

(2010) 03 PAT CK 0170
In the Patna High Court
Case No : Misc. Appeal No. 616 of 2009

Commissioner of Customs

APPELLANT

Vs

Ghanshyam Prasad Gupta

RESPONDENT

Date of Decision : 09-03-2010

Acts Referred:

Citation : (2010) 03 PAT CK 0170

Judgement

Sudhir Kumar katiyar, J.—This appeal u/s 130 of the Customs Act 1962 (hereinafter referred to as the "Act"), is directed against the order dated 9.7.2009, passed by the Customs, Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata, in Custom Appeal No. 369 of 2008 (Shri Ghanshyam Prasad Gupta v. Commissioner of Customs, Patna), whereby the appeal preferred by the respondent herein has been allowed, the orders of the two authorities below have been set aside, and the confiscation proceeding against the respondent herein has been set at naught.

2. A brief statement of facts essential for the disposal of the appeal may be indicated. In view of intelligence report, the authorities under the Act were alert in the township of Raxaul, a town at the Indo-Nepal border known for illegal import and export activities. During the night intervening 3.11.2006 and 4.11.2006, at about 01.00 hours, the functionaries of the department noticed goods being carried on a Thela and was being escorted by a person on a motorcycle. The Thela was moving towards the territory of Nepal along. As soon as they noticed the departmental functionaries, both of them took to their heels abandoning the goods-laden Thela and the motorcycle, and disappeared in the labyrinthine lanes of the township, taking advantage of the darkness of the night. Examination of Thela revealed that it was loaded with logs of some kind of wood, red in colour, and wrapped in plastic fabric. The functionaries then rolled the Thela as well as the motorcycle to the godown of M/S Bihar Carrying Co., Narendra Shrama Road, Raxaul. Two persons opened the doors. A search of the godown disclosed that another consignment of the same item had already been stored which was also seized. It is relevant to state that the goods were red

sandalwood and combined together weighing 1269 Kg., valued at Rs. 5,07,600/-. The seized goods were deposited there and the godown was sealed.

2.1) Enquiry u/s 107 of the Act prima-facie revealed involvement of the respondent. Statements of Binod Kumar Singh and Arvind Kumar, Cashier and Manager respectively, of M/s. Bihar Carrying Company, were recorded on 5.11.2006. Their statements are marked Annexures 6 and 7 respectively. Thereafter the statement of Sujeet Kumar Dey, representative and Booking Clerk of Jayshree Transport (Pvt) Ltd. situate at Kolkata, was recorded on 15.11.2006 (Annexure-4). Statement of Ram Kumar Sharma, Director of Jayshree Transport Pvt. Ltd. was similarly recorded on 28.11.2006 (Annexure-5). These statements were recorded u/s 108 of the Act.

2.2) In view of the materials which had come on record, the authorities issued notice to the respondent. He refused or failed to appear and, therefore, notices were issued to the respondents on 6.11.2006, 27.11.2006, 15.12.2006, 25.12.2006 and 10.3.2007, calling him upon to appear before the authorities to enable them to record his statement u/s 108 of the Act. The respondent did not appear as a result of which his statement u/s 108 of the Act could not be recorded though he had shown cause on 16.8.2007 (Annexure-A to the supplementary counter affidavit). The Joint Commissioner of Customs, Headquarters, Patna, passed the order dated 11.12.2007 (Annexure-2), u/s 122 of the Act, whereby the goods, the Thela, and the motorcycle have been confiscated, and penalty of rupees one lac has been imposed on the respondent herein in terms of Section 114 of the Act. Cash penalty has also been imposed on another person, not relevant in the present context.

3. Aggrieved by the order of the learned first authority, the respondent preferred appeal which was rejected by order dated 20.8.2008 (Annexure-3), passed by the learned Commissioner (Appeals), Customs and Central Excise, Patna. Aggrieved by the same, the petitioner preferred appeal before the Tribunal which has been allowed by the impugned order. Hence this appeal at the instance of the department.

4. While assailing the validity of the impugned order, learned Counsel for the appellant submits that the statements of the four witnesses u/s 108 of the Act adequately implicates the respondent. The same is admissible evidence in terms of Section 108 of the Act. She relies on the judgment of the Supreme Court in Bhana Khalsa Bhai Patel Vs. Assistant Collector of Customs, Bulsar, Gujarat and Another, She submits that the cause shown by the respondent, read with the documentary evidence on record, fully established the culpability of the respondent. She also submits that the primary onus of proof is on the department to establish that the goods in question are smuggled or meant to be smuggled which has been fully discharged by the department. On the other hand, the respondent has failed to discharge his onus, and he has equally failed to avail of the opportunities by his refusal to appear before the authorities. She relies on the judgment of the Supreme Court in Collector of Customs, Madras

and Ors. v. D. Bhoormull reported in 1983 E.L.T. 1546 (S.C.). She also submits that the respondent in his appeal before the learned Commissioner had prayed for reduction of the punishment which by necessary implication means that he has accepted his culpability. She lastly submits that the respondent is trying to take undue and unjustified advantage of hair-splitting technicalities. The Supreme Court had observed that there is no requirement under the Act to prove the culpability with mathematical precision. The substance of guilt has to be established which, in her submission, has been fully established.

5. Learned Counsel for the respondent in his elaborate submissions has submitted that the prescribed procedure has not been followed. He tried to impress on us the relative scope and sweep of Sections 108 and 122, and Chapter-14, of the Act. He has also taken us through the departmental manual. He next submits that there is no worthwhile evidence to establish the culpability of the respondent.

5.1) He also submits that the department is trying to invoke Section 123 of the Act, but he is not covered by any one of the clauses therein. He next submits that the consignment note is in the name of Ghanshyam Gepu, whereas the respondent's name is Ghanshyam Prasad Gupta. He next submits that the respondent was not allowed cross-examination of the witnesses. He relies on the following reported judgments:

(i) Lakshman Exports Limited Vs. Collector of Central Excise,

(ii) New India Assurance Company Ltd. Vs. Nusli Neville Wadia and Another, paragraph 45.

5.2) He lastly submits that it is given to every litigant to set up a prayer in the alternative, and pray for reduction of sentence.

6. We have perused the materials on record and considered the submissions of learned Counsel for the parties. Before we proceed further, we must inform ourselves adequately of the nature, scope, and the content of the Act, and should in the same vein appreciate the onus cast on the department to bring the respondent's action within the mischief of the Act. Sufficient guidance has been provided by the Supreme Court in its judgment in Collector of Customs, Madras and Ors. v. D. Bhoormull (supra), paragraphs 30 and 31 of the same are reproduced hereinbelow:

30. It cannot be disputed that in proceeding for imposing penalties under Clause (8) of Section 167, to which Section 178A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or 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.

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered to use the words of Lord Mansfield in *Blatch v. Archer* (1974) 1 Cowp. 63 at p. 65 "According to the Proof which it was in the power of one side to prove and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

(Emphasis added)

It is thus evident that in a proceeding under the Act the primary onus to prove that the goods in question are contraband goods and are within the mischief of the Act, is on the department. There is no requirement to prove the same with mathematical precision.

7. Law is equally well-settled that in all such quasi-judicial proceedings, the rules of evidence do not apply with its rigours. The basic requirement is that the principles of natural justice must be observed and the delinquent person must be informed of all the materials that have come against him to enable him to put up his defence. It is in this background that we are required to examine the facts and circumstances of the present case. The admitted position is that Raxaul is situate in the State of Bihar at the Indo-Nepal border, and has made itself notorious for smuggling activities. Bihar and Nepal share a very long length of common boundary which is quite porous, full of hilly and jungle areas, and it is very difficult for the Government of India to guard it. It is equally the admitted position that the goods in question were intercepted in the township of Raxaul when it was in the process of being exported to Nepal. It is particularly noticeable that the goods were being transported surreptitiously at a very unearthly hour. It was 01.00 hours during the night intervening 3.11.2006 and 4.11.2006. The authorities were acting on the basis of intelligence report, and on being intercepted the, Thelawala and the motorcycle rider, took to their heels. The functionaries rightly took the Thela and the motorcycle to the godown of M/s. Bihar Carrying Co. Pvt. Ltd. which led seizure of further consignment of red sandalwood lying in the godown. This was followed by intensive enquiry. The statements of at least four persons, who were functionaries of the two transporters, were recorded. There is no doubt about the legal position that their

statements in the scheme of the Act are admissible evidence in terms of Section 108 of the Act. The authorities had also examined the consignment note which, according to the appellant, recorded Ghanshyam Gupta, whereas according to the respondent, recorded Ghanshyam Gepu. We will have to deal with this contention at the appropriate stage.

8. As soon as the situation became clear to the authorities as to the complicity of the respondent summons were issued to him as many as five times and he disobeyed each one of them. It does not need any emphasis to state that the respondent was duty-bound to respond to the summons which he persistently disobeyed. We wish to state at this stage that extraordinary writ jurisdiction is never exercised in favour of a person who has no respect for the lawful authority of the State, no respect for the rule of law and the established procedure. This will undoubtedly weigh against the respondent. The learned first authority has observed as follows in paragraph 4.07 of his order dated 11.12.2007:

4.07.I find it all the more surprising that even after issue of 05 repeated summons Shri Ghanshyam Prasad Gupta did not appear before the investigation to clarify his stand in the matter. His routine requests for another date or appearance after every summon on one pretext or the other and finally not presenting himself for examination even after four extensions only shows his conscious guilt and apprehension of getting exposed during examination u/s 108 of Customs Act 1962. Section 108 of the Customs Act, 1962 empowers the officers of Customs to summon any persons to give evidence and produce documents before any gazetted officer of custom and give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods and that all persons so summoned shall be bound to attend either in person or through an authorised agent as such officer may direct and all persons so summoned shall be bound to state the truth upon any subject, in respect of which they are examined or make statements and produce such documents and other things as may be required. The expressions "any person" includes a person who is suspected or have reason to believe to be concerned in the smuggling of goods. But it is found that the Notice No. 1 Sri Ghanshyam Prasad Gupta never bothered to appear before the investigating agency as a law abiding citizen in spite of various summons issued to him on one pretext or other. He miserably failed in his effort to prove his innocence and always kept seeking adjournments either on one plea or other through his advocate e.g., that he was framed by the other notices, which was obviously an after thought and rather goes on to prove his involvement in the case.

We must give full credit to the authorities who served an exceptionally exhaustive show-cause notice, wherein they summarised the entire materials which had come on record against the respondent and conveyed the same by their show-cause notice dated 24.4.2007 (Annexure-1), issued in terms of Section 124 of the Act. The respondent had shown cause by his communication

dated 16.8.2007.

9. On a consideration of the entire materials on record, the learned first authority passed an exhaustive order u/s 122 of the Act, whereby the goods have been confiscated and a cash penalty of rupees one lac has been imposed on the respondent. As stated hereinabove, the respondent's appeal has been rejected by the learned Commissioner (Appeals). The learned first authority and the learned Commissioner of Appeals have recorded concurrent findings of facts that Ghanshyam Prasad Gupta, the respondent herein, was the consignor as well as the consignee. The goods had been booked at Kolkata, and the destination station was Raxaul, the heaven of smugglers. They have concurrently found that the goods belonged to Ghanshyam Prasad Gupta which he was trying to smuggle to Nepal and is, therefore, liable under the Act,

10. It is relevant to state that the question of cross-examination of any witness would have arisen had he personally appeared and made prayer to that effect. A mere statement in the pleading is always treated by the Court to be grossly inadequate. It is trite law that the litigant makes multiple prayers in his pleadings, but those have to be pressed before the Court. The respondent by his purposive abstention, failed to avail of the opportunities. We must state to the credit of the authorities that they patiently issued summons after summons to the respondent in an act of fairness. We notice in the order of the learned first authority that, at the final stage, the respondent appeared through his counsel by filing duly executed Vakalatnama. This cannot be in compliance of the five summonses for personal appearance so that his statement u/s 108 of the Act could be recorded.

11. Of the four persons who made statements u/s 108 of the Act two have made statements which clearly implicate the respondent. For example, Binod Kumar Singh has stated in his statement that ^-;g eky esjs lDlSy xksnke eas fnukad 24&9&06 dks V?d ds }kjk vk;k Fkk A jDlSy esa eky ikusokys txg ij Self (Consignment Note) fy[kk gqv k gS] vFkkZr Hkstus vkSj ikus okyk O;fDr Jh ? ku";ke xqIr k gSA He has further stated that ^-eSa vius xkMZ dks ?ku";ke xqIr k uke ds O;fDr ls ifjp; dj;k Fkk tks fd cSad jksM+] jDlSy dk fuoklh gSA**

12. We also cannot fail to take notice of the statement of Arvind Kumar who has made the following statement u/s 108 of the Act:

iz"u la[;k ?11?& fnukad 4&11&2006 dks tks eky vkids xksnke iflj ls jkf= igj esa fudyk vkSj dLve vf/kdkjh;ksa }kjk tIr fd;k x;k og eky jkf= igj esa dSls fudyk vkSj fdldks fMyhoj gqv k\ bl lanHkZ esa foLr`r tkudkj ns A

mRrj& fnukad 3&11&06 dks Jh ?ku";ke xqIr k "kke dks ikWp cts gekjs dSf" k;j fouksn dqekj flag ds ikl vk;s cksys fd vkt eSa ,d Bsyk eky ys tkmWxk ckdh eky dy ys tkmWxk A eky yxHkx nks ekg ls iM+k gqv k Fkk A geyksx ckj&ckj rxknk dj jgs Fks fd vki viuk ydM+h ys tk;s gekjk txg :dk gS A bl dkj.k fouksn dqekj flag us vfuy flag xkMZ dks cksy fn;s fd budks ,d Bsyk eky tc vk;sxs rks ns nsuk A ge yksx us dYiuk Hkh ugh fd;k Fkk fd og e/; jkf= esa vkdj gekjs xkMZ ls eky ys

tk;saxs A og yksdy vkneh Fks xkMZ Hkh mudks tkurs Fks bl dkj.k mudks vUnj vkus fn;k A eSa vkSj esjs dSf"jk;j nksusk dks gh ckgj fudyk Fkk bl otg xkMZ vfuy flag laidZ ugh dj ldk A oSls Hkh gekjs V?kUliksVZ es tks Qksu gS mlls ckgj Qksu ugh fd;k tk ldrk gS vkSj vfuy flag us crk;k fd dksbZ Hkh cwFk ml oDr ugh [kqyk Fkk fd og ge yksxks dks crk lds fd bruh jkr dks eky ysus dh ftn dj jgs gS vr% og ;g lksprs gq;s fd eky bUgh dk gS vkSj fouksn dkekj flag us dgk Fkk bl dkj.k og eky ns fn;k A ;g vc esjs le> esa vk jgk gS fd og bruh jkf= esa eky dks D;ks mBkuk pkgrs Fks A

iz"u la[k;k ?12?& vki iwoZ iz"u ds mRrj esa ;g dgk gS fd vc vkidks irk pyk fd Jh xqIrK ;g eky jkr esa v/kZjkf= ds ckn NqMkuk pkgrs Fks& D;k vki bls foLrkj ls crk;sxs\\

mRrj& ge foLrkj ls crk;sxs fd ydM+h dk dUlkbiesaV igyh ckj gekjs ;gkW vk;k Fkk vkSj geyksx tjk Hkh ugh HkkWi lds fd ;g bruk laosnu"khY oLrq gS fd u fIQZ Hkkjrh; dkuwu cfYd vUrj"V?h; O;kikj vf/kfu;e ds rgr izfrcaf/kr gS ,oe~ bl rjg ls Hkkjrh; dkuwu ,oa vUrj"V?h; dkuwu dk mYya?ku gqvK gS A bls rks eS bruk rks le> gh ldrk gWw fd blh dkj.k ls eky dkQh fnukas rd esjs ;gkW iM+k jgk tc fudkyk x;k rc jkf= ds ,sls le; esa tc lkjh nqfu;k lksbZ jgrh gS bls tqM+s rF;ksa ij fopkj djus ij ;g irk pyk fd ;g eky usiky ys tkus dh dksf"kk dh xbZ blh dkj.k ls jkr ds vU/ksjs dk Qk;nk mBkus dh dksf"kk dh xbZ A

iz"u la[k;k ?13? vki ?ku";ke xqIrK dks fdrus fnuksa ls tkurs gS vkSj dSls tkurs gS\\ mRrj& eS vkSj ?ku";ke xqIrK nksuks jDlkSy fuoklh gWw A eS Hkh ;gh iSnk gqvK gWw vr% yksdy esa dkQh yksxks dks tkurk gWw vkSj blh dkj.k eS ?ku";ke xqIrK th dks tkurk gWw A ysfdu gels mudk futh ;k O;olkf;d laca/k dksbZ [kkL ugh gS vkSj bl ydM+h ds dUlkbiesaV vkus ds ckn esa tc og ,d fnu og esjs V?kUliksVZ vkfQl vk;s rHkh geus tkuk fd ydM+h ?ku";ke xqIrK th dk gS ?D;ksfd fcYVh esa ?ku";ke xqIrK th dk dydRrk dk irk fn;k gqvK Fkk? vkSj mUgksus dgk fd vki fpUrK ugh dfj;sxk ge lgwfy;r ls leku mBk ysaxs blds ckn ;nk&dnk gekjs dSf"jk;j mudks eky mBkus ds fy, laidZ djrs jgs A ijUrQ mUgksus eky dks dc vkSj mBk;k ge crk pqds gS vkSj vc foHkkx dks Hkh irk gSA

(Emphasis added)

13. Before we proceed further, we would like to deal with the contention advanced on behalf of the respondent that the consignment note recorded the name of the consignor and consignee as Ghanshyam Gepu. This aspect of the matter has been dealt with by the learned first authority and we entirely agree with the conclusion arrived at by him. The relevant portion of the order is reproduced hereinbelow:

Shri Ghanshyam Prasad Gupta has further stated that he did not book the consignment of the wood in Jay Shree Transport Ltd., Kolkata. In support of his contention, he has stated that the consignment note submitted by the Manager of Bihar Carrying Co., Raxaul, neither bears his name nor his signature and the address of the consignor is also incomplete. I find from the copy of the

consignment note in the file that Shri Ghanshyam Prasad Gupta has willfully misconstrued the name of the consignor as "Ghanshyam Gepu". In fact, even through cursory look of the consignment note, anyone can read the name as "Ghanshyam Gupta". The style of writing letters "t" and "a" in the word "Gupta" clearly matches with the letter "t" and "a" of the word "Kolkata" written just above the name of consignee. As regards writing full address of the consignor is concerned, it is normal practice in the transport business that the addresses are written in short and the booking clerk does not normally verify the genuineness of either the consignor or his address.

Learned Counsel for the appellant is, therefore, right in her submission that the respondent is trying to take undue advantage of the procedure by advancing hair-splitting arguments. We are convinced that Ghanshyam Prasad Gupta was the consignor and consignee of the goods in question, as has been found and held by the two authorities and was making attempts to smuggle the goods across the border surreptitiously at unearthly hour.

14. We must deal with the contention advanced on behalf of the respondent that Tribunal is the last forum of facts which has concluded that there is no material on record to connect the respondent with illegal exports of goods. He has also relied on the judgment of the Supreme Court in *Metroark Ltd. Vs. Commissioner of Central Excise, Calcutta*, wherein, with respect to the scope and ambit of Article 136, it has been observed that unless it is shown that there is something perverse in its finding, the Supreme Court will not interfere with the fact-finding of the Tribunal. It must be stated that the judgment deals with the scope and ambit of the Supreme Court under Article 136 of the Constitution of India. Secondly, law is well settled that the High Court in exercise of jurisdiction under Articles 226 and 227 of the Constitution normally takes the findings of facts recorded by the forum of facts as final. This is subject to well-known exception that the High Court can, on the basis of the materials on record, come to the conclusion that the findings of facts recorded by the last forum of facts were perverse. We indeed feel unhappy at the perfunctory manner in which the Tribunal has dealt with the whole matter. The learned first authority as well as the learned Commissioner of Appeals have taken pains to examine the entire materials on record and reached the conclusions. The learned Tribunal has, in a spirit of bravado refused to examine the facts and by its sweeping observations upset the findings of facts recorded by the two authorities, and recorded perverse findings that there is no material to connect the respondent with the alleged export of goods. We entirely disagree with the approach of the Tribunal.

15. In the result, this appeal is allowed, the order of the learned Tribunal is hereby set aside, and that of the learned Commissioner (Appeals) is hereby restored.

16. In the circumstances of the case, there shall be no orders as to costs.