

Commissioner of Customs (Preventive) Vs. Ritu Kumar and ors.

Commissioner of Customs (Preventive) Vs. Ritu Kumar and ors.

SooperKanoon Citation : sooperkanoon.com/887524

Court : Kolkata

Decided On : Dec-09-2005

Judge : Bhaskar Bhattacharya and ;Arun Kumar Bhattacharya, JJ.

Acts : [Customs Act, 1962](#) - Sections 11, 110, 112B, 123 and 130A; ;Foreign Trade (Dev and Reg) Act, 1992 - Section 3(3)

Appeal No. : CUSTA No. 6 of 2002

Appellant : Commissioner of Customs (Preventive)

Respondent : Ritu Kumar and ors.

Advocate for Def. : Summit Talukdar, ;Soumyajit Dasgupta and ;Sandip Agarwal, Adv.

Advocate for Pet/Ap. : D.P. Mukherjee and ;I.P. Mukherjee, Adv.

Disposition : Appeal dismissed

Judgement :

Bhaskar Bhattacharya, J.

1. By this appeal under Section 130A of the Customs Act, (hereinafter referred to as the Act) the Commissioner of Customs (Preventive), West Bengal, Kolkata has challenged the order of the Appellate Tribunal affirming the finding of the

Commissioner of Appeal holding that there was no justification for confiscation of goods belonging to the appellant and of imposing personal penalty upon the directors of the respondent company.

2. The fact giving rise to the filing of this appeal may be summed up thus:

(a) Acting on a specific information that huge quantity of Silk fabrics of Chinese origin had been stored at the factory-cum-godown premises of M/s. Ritika Limited, the respondent herein, the Officers of P & I Branch, West Bengal, Kolkata searched the premises in presence of the Assistant Commissioner of Customs, P & I Branch, the Director of M/s. Ritika Limited and two independent witnesses. The search yielded in recovery of 2907.67 meters of silk fabrics of Chinese origin in roll form as well as in cut-piece form. On demand, the representatives of the company could not produce any document except one voucher of Ritika Limited and one bill of Nav Bharat Textiles, in support of legal importation/acquisition of the goods.

(b) The goods were seized under Section 110 of the Customs Act on reasonable belief that those were smuggled into India through unauthorised route in contravention of Section 3(3) of Foreign Trade (Dev & Reg) Act, 1992 read with Section 11 of Customs Act.

(c) After departmental investigation, a notice to show-cause was issued on 5th February, 1998 to the respondents asking them to show-cause why the seized goods should not be confiscated and why penalty should not be imposed upon the directors of the Company. In reply to the notice, written explanations were given stating that the Company purchased raw-materials from the various suppliers including one Nav Bharat Textiles and payment were made through account payee cheques. In other words, the respondents claimed to be bona fide purchasers from Nav Bharat Textile and according to the respondents, the salesman of Nav Bharat Textile came to the shop of the respondents and supplied those materials on the basis of voucher the amount was paid by account payee cheques which were duly encashed.

(d) The Joint Commissioner of Customs after hearing the parties ordered absolute confiscation of the seized goods and imposed personal penalty of Rs. 7,00,000/-

upon each of the three Directors of the M/s. Ritika Limited under Section 112B of the Act. The said Joint Commissioner while passing such order, came to the conclusion that the purported supplier namely, M/s. Nav Bharat textile on investigation having been found to be a non-existing concern, the department had discharged their initial burden of proof. It is further recorded that correspondence with the Bank could not disclose who had actually encashed the cheques purportedly issued for payment of the goods and accordingly, he disbelieved the defence of the respondents that they were bona fide purchasers for value.

(e) Being dissatisfied, the respondents preferred an appeal before the Commissioner of Customs (Appeal) and the said appellate authority allowed the appeal thereby setting aside the order of confiscation and penalty with a definite finding that the respondents purchased the goods through Nav Bharat Textile for which payment was made by cheques. It was further held that goods being non-notified item, the burden of proof that the goods were smuggled in nature rested upon the department and the department had failed to discharge the same by not adducing any concrete evidence to substantiate the contention.

3. Being dissatisfied, the Revenue preferred an appeal before the Customs Excise and Gold Control Appellate Tribunal and as indicated earlier, the Tribunal has affirmed the order passed by the appellate authority.

4. Mr. Mukherjee, the learned Advocate appearing on behalf of the revenue has strenuously contended before us that the Tribunal below totally misplaced the question of burden by holding that the appellant could not discharge the said burden. Mr. Mukherjee by relying upon the decision of the Supreme Court in the case of Collector of Customs, Madras and Ors. v. D. Bhoormull reported in : 1975 CriLJ545 , contended that his client having discharged the initial burden, it was for the respondents to prove that those were not smuggled goods and that they were bona fide purchasers and having failed to prove such fact, that Tribunal and the appellate authority erred in reversing the order of the Joint Commissioner. Mr Mukherjee further contends that it appeared through investigation that the Nav Bharat Textile was not in existence and as such, the appellate authority and the Tribunal illegally reversed the decision of the Joint Commissioner imposing penalty

and confiscation.

5. The aforesaid contentions of Mr. Mukherjee are seriously disputed by Mr. Talukdar, the learned Advocate appearing on behalf of the respondents and he contends that the Tribunal and the appellate authority rightly applied the principle of burden as the goods are undisputedly non-notified goods. Mr. Talukdar, thus, prays for dismissal of the appeal.

6. After hearing the learned Counsel for the parties and after going through the materials on record we find that admittedly the goods in question are non-notified items in terms of Section 123 of the Act. Such being the position, the burden is upon the revenue to prove that those were smuggled goods. In this case, it appears that no specific evidence has been produced showing that the goods in question were smuggled to India without complying with the formalities contained in the statutes. Therefore, the initial burden that the goods were smuggled was not discharged. Moreover, in this case, the respondents have definitely asserted that they purchased the goods in question from Nav Bharat Textile in 1995 by account payee cheques and that those were encashed. It appears from the order of Joint Commissioner that he merely recorded that it did not reveal from the correspondence with the Bank as to the identity of the person who encashed the cheques.

7. In our view, once the respondents have asserted that those account payee cheques given to Nav Bharat were encashed, so long the revenue can establish by definite evidence that such statement is wrong, the respondents can not be held to be guilty merely because the revenue could not collect sufficient material as to who encashed those cheques and as to whether those cheques were at all issued. It must be presumed that the version of the respondent that those were encashed by Nav Bharat is correct unless the Bank gives definite information that the claim of the respondents is false.

8. The goods in question being non-notified in terms of Section 123 of the Act, the burden is upon the revenue to prove such fact. We are unable to accept the contentions of Mr. Mukherjee that burden shifted to the respondents.

9. It is now settled law that burden in a criminal prosecution in the absence of any special protection given in any statute is always upon the prosecution. The goods in question being non-notified one, the burden is upon the revenue. Onus of proof is different from the burden of proof and we should not confuse the term 'onus' with 'burden'. Burden of proof lies upon the person who has to prove a fact and it never shifts but the onus is shifted at every stage in the process of evaluation of evidence. (See *A. Raghavamma v. A. Chenchamma* reported in : [1964]2SCR933 .)

10. In this case, the respondent specifically stated that they got those articles by purchase through payment by account payee cheques. If the revenue could produce the documents of the Bank showing that those were not encashed, we are prepared to accept the contention of Mr. Mukherjee that initial burden was discharged and the onus shifted upon the respondents to prove his definite defence. But the revenue having failed to discharge initial burden in this case, no question of shifting of onus arises. In the case of *Collector of Customs, Madras and Ors.* (supra), relied upon by Mr. Mukherjee it was specifically pointed out in paragraph 30 of the judgment that the fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary, is on the department. It was further pointed out that the law did not require the prosecution to prove the impossible. All that it required, the Supreme Court proceeded, is the establishment of such a degree of probability that a prudent man might, on its basis, believe in the existence of the fact in issue.

11. In this case, as indicated earlier, if the department produced documents showing that the defence of the respondent that they paid the price of the goods by account payee cheque in favour of Nav Bharat Textile was a false plea by production of the Bank's documents, the Court could reasonably come to the conclusion that the defendant had taken a definite wrong plea and as such, they were guilty; but the department could not disprove such assertion. No material had been placed showing that no such cheque was encashed by Nav Bharat.

12. Although Mr. Mukherjee tried to impress us that Nav Bharat was not in existence and/or a fictitious person, we are not impressed by such contention. The

respondents purchased goods in 1995 and the investigation started in the year 1997. If by that time, the Nav Bharat had really removed their business, for that reason the respondents could not be blamed.

13. We, thus, find that the appellate authority and the Tribunal rightly held that the burden was not discharged by the revenue in the facts and circumstances of the case and as such no substantial question of law is involved herein. We accordingly dismiss this appeal with costs which we assess at 300 G.Ms.

Bhaskar Bhattacharya, J.

14. I agree.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com