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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-22-1983

Reported in : (1983)(14)ELT2086TriDel

Appellant : Ranjit Ram

Respondent : Collector of Customs

Judgement :

1. The short questions in this revision application, transferred to the Tribunal and heard by us as an appeal, are as to whether- (a) Section 123 applies to the alleged recovery of certain gold biscuits with foreign markings from the Appellant; (b) if not, is there any evidence on record to justify the imposition of a penalty in a sum of Rs. 5,000/- under Section 74 of the Gold Control Act, 1968.

(a) on 12-2-1973, a party of Police Officers in Sirsa apprehended the Appellant and recovered on search two gold biscuits with foreign markings. The Police then prepared a recovery memo and also recorded his statement under Section 161 of the Cr. P.C.; (b) the Police officers who had participated in the search in the preparation of the recovery memo and in recording the Appellant's statement had not been examined in the proceedings instituted under the Gold Control Act, 1968 and the Customs Act, 1962; (c) nevertheless, it was the recovery memo recorded by the Police and the statement under Section 161 Cr. P.C. made by the Appellant that form the entire basis of the adjudication under the aforesaid Acts.

3. In the course of the hearing before us, Shri R.D. Jolly, the learned Advocate for the Appellant submitted inter alia, that- (a) the recovery having been affected by Police officer and not by an officer of the Customs or Gold Control, the ruling relating to the burden of proof in Section 123 is inapplicable; (b) a statement recorded under Sec. 161 of the Cr. P.C. is not evidence in the adjudication proceedings unless the contents are properly proved.

4. The learned Departmental Representative drew our attention to the order in adjudication as well as the order in appeal wherein it was stated that the Appellant did not desire to cross-examine the Police officers who had earlier recorded the recovery memo as well as the statement of the Appellant. According to him the statement made under Sec. 161 Cr. P.C. to the Police is to be read as evidence in the adjudication proceedings.

5. We have given our anxious consideration to the case and we find ourselves unable to agree with the contentions of the Departmental Representative.

6. In terms of the relevant provisions of both the aforesaid enactments,- (a) it is an officer of Customs or any Gold Control Officer authorised in this behalf that is empowered to- (i) search suspected persons (Sec. 101 of the Customs Act and Sec.

59 of the Gold Control Act); (ii) examine any person during the course of any enquiry (Sec. 107 of the Customs Act and 64 of the Gold Control Act); (b) it is the "proper officer" as denned in Section 2(34) of the Customs Act that could seize any goods if he has reason to believe that they are liable to confiscation under the Customs Act and it is any Gold Control Officer who could likewise seize such gold in terms of the Gold Control Act. (Sec. 110 of the Customs Act and Sec. 66 of the Gold Control Act).

7. It is only when any goods specified in Clause (2) of Section 123 of the Customs Act, 1962, are seized under the Customs Act that the rule of evidence therein relating to burden of proof becomes applicable. A seizure under the Act cannot be effected by a person other than a proper officer as defined in the Act. Once, therefore, the seizure has been effected by the Police as in this case, and not by

the proper officer, Section 123 becomes inapplicable since it was not a seizure under the Act in terms of the power specifically vested in the proper officer. In such a case, the burden, therefore, squarely rests on the Revenue to prove all the essential ingredients of the offence with which the Appellant in this case is charged.

8. Even if this were not so, in terms of Section 162 Cr.P.C. a statement recorded under Section 161 Cr. P.C. is neither to be signed nor to be used for any purpose, even at any enquiry or trial by a criminal court in respect of any offence under investigation by the Police, except to contradict a witness in the manner provided under Section 145 of the Indian Evidence Act In the premises, it is not evidence, ipso facto, even in a trial by a criminal court. Much less, can such statement or recovery memo by the Police be read into evidence in a proceeding under either the Customs Act or the Gold Control Act.

When it cannot be read as evidence in a proceeding in a criminal court, it can hardly form part of the evidence under the aforesaid enactments Once this was so, the seizure itself has not been proved and there is no question of the applicability of Section 123 of the Customs Act In any view therefore, the burden of proof rests squarely on the Revenue.

9. In view of the bar of the use of a statement recorded under Section 161 Cr. P.C. already discussed, it cannot be evidence in the adjudication proceedings.

10. In the circumstances, when neither the seizure nor the statement admittedly recorded by the Police have been brought on the record in the adjudication proceedings, it is futile to say that the Appellant did not ask for an opportunity to cross-examine the persons associated with either the recovery memo or the statement under Sec. 161 Cr. P.C.11. In the result, we allow the appeal and the penalty of Rs. 5000/- if already paid should be refunded to the Appellant.