct and does not

require any interference.

7. As regards the seizure of Indian currency under Section 121 of the Customs Act 1962, I find that the appellant No. '2' had categorically stated in his statement dated 2.2/23-10-97 that the said foreign currency is sale proceeds of the smuggled silver. Since the statement of appellant No. '2' is not retracted, the appellant No. '4' is not able to prove beyond doubt that Indian currency is for the sale and purchase of agricultural land. Further, I find that the appellant No.'4' had connived with appellant No. '1', '3' and '5' to manipulate and create documents to give legitimacy to the presence of Indian currency is in itself indicates that they were undertaking a massive cover up operation. As I have already held that the appellant No. '4' had not produced these documents (if he had these with him before 19-12-97), is in itself an indicator that something was amiss, as he failed to cooperate with the investigating authorities from 24-10-97 to 19-12-97.

Accordingly, I do not find any reason for interfering with the order of the lower authorities as regards the absolute confiscation of the Indian currency.

8. It was argued on behalf of the appellants that they have been acquitted by the Chief Judicial Magistrate from the prosecution launched by Customs authorities, hence the current proceedings should not have been proceeded by the lower authorities. I find that the issue is now settled by the Hon'ble Supreme Court in the case of Standard Chartered Bank as reported at 2006 (197) E.L.T. 18, wherein Apex Court clearly settled the law, as to, that the proceedings of adjudication and prosecution are two different proceedings and result of either of them is not binding on the other. The Hon'ble Supreme Court has held as under: Counsel submitted that the devising of a special machinery for adjudication, the limiting of the "without prejudice" clause in Section 56 to any award of penalty and not the initiation of proceedings under Section 51 of the Act, the making of contravention of any of the provisions of this Act as the key to both proceedings, would all indicate that an adjudication should precede a prosecution under Section 56 of the Act. There is nothing, in the Act to indicate that a finding in an adjudication, is binding on the court in a prosecution under Section 56 of the Act. There is no indication that the prosecution depends upon the result of the adjudication. We

have already held that on the scheme of the Act, the two proceedings are independent. The finding in one is not conclusive in the other.

9. Accordingly, I find that the contention of the learned Counsel that having been exonerated by the criminal court on the same set of records, the authorities should have dropped the proceedings is now settled against the appellant.

10. Accordingly, I do not find any merits in the appeals filed by the appellants and the impugned order does not require any interference.

All the appeals filed by the appellants are dismissed.

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