

Rajeev Sharma Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-18-1994

Reported in : (1995)(75)ELT116TriDel

Appellant : Rajeev Sharma

Respondent : Collector of Customs

Judgement :

1. The above appeal arises out of the order of Addl. Collector of Customs, New Delhi confiscating absolutely 2646 kgs. of Polyester Texturised yarn of Korean origin valued at Rs. 3,43,980/- recovered on 2-2-1987 from the factory premises of the appellant herein and imposing a penalty of Rs. 50,000/- upon him for contravention of the relevant provisions of the Customs Act, 1962.

2. The brief facts of the case are that on 2-2-1987, the Customs Preventive Staff searched premises of WZ-191/1, Madipur Village and recovered 84 Card Board cartons wrapped in gunny cloth containing Polyester Texturised yarn made in Korea. The same were seized in the absence of production of any evidence for their lawful import or acquisition etc. Statement of Proprietor of the factory, Shri Rajeev Sharma was recorded on the same date in which he stated that he was a permanent resident of Ludhiana where he was carrying on the business of fabrication of Hosiery goods before shifting his business to Delhi in June, 1986 and that he had brought 8 Interlock machines and installed them in his factory premises in Delhi for the purpose of converting yarn into fabric. He deposed that he had been introduced to a Sikh gentleman named Monty who told him that he

would send yarn of Korean origin covered by valid import documents to Delhi sometime in January 1987. He further stated that the fabrication charges were fixed at Rs. 5/- per kg. The appellant was busy at Ludhiana in connection with settling the marriage of his sister on 25th January 1987 and when he came to his factory on 2nd February, 1987, he was told by his labourer Shri Ram Pravesh that one Sikh gentleman had come to his factory on 1-2-1987 along with a truck containing Card Board cartons all containing polyester texturised yarn of Korean origin and the said Shri Monty had told Shri Ram Pravesh that he would come on 2-2-1987 with valid import documents covering the goods and while the appellant was waiting for Shri Monty, the Customs officers visited the factory and seized the goods. Shri Pravesh's statement corroborated the statement of the appellant herein. The appellant furnished the Telephone No. of Monty but could not furnish his address.

3. A show cause notice was issued to the appellant proposing confiscation of the yarn alleged to have been illicitly imported into India and acquired/possessed by the appellant knowing or having reason to believe that the goods were liable to confiscation and proposing levy of penalty. The goods having been confiscated and penalty imposed, the above appeal has been preferred.

4. We have heard Shri S.C. Chawla, learned Advocate for the appellant and Shri K.N. Gupta, learned DR for the respondent. We find from the statement of the appellant that he knew the said Shri Monty and further knew that Shri Monty dealt in smuggled goods and it appears that there was a pre-existing arrangement between him and Shri Monty to leave the yarn in the factory premises of the appellant. It does not appear likely that a person would leave such a large quantity of yarn (notified goods) namely over 2646 kgs. valued at Rs. 3,43,980/- without any prior agreement or arrangement and especially in the absence of Prop, of the factory on that date. It is relevant to note that from delivery till date, the said Shri Monty has not come forward to claim the goods, which according to the appellant, belonged to Shri Monty.

We, therefore, see no reason to interfere with the finding of the Adjudicating Authority that the appellant had knowledge or reasonable belief that the goods

seized from his factory were liable to confiscation. We therefore, uphold the order of the Adjudicating Authority. However, having regard to the fact that the goods have not been claimed by the appellant and that he was also not present at the time when the goods were delivered at his factory, we reduce the penalty to Rs. 25,000/- subject to this modification, the impugned order is confirmed and the appeal rejected.

With due respect to Hon'ble Member (Judicial) my views and orders in this matter are as follows :- 5. I consider that in this matter the burden of proving the charge lies on the Department and the Department has not discharged its burden beyond doubt Even from the point of view of preponderance of probability it is seen that the appellant's statement that he was away from the factory in connection with settling of marriage of his sister has not been contradicted or shown to be wrong. In the circumstances, his submission that in his absence his labourer Ram Pravesh was approached and the owner of the goods left the cartons and told him that he would come and talk to the appellant the next day, remains in the realm of high probability particularly in view of the statement of Ram Pravesh, which corroborates the statement of the appellant in above respect.

Hence, in my opinion the appellant was entitled to the benefit of doubt. I, therefore set aside the penalty imposed on him. Since the confiscation of the goods has not been challenged, the impugned order is otherwise confirmed but the appeal is accepted.

In view of the difference of opinion between Hon'ble Member (Judicial) and the Vice President, the matter is submitted to the President for reference to a Third Member on the following point :- "Whether in the facts and circumstances of this case, the benefit of doubt was required to be extended and the penalty set aside or penalty was required to be reduced as suggested by Hon'ble Member Judicial)." (S.K. Bhamagar,) (Jyoti Balasundaram) Vice President Member (J) Dated : 15-2-1994 Dated : 16-2-1994 The point of difference of referred to Shri S.L. Peeran, Member (Judicial).

I have heard both sides and have perused the record and the opinion expressed by the differing members.

6. The panchnama dt. 2-2-1987 states that a search of business premises of Shri Rajiv Sharma situated at WZ-191/1, Madipur Village, New Delhi-63 was conducted and as a result of the search 84 cardboard carton polyster texturised yarn of Korean origin of the following description, weight and value was recovered.

"(i) 42 cardboard cartons wrapped with gunny cloth having markings "Mitez 40% polyster texturised yarn Calcutta in transit to Nepal 75D - 36F - Semi dull grade 'AA' Made in Korea" each cardboard carton contains 18 cones of 27 kgs. net weight in total having markings 100% polyster textured yarn 75D - 36F Semi-dull grade AA twist O" Total net weight 42 cartons 1134 kgs. valued Rs. 1,47,420/-.

(ii) 42 C/B cartons wrapped with gunny cloth having markings "SINCE RETEX 7160-86 Calcutta in transit to Nepal made in Korea".

each cardboard contain 12 cones of 36 kgs. net weight in total having marking "Polyster Dowtexturised yarn Lenex 75/36 2H grade A. Total net weight of yarn is Value = Rs. 1,96,560/- Grand Total = 84 cartons

7. The statement of the appellant was also recorded by the Investigation Officer. Inter alia, the appellant had stated before the officers that in June, 1986, he hired a shed in Madipur Village on a monthly rent of Rs. 4,000/- per month. He installed inter-lock machines in the said rented premises then he started fabricating cotton garments after purchasing the item from the local market. He stated that he had left for Ludhiana on 7-1-1987 and there he met one Sikh Gentleman at Delhi aged about 30 years of wheatish complexion by the name 'Monti' through a broker Shri A.K. Gupta of Delhi whose address he did not know. He knew Shri Ashok Kumar Gupta as he often visited Ludhiana and was seen in market but he had not done any business through him and as such he did not know his address. The said Monti had told him that he wanted to get fabricated polyster cloth out of 100% polyster texturised yarn of Korean origin. He told him that dealing in smuggled yarn was an offence, for which Monti had told him that he had imported documents with him with regard to the said yarn and that there will be no problem. He also told him that he contacted him in Delhi at manufacturing premises and also sent the yarn of Korean origin to the factory. He has further stated that Monti visited Delhi sometime in the month of Jan., 1987 and when he asked him to give address or

atleast telephone No. at Delhi, he told him that there was no need for that as he himself would contact him in Delhi. The fabrication charges were settled @ Rs. 5/- per k.g. He has further stated that he came to Delhi on 8-1-1987 but he had to leave for Ludhiana on 9-1-1987 in connection with the settlement of engagement of his younger sister. After fixing the marriage of his sister for 25-1-1987, he returned to Delhi on 20-1-1987. However in the meantime, he had been manufacturing/ fabricating Indian Polyester Cloth out of Indian Polyester Yarn after getting orders from the local market. He had employed five labourers and one mechanic for fabrication. In his absence, the fabrication work was being looked after by his mechanic Shri Pawan Kumar whom he had brought from Ludhiana. Since he was busy in making arrangement for the marriage of her sister which was to be performed at Ghaziabad. He visited his factory premises very hardly. After performing the marriage of her sister he came to his factory premises on 2-2-1987 and he was told by his labourer Shri Ram Parvesh that one Sikh Gentleman who had told his name as Monti had come to the factory on previous night i.e.

1-2-1987 along with 84 card-board cartons in a truck and had left the same in his factory saying that he would come in the morning and talk to him regarding these packages. His labourer stays overnight in the factory premises itself. He has further stated that he came to the factory premises in the morning on 2-2-1987. He had found 84 cardboard cartons wrapped with gunny cloth containing polyester Yarn made in Korea with each package having markings, weight and other descriptions as detailed in the panchnama dt. 2-2-1987. He had asked his labourer as to whether the above said Monti had left the documents in respect of the above said 84 cartons for which his labourer had replied in the negative and had told him that Shri Monti would himself come and talk to him about those packages. He was waiting for Monti when the Custom Officers visited the factory premises and inquired about the eightyfour cartons and recorded the statement. He has also stated that he did not have any evidence for storage, purchase of the above-said 84 cartons.

8. The statement of Shri Ram Parvesh was also recorded in Hindi. The translation in English has been placed for us. He has stated that he is working in the factory of the appellant since 1986. He has stated that 84 bundles which had been left on

the night of 1-2-1987 in the factory by one Sikh gentleman who told his name as Monty. The said Monty has brought the bundles in a truck and had told him that he would come and talk to Mr. Sharma and then order for fabrication. He has stated that whenever Yarn for fabrication would come to factory he would receive and keep the same in the factory. On Sunday due to holiday, there was no work and Sharmaji had not come to the factory. When Sharma came to the factory in the morning on 2-2-1987 then he told him about the goods and also told him that Sardarji would come either today or tomorrow and would explain about the goods. Sardarji did not give any documents and that Sardarji was very slim and tall. He was wearing Kurta Pajama and red turban and was of fair complexion. His age would be 30 or 32.

9. We have heard Shri M.L. Chugh, Id. Advocate for the appellant and Shri K.N. Gupta, Id. SDR, for the Revenue.

10. Id. Advocate argued that the Department had not discharged their burden about the goods being smuggled one. He further submitted that the appellant was totally innocent and the Deptt. had also not proved or placed any evidence pertaining to his involvement in smuggling or dealing with the smuggled goods. The statement of the appellant and his employee was a natural one and the Deptt. having relied the same should accept its veracity and its truthfulness. The Deptt. had also failed to apprehend Monty. The owner of the said goods had also failed to send the goods for test in order to ascertain as to the nature of the goods being of foreign origin or not. He submitted that the cartons were bearing the brand made in Korea while the goods kept inside the cartons or gunny bags did not bear any mark or name of a foreign country or origin. In this circumstance merely because a wrapper or carton bears the name of the foreign country, it cannot be presumed that the goods were of foreign origin. He further submitted that the appellant had been detained in COFEPOSA Act, 1979 and later he was acquitted for lack of evidence. He further submitted that Monty has now been apprehended and detained in other offences.. In that view of the matter, the appellant being innocent and the circumstances explained by him having not been controverted by the Department, his version should be accepted. He further submitted that the opinion expressed by Id. Vice President, in the circumstances of the case is

correct one.

11. On the other hand, Id. SDR pointed out that no person would have left such valuable and expensive material with a stranger without any business transaction and earlier understandings. He submitted that the Deptt. cannot prove their case with a mathematical precision. In this connection, he relied on the Supreme Court decision rendered in the case of Collector v. D. Bhoormull as reported in 1983 (13) E.L.T. 1546.

He submitted that the goods carried the foreign marking made in Korea and therefore, the Department had discharged their burden and it was for the appellant to have shown his non-involvement in smuggling and that he was in possession of the smuggled goods itself, was sufficient to impose penalty.

12. I have considered the submissions made by both the sides and have perused the panchnama, statement of the appellant and his worker as well as the citation referred to before me. In the case of this nature, the Deptt. has to first prove that the goods in possession of the appellants was smuggled one and of foreign origin. The Deptt. also has to place cogent and acceptable evidence with regard to the falsity of the appellant's version. In this particular case as can be seen from the Mahazar report, the cartons were bearing the name of foreign country. The question before me is as to whether the cartons bearing foreign country's name could be sufficient to hold that seized goods were smuggled one. This initial burden in my opinion has not been discharged by the department. The reason being that the origin of the goods being of foreign nature cannot be presumed on the basis of marking on a wrapper or external cover on gunny bags. It is possible that thrown away wrappers of licit import might have been used for packing Indian goods. Therefore, the goods have to be examined by experts and opinion obtained as to its nature and as to whether they are of foreign origin. This has been the opinion expressed in a number of decisions rendered by the Tribunal as in the case of Collector v. Shri Balakrishnan as reported in 1987 (29) E.L.T. 65. The ruling rendered in para 6 of the judgment is reproduced hereinbelow: Daroga Singh, Prop. Vijay Stores v. Collector of Customs as reported in 1992 (60) E.L.T. 427. The Tribunal has also distinguished the Supreme Court ruling rendered in the

Bhurmal's case. It has been laid down in this ruling that mere foreign origin by itself is not sufficient to show that the goods were of smuggled nature, by distinguishing the Supreme Court ruling in Bhurmal's case, the Bench has held in paras 8 to 10 as follows : 13. In the case of Gudipati Papa Rao v. Collector of Central Excise, Guntur reported in 1987 (27) E.L.T. 524, the Tribunal has also held that the mere fact, that the goods appeared to be of foreign origin would not clothe the authorities with any jurisdiction under the Act to effect a seizure. It has been further held that this seizure must be preceded by "reasonable belief in the mind of the seizing authority, that the place for search contains any contraband goods which deserve seizure".

It has further been held that the presumption under Section 123 of the Customs Act, 1962 is not invokable unless the onus of proving that the goods are of foreign origin is discharged by the department.

14. In this particular case, the appellant has stated that he was not in the factory. The said Monty has delivered the goods and that the appellants had also disclosed that he had categorically told Monty that he would not accept the foreign goods for the purpose of fabrication.

The said Monty has delivered the goods on Saturday night on 1-2-1987 to the worker Ram Parvesh. Shri Ram Parvesh has clearly described as to how Monty had delivered the goods and also his physical features. The said Monty was to come next day to discuss about the fabrication work to be carried out by the appellant. The appellant was to make further enquiries before accepting the work. In the meantime, the Customs Authorities have seized the goods on the very next day. It had become very important and necessary for the Customs Authorities to have apprehended Monty which they have failed to do. The Department has also failed to establish that the seized goods were of foreign origin and that they were also smuggled one. The appellant is not the owner of the goods and that he had also not purchased or had received the same personally. In the circumstance, the goods having been left in the factory in his absence, it cannot be held that he had any involvement with the licit or illicit dealing of the said goods. The department has failed in their duty to have further investigated the matter and to have

apprehended the owner Shri Monty and extracted further details pertaining to the seized goods. They have also not shown any reason as to why the statement of the appellant and his worker should not be accepted in this case. In a case of this nature, if a genuine small scale industrialist is accepting goods for manufacture on job work charges and he is apprehended and charged for smuggling without proper evidence, then great injustice would be caused to innocent persons. It is seen in this case that the appellant had been held in COFEPOSA Act and he was discharged for lack of evidence. Therefore, taking into consideration the rulings cited before me, I am of the considered opinion that the department had not discharged their burden with regard to the smuggled nature of the goods and also failed to investigate in the matter and apprehend the real person namely Monty to ascertain the truth of the matter. As can be seen from the statement of appellant, Monty had told him that he was having proper documents in respect of the said goods. In the absence of the Deptt. having investigated in this matter fully a serious doubt arises about the whole case and the benefit of such a doubt should be given to the appellant. In the result, following the ratio of the citations placed before me and in the facts and circumstances of the case, I accept the opinion of Id.Vice President and order for accepting the appeal. The appeal papers should be placed before the Original Bench for passing the final order.

Sd/- In view of the majority opinion the appellant is granted the benefit of doubt and his appeal in respect of only penalty is accepted.

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