

Bahubali Vs. Collector of Central Excise and

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

Decided On : Dec-17-1983

Reported in : (1984)(16)ELT631Tri(Chennai)

Appellant : Bahubali

Respondent : Collector of Central Excise and

Judgement :

1. This is an application for reference under Section 130(1) of the Customs Act, 1962 against the order of the Tribunal in appeal No. CD.(MAS) 31/82, dated 25-6-1983. A short resume of the facts may be relevant to consider the issue whether any question of law arises out of the order of this Tribunal meriting a statutory reference under Section 130(1) to the High Court, 2. On information that the appellant herein and his cousin, Sripad, were transporting contraband gold by train No. 85 Secunderabad-Bangalore Passenger on 16-4-1964 and were due to alight at Yashwanthapur railway station at or about 5.45 P.M., the officers of the Central Excise Department proceeded to Yashwanthapur railway station and found the appellant and his cousin alighting from the train in question. They carried out a search of the appellant's suit-case and found 30 gold slabs in the shape of biscuits weighing 10 tolas each, bearing foreign marks "JOHNSON MATHEY LONDON 999.0-10 TOLAS" on One side and "MOCATTA- GOLDSMID LTD. LONDON" on the other side. The officers seized the same under cover of mahazar dated 16-4-1964, attested by witnesses. On 17-4-1964, the appellant gave a statement confessing to the purchase of the gold under seizure from one Sri Ram at Bombay

on 15-4-1964 for Rs. 39,500/- and was transporting the same for disposal at Bangalore to Popular Jewellers. He further confessed of having transported contraband gold on earlier occasions. The statement of the appellant was corroborated by a statement of his cousin, Sripad, who accompanied him. Proceedings were initiated as per law which eventually culminated in an order of absolute confiscation by the Collector of Central Excise and Customs, Bangalore, under Section 111(d) besides a penalty of Rs. 2,500/- under Section 112 of the Act, vide his order C.No. VIII/10/I8/70-Cus., dated 29-7-1982, which was affirmed by a Bench of this Tribunal by its order dated 25-6-1983, out of which this present reference application arises.

3. The learned counsel appearing for the applicant-appellant, Shri G.Chander Kumar, submitted the following as questions of law for reference to the High Court: (1) Whether on the facts and circumstances of the case, Section 123 of the Customs Act is applicable to this case.

(2) Whether on the facts and circumstances of this case, the statement recorded from the appellant Bahubali on 17-4-1964 is admissible in evidence and whether the same is voluntary or hit by Section 24 of the Evidence Act.

(3) Whether in the circumstances of the case a fresh show cause notice issued by the Collector of Central Excise dated 18-6-1970 was in supersession of the show cause notice dated 17-4-1964 and as such barred by Section 110(2) of the Customs Act.

(4) On the day of arguments, the learned counsel submitted that whether the acquittal given in the criminal case filed against the appellant that the seizure was not on the basis of a reasonable belief by the seizing officer and therefore Section 123 is not applicable, is binding on the Tribunal and should be referred as an additional question of law to the High Court.

4. The Senior Departmental Representative contended that no question of law arises out of the order passed by the Tribunal and the Tribunal has found the appellant guilty of contravention of the provisions of the Customs Act de hors Section 123 of the Act. Even if Section 123 is not applicable, Sections 106 and

114 of the Evidence Act can certainly be pressed into service by the Department on the ratio of the rulings of the Supreme Court, which incidentally has been done in this case, and hence no question of law arises in the circumstances for reference to the High Court. It was further submitted by him that the criminal court has not given a finding on merits and submitted with "considerable degree of emphasis" that Section 123 of the Customs Act was not applied by the criminal court as the officer had deposed that he effected the seizure on suspicion and on that short point the appellant-accused was acquitted of the charge under Section 135(b) of the Customs Act. The Senior Departmental Representative further submitted that even otherwise, the adjudication proceedings and the prosecution proceedings are different proceedings before different forums and the finding of an acquittal cannot set at naught a valid order of confiscation passed by a competent adjudicating authority under law. Anyway, this question is purely academic, as in the instant case the criminal court has not given a finding on merits with reference to the contraband nature of the gold in question.

5. The question that arises for our consideration is whether any question of law emanates out of the order passed by the Tribunal meriting a statutory reference to the High Court under Section 130(1) of the Customs Act. The submission of the learned counsel for the appellant with reference to the applicability of Section 123 as a question of law does not at all arise for consideration on the facts and circumstances of this case. The Tribunal has dealt with the import and applicability of Section 123 in a comprehensive fashion in its order from para 13 onwards and we have clearly found that in the instant case, assuming *arguendo* that Section 123 is not applicable there are other clinching circumstances which would clearly cast a burden on the appellant to offer convincing, satisfactory explanation as to the possession of a huge quantity of gold slabs with foreign markings and the Department would be well within its legal rights to invoke statutory presumptions under Sections 106 and 114 of the Evidence Act in the light of the facts and circumstances of this case.

We have also referred to the ruling of the Supreme Court reported in AIR 1974 S.C. 859-Collector of Customs and Ors. v. D. Bhoormull-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." The Supreme Court has also in a later judgment reported in AIR 1980 S.C. 593-State of Maharashtra v. Natwarlal Damodardas Soni-highlighted the proposition that illegal importation of gold into the country within the meaning of Section 111(d) of the Customs Act could be presumed under Sections 106 and 114 of the Evidence Act, if the totality of facts proved could warrant such a presumption. It may not be out of place to extract the weighty observations of the Supreme Court herein : "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) S.C.R. 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 Labhchand 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."

The Tribunal has also respectfully adopted the ratio in the ruling of the Supreme Court reported in AIR 1975 S.C. 2083-Balumal Jamnadas v.State of Maharashtra-with reference to the applicability of Sections 114 and 106 of the Evidence Act de hors Section 123 of the Customs Act, 1962.

6. Therefore, on a careful consideration of the facts, the Tribunal has factually found by clinching weighty circumstances and preponderance of probabilities that irrespective of the applicability of Section 123 of the Customs Act, the Department has satisfactorily discharged its legal burden with reference to the contraband nature of the goods and has justifiably invoked the aid of Sections 106 and 114 of the Evidence Act against the appellant. We also find that the acquittal in the criminal court is based more on the non-applicability of Section 123 of the Customs Act on account of the usage of the word 'suspicion' in the deposition of the seizing officer as a prosecution witness. Therefore, we do not find any question of law arising for reference, as contended by the learned counsel for the appellant, in this regard.

7. The next submission of the learned counsel for the appellant that a question of law, with reference to the voluntary nature of the confessional statement of the appellant, arises for reference is also legally not sustainable. We have on detailed analysis of the facts and evidence found that the confessional statement was voluntary and true, and as against this factual finding no question of law, in our opinion, arises for reference to the High Court. We, therefore, reject the contention of the learned counsel for the appellant in this regard also.

8. With reference to the plea relating to the show cause notice, we brought to the notice of the learned counsel that he did not seriously press his contention even at the time of arguing the appeal and this has also been factually recorded in the order of the Tribunal at para 15. The present occasion can hardly be one for reopening this issue.

However we note in passing that the admitted fact remains that the show cause notice was issued to the appellant immediately after the seizure as early as on 17-4-64 and a subsequent notice from the Collector of Customs and Central Excise dated 18-6-70, purporting to be a show cause notice issued in consequence of the judgment of the High Court of Karnataka at Bangalore dated 18-3-70 in W.P. 2567 of 1967 giving liberty to the Collector of Central Excise and Customs, Bangalore to proceed with the adjudication proceedings under law after affording an opportunity to the appellant to file explanation to the show cause notice and of being heard in person, cannot be said to be a fresh show cause notice in supersession of the earlier one. It is nobody's case that the Department gave up the earlier show cause notice and issue of a notice at a later point of time pursuant to the order of the High Court cannot obliterate or nullify the validity of the earlier show cause notice which very much exists. Therefore, there was no supersession of the earlier notice and bar of limitation under Section 110(2) of the Customs Act does not arise. We therefore reject this submission of the learned counsel.

9. The last submission of the learned counsel, which he raised for the first time at the time of arguments, is with reference to the legal effect of an acquittal by a criminal court in a criminal prosecution on the connected adjudication proceedings. We find as a fact that the criminal court has not given a finding on merits, as rightly

contended by the learned Senior Departmental Representative and the acquittal in the criminal court is based merely on the ground of non-applicability of Section 123 of the Customs Act in the instant case in respect of the charge under Section 135 (b) of Customs Act. The criminal court has not gone into the question nor given a finding that the appellant did not transport contraband gold with foreign markings nor has the criminal court accepted as a fact the explanation of the accused in the criminal prosecution. Likewise, the criminal court has also not gone into the question with reference to the applicability of Sections 106 and 114 of the Evidence Act. Since the acquittal in the criminal court of the appellant in respect of a charge under Section 135(b) of the Customs Act is based exclusively on the non-applicability of the statutory presumption under Section 123 of the Customs Act and since the criminal court has not considered the other questions at all, which the adjudicating authority has taken into consideration for finding the appellant guilty of contravention of Section 111(d) of the Customs Act, the submission of the learned counsel that the acquittal of the appellant in the criminal court, which could well be characterised in the instant case as technical in nature, would ipso facto set at naught the order of confiscation by the adjudicating authority, is not legally sustainable. On the facts and circumstances of this case no question of law arises for reference to the High Court in this regard as well.

10. The ruling relied upon by the learned counsel for the appellant, reported in AIR 1966 Mysore 68-P. Channappa v. Mysore Revenue Appellate Tribunal, Bangalore and others-is clearly distinguishable on facts and has no application or relevance to the facts of the instant case. In that case the transport permit of the petitioner was suspended by the Regional Transport Authority, Mandya, on an allegation of overloading of the bus. In a criminal prosecution before the Magistrate's Court in respect of an identical question as to the overloading of the bus, the petitioner was acquitted on a finding of fact.

11. Though not cited by either side we would like to refer to the following case laws having a bearing on this issue.

12. Before the Karnataka High Court in the case of State of Mysore v. Abdul Hafeez, reported in 1967 M.L.J. (Crl.) 506, the question that arose for

consideration was whether a criminal court acting under Section 517 of the Code of Criminal Procedure, 1898 can set at naught a confiscation order de hors the provisions contained in the Indian Wireless Telegraph Act. The question was answered in favour of the State on the ground, the view taken by a number of High Courts in this country is that the general provisions of Section 517 do not apply to cases under statutes in which special provisions for forfeiture have been made". Yet another case of the Karnataka High Court on the point is the one reported in AIR 1967 Mysore 231-State v. Abdul Hasheed, wherein His Lordship Bhimah J. held that Section 517 was controlled by Sub-section (2) of Section 5 of the Code of Criminal Procedure, 1898 and consequently, the powers of forfeiture or confiscation exercisable by the authority named in a special enactment cannot be rendered negatory by a criminal court in exercise of its power under Section 517 of the 1898 Code.

13. In a Bench ruling of the Madras High Court in Criminal Revision Case No. 206 of 1976, Criminal Revision Petition No. 204 of 1976 in the Assistant Collector of Customs, Preventive Department, Custom House, Madras v. Misrimal and Shah Monmal Misrimal, His Lordship the Chief Justice, speaking for the Bench, has held that before a criminal court acting under Section 517 of the Criminal Procedure Code, 1898, corresponding to Section 452 of the Code of Criminal Procedure, 1973, directing delivery of the goods to any person it "must be satisfied that the person claiming is entitled to possession. In a case where proceedings have been taken under the Customs Act and the concerned property has been confiscated and in law it has vested in the Central Government, without challenging the confiscation proceedings, the person cannot claim to be entitled to the possession of the goods".

"The Legislature by enacting the Customs Act has empowered the Customs authorities to take adjudication proceedings and after observing all the formalities direct confiscation. When once such an order is made in law, the goods vest in the Central Government. The Act also makes it clear that the adjudicating officer is entitled to hold possession of the goods on behalf of the Central Government. When such is the position, the goods are not available, though they are produced before the criminal court, for the court making any order regarding their disposal.

The power of the criminal court would arise only when the person claiming to be entitled to possession of the goods which are in the custody of the court makes out a case". The Bench, advertent to the scope of Section 5(2) of the Criminal Procedure Code, has also held that "the offence with which the respondents were charged was under Section 135(b) of the Customs Act and the procedure regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with the offence is prescribed under the Act has to be followed in preference to the procedure under the Code". A reference has also been made in this Bench ruling to an earlier Division Bench ruling of the Madras High Court, reported in 1955 Madras Weekly Notes Cr. 137- Assistant Collector of Customs v. Krishna Pillai-and the Division Bench has relied on the same as an authority for the proposition that the authority of the customs to hold and possess the goods is independent of the order of the acquittal made by the criminal court. It would be apposite to extract the observation of Mack J. at page 555 of the said ruling : "The fact that they (Customs authorities) instituted prosecution in the Magistrate's Court against a particular person in relation to such property does not mean that it must in any event be handed over to him in the event of his acquittal. The property itself is legally and rightly held by the Custom authorities until duty and discretionary penalty are paid by the claimant, that is, if confiscation is not ordered. I am unable to see how, merely because the prosecution against one person launched by the customs authorities in relation to valuable property obviously smuggled across the border fails, it is incumbent on the Magistrate to return it to this person on acquittal." 14. In a Bench ruling of the Madras High Court, reported in AIR 1952 Madras 853, His Lordship Chief Justice Rajamannar, speaking for the Bench, has, while considering the case laws in extenso, observed :- "...If there is a conviction by a competent criminal court, that would furnish conclusive ground for any penal action by the Transport Authorities. Equally, if the criminal prosecution ended in a discharge or acquittal of the accused and that event happened before the order of any Road Transport Tribunal, then such Tribunal would not have the power to go behind the final order of a competent criminal court. If at the time the Road Transport Tribunal disposes of any application or before such tribunal passes an order no prosecution has been launched, then of course it is not incumbent on the tribunal to await a criminal prosecution".

15. In a ruling of the Madras High Court, reported in AIR 1965 Madras 502-Shaik Kasim, petitioner v. The Superintendent of Post Offices, Chingleput Dn. and another-His Lordship Justice M. Anantanarayanan, considering case laws bearing on the subject in extenso, has held that where a person is acquitted upon grave charges arising out of the facts, on the substantial merits and not merely on some technical plea, such as lack of sanction, it is not in consonance with principles of natural justice that a domestic forum, exercising disciplinary jurisdiction, should come to a different conclusion in the departmental proceedings, whether before or after the criminal trial. "Authorities are not lacking for the view that a mere acquittal by a criminal court, does not necessarily absolve the concerned individual from liability, on the same facts, in disciplinary proceedings. Obviously, the principle can never be stated in any absolute or unqualified form. As I earlier expressed, where the acquittal is on a technical ground or the facts are held established which would justify disciplinary action, but the criminal trial ends in an acquittal, because some necessary ingredient has not been proved beyond reasonable doubt, there might well be a case for contending that the departmental authorities could nevertheless punish.". In Dalmer Singh v. State of Pepsu, AIR 1955 Pepsu 97 at p. 99, it was held that even where there had been a regular trial, the judgment of the criminal court was not necessarily conclusive as regards departmental or disciplinary action. The prosecution might fail for technical reasons. In Karuppa Udaya v. State of Madras, AIR 1966 Madras 460, Rajagopalan J. of the Madras High Court, pointed out with regard to a charge in the criminal court under Section 420 I.P.C. that the question whether the concerned party could have prosecuted in a criminal court or not, did not affect the jurisdiction of the Revenue Divisional Officer to enquire into the truth of the charges. In Mohamed Israil v. Sia Suran Sinha, AIR 1961 Pat. 411 at p. 412, the Bench has held that though the evidence might not be sufficient for securing conviction in a criminal case, the management had every jurisdiction to deny re-employment in the context of heavy suspicion relating to the charge. A Bench of the Orissa High Court in Radhakanta v. State of Orissa, AIR 1962 Orissa 125, has held that the mere fact that the criminal court did not convict the plaintiff of the charges of the criminal breach of trust, cheating and forgery, did not preclude the department from making a further probe into the matter, as the plaintiff had been acquitted upon the benefit of doubt.

16. On a consideration of the ratio embedded in the above rulings, the following principles may be said to emerge : (1) When pursuant to an order of confiscation in a valid adjudication proceeding the goods themselves come to vest in the Central Government under Section 126 of the Customs Act it is absolute and not contingent on the conviction or acquittal of a criminal court and the vesting contemplated under Section 126(1) of the Customs Act is subject only to disturbance by an appellate or revisional authority prescribed in the Customs Act. The material object produced in the trial of cases in criminal prosecutions under the Customs Act, Gold (Control) Act, after having been subjected to the process of adjudication will be in the nature of case exhibits than case properties and would not, therefore, require any order of disposal by the criminal court at the end of the trial.

(2) Powers exercisable by a criminal court in prosecutions launched under the Customs Act will be governed by Sections 4 and 5 of the Code of Criminal Procedure and Section 5, being in the nature of special provision applicable to prosecutions launched under the Customs Act would exclude the general provisions such as Section 517 of the Cr P.C. 1898 or the present amended Section 452 of the Code under the well-known maxim *specialibus generalis non derogant*.

(3) If the issue before the quasi-judicial adjudicating authority and the criminal court is identical and one and the same and if a competent criminal court has, on consideration of the issues involved on merits, had recorded a finding of acquittal, the administrative or adjudicating authority would have to bear that factor in mind in the adjudication proceedings.

(4) If the criminal prosecution ends in an acquittal either by giving a benefit of doubt or otherwise on technical grounds, such as non-applicability of a statutory presumption or want of sanction or inherent lack of jurisdiction or flagrant violation of canons of natural justice, such an order of acquittal cannot be pressed into service to set at naught a valid adjudication proceeding.

(5) Instances are not wanting where, when a criminal court has acquitted a person in a criminal prosecution, on the same facts, departmental proceedings have been

initiated for a lesser charge which may not amount to a criminal offence but may amount to grave dereliction of duty. For instance, a school master may be acquitted of a charge of rape alleged to have been committed against a girl-student in his care. But that cannot preclude the departmental authority, upon those very facts, from punishing him for grave impropriety in his relationships with the girl-students, which disentitles him to that office.

17. We would find in the instant case that factually the criminal court has not acquitted the appellant on merits. The acquittal of the criminal court in respect of one of the two charges, viz. charge under Section 135(b) of the Customs Act against the appellant is on a technical ground on the view that the presumption under Section of the Customs Act was not applicable. The criminal court has not considered the applicability of Sections 106 and 114 of the Evidence Act vis-a-vis the appellant in the light of the ratio of the Supreme Court rulings cited supra. The criminal court has not directed the return of the property to the appellant-accused nor has it found that the appellant-accused is entitled to the possession of the goods under Section 517 of the Cr. P.C. Moreover, the criminal court has found the appellant guilty under Rule 126-I(i)(10) read with rule 126-P(2)(ii) of the Defence of India Rules and has observed that "considering his age, antecedents, the penalty he has already suffered in the departmental proceedings and confiscation of 30 gold pieces valued about Rs. 50,000/-, I feel that the accused No. 1 deserves lenient punishment."

It does not at all stand to reason how in the context of such a finding by the criminal court, it would be open to the learned counsel for the appellant to contend that there has been an order of acquittal on merits which would nullify the entire order of confiscation and more so, a question of law would arise meriting a reference to the High Court we have no hesitation to reject this submission of the learned counsel as utterly unsustainable and devoid of merits.

18. For the foregoing reasons, we find that the order of the Tribunal is based on consideration of facts and evidence and no question of law arises at all for reference to the High Court. Accordingly we reject the reference application.