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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Nov-29-1983

Reported in : (1984)(16)ELT622Tri(Chennai)

Appellant : Kallatra MahIn and ors.

Respondent : Collector of Central Excise

Judgement :

1. Appeals under Section 129 A of the Customs Act, 1962 praying that in the circumstances stated therein, the Tribunal will be pleased to set aside the order of the Central Board of Excise and Custom-, dated 27-3-1980 in No. 753-758 of 1980.

2. These appeals coming up for orders upon perusing the records and upon hearing the arguments of Shri M. Ratna Singh, Advocate for appellants in Sl. Nos. 1 & 2 and Shri J. Jeshtmal, Advocate for appellant in Sl. No. 3 and upon hearing the arguments of Shri V.Ramachandra, Senior Departmental Representative for the respondent, the Tribunal makes the following order : 3. These are appeals against the order of the Central Board of Excise and Customs, dated 27-3-1980 in No. 753-758 of 1980, confirming the order of the Collector of Central Excise & Customs, Bangalore dated 28-12-1977 in C. No. VII/10/43/71-Cus. (OR 36/71), As the above appeals arise out of a common order passed by the Collector of Central Excise, Bangalore, they were heard together and are being disposed of by a single order. The Collector of Central Excise, by his impugned order, has imposed penalties on the appellants in No. 104/80 (Kallatra Mahin), A. No. 105/80 (Haji K.

Abdul Khader) and A. No. 106/80 (M.M.Abdulkhader) in a sum of Rs. 10 lakhs, Rs. 2 lakhs and Rs, 2 lakhs, respectively, under Section 112 (b)(i) of the Customs Act, 4. The brief facts relating to the cases are as under. On receipt of specific recorded information, the Superintendent, Customs Special Preventive, Mangalore, with his staff proceeded to Manki village in Honawar Taluk, Karnataka State, on the night of 30-12-71 and at about 2.30 AM. on 31-12-1971 intercepted two lorries, respectively bearing registration Nos. MYX 7985 and MYG 4219. The lorry bearing registration No. MYX 7985 was driven by one K.M. Ahmed, while cleaner Narasimha was the other occupant of the same, and the lorry bearing registration No.MYG 4219 was driven by N.A. Abubacker and there was no other occupant in the said lorry. The lorries were apparently found to carry fish manure bags and sales tax delivery notes were also produced by the respective drivers for the same. The lorries were taken to Custom House, Goondapur, for a detailed examination of the loads carried by them and when the authorities began to examine the goods transported by the lorries in the presence of witnesses, both the drivers and the cleaner confessed before the officers that the lorries contained some gunny bundles with smuggled goods for being transported to Bangalore secretly. On a detailed examination of the goods carried by the lorries it was found that lorry MYX 7985 contained besides 66 bags of fish manure, 77 gunny bundles concealed underneath, while lorry MYG 4219 contained besides 66 bags of fish manure, 75 gunny bundles concealed underneath. The total number of 152 gunny bundles which were found in both the lorries, apart from fish manure bags, were opened and examined by the authorities in the presence of witnesses and were found to contain Japanese and German made synthetic fabrics and metallic yarn of foreign origin which were recovered under Mahazar, attested by witnesses. Precise information with reference to these contraband goods had been received by the authorities, in pursuance of which they went to Manki sea coast and intercepted the lorries as stated above. The contraband goods, viz. fabrics and metallic yarn, in 77 bundles in lorry MYX 7985 were valued at Rs. 9,29,570/-, while those in lorry MYG 4219 were valued at Rs. 10,22,620/-the total value of the contraband goods in both the lorries being 19,52,190/-.

5. Statements were recorded on 31-12-71 from the two drivers of the lorries and cleaner Narasimha in which they confessed to their complicity in the transport of

the contraband goods and also implicated the appellants Kallatra Mahin, Haji K. Abdulkhader of Ponachi and M.M.Abdulkhader. One Abdulla Ibrahim of Honawar, who was examined during the investigation by the Customs authorities, also clearly implicated the appellants herein by his statement dated 13-1-72. The delivery note for the other goods carried by the lorries at the time of seizure were issued by the firm, M/s. M.M. Abdul Khader, fish merchants, of which admittedly M.M. Abdulkhader is a partner, under cover of which smuggled goods had been transported along with fish manure. After detailed investigation and examination of the witnesses, show cause notices were issued to the above appellants and Ors. concerned as per law which eventually culminated in the impugned order, now appealed against.

6. The learned counsel appearing for appellants Kallatra Mahin and Haji K. Abdulkhader of Ponachi (104/80 and 105/80) made the following submissions: (1) The confessional statements of the lorry driver, K.M. Ahmed of MYX 7985 recorded on 31-12-71 and 6-3-72 have to be rejected because they are at variance inter se in certain vital aspects besides other material discrepancies and prevarications, rendering them, unacceptable, (2) It was contended that the fact that lorry driver K.M. Ahmed disowned the very ownership of his lorry bearing registration No. MYG 4219, coupled with the introduction of a fictitious name like D'Souza, whose whereabouts are to this date shrouded in mystery, would only indicate that driver K.M. Ahmed is unreliable.

(3) It was further urged that according to the statement of driver K.M. Ahmed, he was paid a sum of Rs. 500/- as remuneration for transporting the contraband goods and admittedly the said sum of Rs. 500/- was not recovered from the person of driver K.M. Ahmed at the time of seizure of the contraband goods. Therefore, the non-recovery of the alleged sum of Rs. 500/- is a circumstance that militates against the Department's version and would attract an adverse inference against the Department under Section 114(g) of the Evidence Act.

(4) Section 123 of the Customs Act is not applicable to appellant Kallatra Mahin in the circumstances of the case and the finding of the adjudicating authority that Kallatra Mahin is the owner of the goods transported in the lorries is factually

wrong.

(5) The adjudicating authority in para 16.10 of his order has found that Haji Abdulkhader is the owner of both lorries MYX 7985 and MYG 4219 and held him liable for penalty under Section 112(b)(i) of the Act, while in para 16.5 of the order he has placed reliance on the statement of the Driver K.M. Ahmed alias Ahmed Kunhi and found that the two lorries under seizure belonged to the family of Kallatra Mahin. Hence the order is liable to be set aside on the basis of this basic inconsistency.

(6) Regarding appellant Haji Khader (105/80), the learned counsel finally submitted that though he might not be in a position to legally assail the confiscation of the lorries in question, imposition of a penalty on Haji Abdul Khader of Ponachi is not warranted under law or on facts of this case. The adjudicating authority, according to the appellant, has erroneously placed reliance on hearsay evidence and found Haji Abdulkhader liable to penalty under Section 112(b)(i) of the Act.

7. Reliance was also placed on behalf of the appellant on the following cases; which we shall deal with in extenso at the relevant stage.

1. AIR 1961 S.C, 264-1983 E.L.T. 1321 (S.C.) (Ambalal v. Union of India and Ors.).

8. The learned Senior Departmental Representative submitted that the statements of the two lorry drivers and the cleaner recorded immediately after seizure, recovery of two delivery notes bearing Nos.

B 10 36532 and 36533 dated 29-12-71, coupled with the statement of Tukaram R. Dalai and other witnesses, would clearly prove the liability of the appellants in the case.

9. We have carefully considered the contentions of the respective parties and we shall first take up for consideration the questions that arise for determination with reference to appeals No. 104/80 and 105/80 and deal with appeal No. 106/80 thereafter. The fact that at or about 2.30 A.M. on 31-12-71 two lorries bearing

registration Nos. MYX 7985 and MYG 4219 were intercepted by the authorities and on examination of the contents, they were found to contain contraband goods, viz.

Japanese and German made synthetic fabrics and metallic yarn of foreign origin does not admit of any controversy. The two respective drivers of the lorries and the cleaner who were examined immediately after seizure gave statements admitting their complicity, implicating the appellants herein. The main contention of the learned counsel for the appellants is that the statements of the two lorry drivers which are inculpatory and confessional in nature, implicating the appellants are incredible and unreliable because of certain vital contradictions between the statements recorded on 31-12-71 and those recorded on a later date. On a scrutiny of the statements recorded from the lorry drivers we find that they are spontaneous, voluntary and true. In appreciating the evidence of a particular witness we will have to take the evidence or statement, in entirety and assess the same. Some contradictions or discrepancies here and there, particularly when a person gives statements on two occasions after an interval of time are bound to occur and unless the contradictions are vital going to the root of the question, minor discrepancies and inconsistencies cannot be elevated to the realm of falsehood to characterise the witness concerned as unreliable. As correctly observed by the Collector, the statements of the two lorry drivers are inculpatory and confessional and when appellants Kallatra Mahin and Haji Abdulkhader (Ponachi) are implicated by the two lorry drivers, they certainly deserve consideration under law in the light of other materials available on record. We are inclined to accept the earliest statements of the two lorry drivers and the cleaner as true and voluntary and the implication of the appellants by them is well corroborated by other materials on record.

10. The contention of the learned counsel for the appellants that non-recovery of Rs. 500/-, alleged to have been paid as remuneration to the lorry driver, non-tracing of D'Souza, who, according to the counsel, is a fictitious person introduced by the driver, K.M. Ahmed, and his disowning of the lorry bearing registration No. MYG 4219 would render the entire evidence of K.M. Ahmed unreliable and untrustworthy, is not legally tenable. N. Abubacker, one of the drivers of the lorries

in question in his statement before the Inspector of Customs on 31-12-1971 has clearly admitted that the owner of lorry MYG 4219 is a close relative of Kallatra Mahin and that on 30-12-1971 at about 4.30 P.M. Kallatra Mahin called him and the other driver, K.M. Ahmed and asked them to go in lorries MYG 4219 and MYG 7985 to a place called Manki Sea shore to load smuggled goods of foreign origin and transport them to Bangalore after covering them with fish bags. He has further admitted in that statement that he and the other driver K.M. Ahmed were paid Rs. 500/- as bakshis. The submission of the learned counsel that D'Souza must be a fictitious person introduced by K.M. Ahmed is merely a surmise. It might well be that D'Souza is a person very much in existence well within the knowledge of the driver K.M. Ahmed and merely because the Department is not able to trace the whereabouts of D'Souza, it does not mean that very introduction of a person by name D'Souza by K.M. Ahmed must be the figment of his imagination. The cleaner of the lorry MYX 7985, Narasimha, in his statement dated 31-12-1971 before the Inspector of Customs, has stated that the permanent driver of lorry MYX 7985 is one D'Souza of Kasargode. Even if D'Souza had been traced and examined by the Department, that would not in any way alter the basic fact that K.M. Ahmed and Abubacker were drivers who drove the two respective lorries with contraband goods on the day in question.

Likewise, it is possible that the remuneration of Rs. 500/- alleged to have been received by the lorry driver could have been either spent or given to some persons and the mere fact that the same was not recovered from the person of the lorry driver would not certainly lead to the logical conclusion that such version is false. It has not been even contended, before us by the learned counsel that the statements of the two lorry drivers and the cleaner were either not voluntary or extorted under coercion. Minor discrepancies here and other would only prove the untutored veracity of the witnesses and we have no hesitation to place reliance on the statements of the drivers and the cleaner.

11. The learned counsel contended that Section 123 invoked by the adjudicating authority in the impugned order against the appellant is legally untenable and submitted even if the goods in question are notified goods under Chapter IV, the burden of proving that the goods are not smuggled goods cannot be cast on the

appellants because admittedly they were not recovered from their possession. We agree with this submission of the learned counsel that Section 123 is not applicable in the facts and circumstances of this case because the smuggled goods were recovered from the two lorries which were being driven by the drivers, K.M. Ahmed and Abubacker and therefore the goods could not be said to have recovered from the possession of the appellant Kallatra Mahin within the meaning of Section 123 of the Act.

Be that as it may, the question for consideration in this context is whether the finding of the adjudicating authority against appellant Kaliatra Mahin is sustainable on facts and law de hors Section 123.

Even if Section 123 is totally excluded out of consideration and the reasoning of the adjudicating authority in this regard is held not legally-tenable, his findings are clearly maintainable on other facts and circumstances of this case.

12. It was urged by the learned counsel for the appellant that the finding of the adjudicating authority that KalJatra Mahin is the owner of the goods under seizure is factually incorrect. We are not able to agree with the submission of the learned counsel. Even though appellant Kallatra Mahin has disowned ownership of the goods under seizure, the statements recorded from the two drivers of the lorries and the cleaner immediately after seizure, recovery of delivery notes and the statement of Abdulla Ibrahim recorded on 13-1-1972, would clearly implicate his ownership.

13. We do not find any conflict in the reasoning of the adjudicating authority with reference to the ownership of the lorries in question, as was sought to be contended by the learned counsel for the appellant.

What the adjudicating authority has done is merely to highlight the connection of Haji Abdulkhader (Ponachi) with the vehicle MYG 4219 in question and even though the registration of that vehicle would stand in the name of K.M. Ahmed alias Ahmed Kunhi, Haji Abdulkhader has been found to be the real owner not only on the basis of other records but also certain circumstances such as his standing as surety for the purchase of the same. Haji Abdulkhader himself in his statement

before the Inspector of Customs, Mangalore, on 28-1-1972, admitted having paid the tax and surcharge on vehicle MYG 4219 and that he looked after the daily income and expenditure accounts of lorry MYX 7985. It is common case that Haji Abdulkhader is the registered owner of the other lorry bearing No. MYX 7985. The adjudicating authority has observed in para 16.5 of the order that the statement of the lorry driver K.M. Ahmed alias Ahmed Kunhi disclosed that the two lorries under seizure belonged to the family of Kallatra Mahin. The indisputable fact remains that Kallatra Mahin and Haji Abdulkhader are related to each other and driver K.M. Ahmed who was found driving orry MYX 7985 is admittedly a relation of Kallatra Mahin himself and was staying with him attending to various items of work as per his instructions, as clearly evidenced by Kallatra Mahin's statement dated 4-1-1972 before the Superintendent of Customs. Therefore, on scrutiny we do not find any inconsistency in the finding of the adjudicating authority with reference to the ownership of the lorries in question. Therefore, we find that appellant Kallatra Mahin has been proved on the materials available on record to be the owner of the contraband goods under seizure and has played an active part in the transportation of the same, as correctly found by the adjudicating authority.

14. The learned counsel for the appellant did not assail the confiscation of the lorries and in fact conceded the correctness of the same. In respect of the penalty against appellant Haji Abdulkhader, the main thrust of the contention of the learned counsel was that the adjudicating authority is in error to have placed reliance not only on the confessional statements of persons who are in the position of an accomplice but also on the hearsay evidence of Abdulla Ibrahim Patel and pressed into service the following rulings of the Supreme Court.(S.C.) (Amba Lal v. Union of India and Ors.) is not at all relevant to the facts and circumstances of this case. This ruling arises under the provisions of Sea Customs Act, 1878 while Supreme Court was considering the scope of Sections 168, 171 A, 178A, 19, 167(8) and 5. The Supreme Court observed that if the burden of proof is on the Customs authorities, they have to bring home the guilt to the person alleged to have committed a particular offence under the said Acts by adducing satisfactory evidence. Nobody can quarrel with this fundamental proposition of law and we most respectfully agree with the above observation of the highest court of the land. It should be borne in mind that the Supreme Court in that case has found as a fact

that no evidence was forthcoming against the appellant and also held that there was no evidence to prove the case of the Customs authorities.

16. The ruling reported in AIR 1962 1764 (Shanti Prasad Jain v. Union of India), relied upon by the learned counsel for the appellant, is one arising under the provisions of the Foreign Exchange Regulations Act (7 of 1947), wherein the Supreme Court has held that the proceedings under the Act are quasi-criminal in character and it is the duty of the respondent as prosecutor to make out beyond all reasonable doubt that there has been a violation of the law. In the case on hand we have factually found that the materials on record clearly implicate the appellants in respect of the offences committed by them and therefore, this ruling also would not help the appellants in any way.

17. The learned counsel lastly relied upon the ruling reported in AIR 1964 S.C. 1184 (Haricharan Kurmi v. State of Bihar). That was a case where the Supreme Court considered the scope of Section 30 of the Evidence Act dealing with evidentiary value of the confessional statement of a co-accused as a piece of evidence vis-a-vis Section 3 of the Evidence Act. The Supreme Court has held in that case that the testimony of an accomplice may be treated as substantive evidence and is evidence under Section 3 of the Evidence Act, though very weak and tainted, whereas the confession of a co-accused stands on a different footing and cannot be treated as a piece of substantive evidence and can be pressed into service only when the Court is inclined to accept the other evidence and feels the necessity of an assurance in support of the conclusion deducible from the said evidence. It should be noted that the Supreme Court in the above Ruling disapproves the observations of an earlier Supreme Court Ruling in Ramprakash's case [1959 M.L.J.(Cri) S.C. 51] which do not seem to recognise the distinction between the evidence of an accomplice and the confessional statement of a co-accused. In our opinion, this ruling also is not relevant to the facts and circumstances of this case because in the instant case the persons who gave confessional statements cannot be said to be co-accused as in a criminal case. Even if the persons who have given confessional statements have been privy to the act of transporting contraband goods, they can only be characterised, at the worst, as in the position of an accomplice and the evidence of an accomplice is

clearly admissible in law though law requires corroboration in material particulars for the same.

18. The learned Departmental Representative placed reliance on the ruling of the Supreme Court reported in AIR 1974 S.C. 859 (Collector of Customs, Madras v. D. Bhoomull) wherein the Supreme Court has clearly observed : "...the prosecution of the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it-"all exactness is a fake". El Dorado of absolute proof being unattainable, the law accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case." "...Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person and in the result prove him guilty."(State of Maharashtra v. Natwarlal Damodardas Soni), the Supreme Court has observed : "18. It is trite law that even in cases where Section 123(1) of the Customs Act is not attracted, the prosecution can discharge its burden by establishing circumstances from which a prudent man, acting prudently, may infer that in all probability the goods in question were smuggled goods, and the accused had the requisite guilty knowledge in respect thereof. The leading case is : Issardas Daulat Ram v. Union of India, 1962 Supp. (1) SCR 358. In that case, in reaching the conclusion that the gold had been smuggled, the Collector of Customs considered the credibility of the story put forward by the appellant about the purchase of the gold and also the conduct of the appellant in trying to get the

gold melted so as to reduce its fineness by mixing silver with it, in an attempt to approximate the resultant product to licit gold found in the market.

The ratio of this decision was followed by this Court in *Labchand Dhanpat Singh Jain v. State of Maharashtra*, AIR 1975 S.C. 182. The appellant-accused therein was trying to enter the railway compartment at Bombay station. Seeing his nervousness, the Railway Police questioned him and searched his person and recovered nine bars of gold with foreign markings. The accused put forward an incredible story with regard to the possession of the gold. This Court held, that in the circumstances of the case, an inference could very well be drawn that the gold must have been imported after the law passed in 1948 restricting its entry, that the burden of proving an innocent receipt of gold lay upon the appellant under Section 106, Evidence Act and that the totality of facts proved is enough to raise a presumption under Section 114, Evidence Act, that the gold had been illegally imported into the country, so as to be covered by Section 111(d) of the Customs Act." "19. It is to be noted that in *Labhchand's* case (*ibid*), Section 123 of the Customs Act was not applicable, as the seizure of the gold was by the police and not by the Customs Officer. The Courts in that case did not use this presumption under Section 123 of the Customs Act against the appellant. They relied upon the circumstantial evidence to raise the necessary inference with regard to the character of the gold seized and the possession of the requisite mens rea by the accused. The ratio of *Labhchand's* case (*ibid*) applies fortiori, to the facts of the case before us." "20. In *Balumal Jammandas v. State of Maharashtra*, AIR 1975 S.C. 2083, a Bench of this Court to which one of us (Sarkaria, J) was a party, eleven boxes were seized by the Police from a Room No. 10 at Sheriff Deoji Street, Bombay. On opening the boxes, goods bearing foreign markings such as 'Made in Germany', were found. A rent receipt in the name of the accused in respect of Room No. 10, in the occupation of the accused was also recovered. It was held by this Court that even if the goods bearing foreign markings, were not seized under the Customs Act, and as such Section 123(1) of the Act was not attracted, the afore-mentioned circumstances, under Section 114 read with Section 106 of the Evidence Act were sufficient to presume that the accused knew that the goods had been smuggled or imported in contravention of law." 20. The Madras High Court in the judgment reported in 1978 Tax. L.R.1735 (R.S.

Kalyanasundaram v. Collector of Customs, Madras) has held that departmental proceedings under Section 112 of the Customs Act could not be said to be vitiated merely because they were based on consideration of the confession of the co-accused especially when such confession was only one of the pieces of evidence taken into consideration. Therefore, we uphold the finding of the adjudicating authority that appellant Haji Abdul Khader is liable for a penalty under Section 112(b)(i) of the Act.

21. This leaves us only with appeal No. 106/80 in respect of M.M.Abdulkhader. The learned counsel appearing for this appellant raised an important question of law which should dispose of the appeal without further probe into the factual ramifications. It was contended that no show cause notice at all was issued to this appellant and the show cause notice has been issued only to M/s. M.M. Abdul Khader, a partnership firm, of which M.M. Abdul Khader was one of the partners. A copy of the partnership deed was also produced for our perusal. We find from the records that the adjudicating authority has issued a show cause notice in the name of the firm, M/s. M.M. Abdul Khader, which also gave a reply to the show cause notice and was represented in the adjudication proceedings by their counsel. But we find that the adjudicating authority has considered and analysed the entire evidence against M.M. Abdul Khader in his individual capacity and has imposed a penalty on him under Section 112(b)(i) of the Act. We are informed that M.M. Abdulkhader is no more and indeed a petition by his legal representatives to come on record and prosecute the appeal has also been filed by the learned counsel for the appellant. We find that non-issue of a show cause notice against M.M. Abdul Khader, who, in his individual capacity, has been subjected to a penalty under Section 112(b)(i) of the Act is a serious infirmity which would vitiate the order of adjudication against this appellant. It was urged by the learned Senior Departmental Representative that the matter could be remitted back for a de novo readjudication. We are not able to accede to this submission because first of all, M.M. Abdul Khader is admittedly no more and therefore the question of readjudication after issue of a show cause notice against him would not arise. Apart from it, we find that the seizure in this case was on 31-12-71 and the adjudication order itself was passed on 28-12-77. After a lapse of such long number of years and at this distance of time we do not consider it proper and just

to remit the case for readjudication, even if such a course is permissible under law. We therefore allow appeal No. 106/80 in respect of M.M. Abdul Khader on this technical point without going into the merits and set aside the penalty imposed on him.

22. In the result, we dismiss appeal No. 104/80 and 105/80 for the reasons stated supra and confirm the penalties imposed by the adjudicating authority.

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