

(2010) 08 CAL CK 0098
In the Calcutta High Court
Case No : CUSTA No. 3 of 2004

Commissioner of Customs

APPELLANT

Vs

National Radio Products

RESPONDENT

Date of Decision : 10-08-2010

Acts Referred:

Customs Act, 1962 — Section 111, 113, 123, 143
Evidence Act, 1872 — Section 106

Citation : (2012) 3 CHN 29 : (2011) 263 ELT 236

Hon'ble Judges : Kalyan Jyoti Sengupta, J; Kalidas Mukherjee, J

Bench : Division Bench

Advocate : hatterjee, for the Appellant;

Final Decision : Dismissed

Judgement

1. The Court : This court by order dated June 15, 2004 admitted the appeal on the following substantial questions of Law:

(i) Whether on the facts and circumstances of the case the department was able to discharge the initial burden of proving that the goods were smuggled and was so recovered from the possession of the respondents and that the evidence adduced was sufficient for the purpose of Section 106 of the Evidence Act to discharge the burden as was held in the case of " Collector of Customs, Madras and Others Vs. D. Bhoormall, on the principle whereof the onus shifts on the respondent particularly when the case was admittedly of foreign origin and the respondent, could not produce any document regarding procurement of the goods and payment thereof and the respondent failed to identify any supplier of the goods and that there was admission on the part of the respondent that the goods were procured from Nepal through cash transaction of which there was no record with further admission that the goods were illegally imported into India which seems to be sufficient evidence of discharge the burden laying on the department and shifts the onus on the respondent?

(ii) Whether on the facts and circumstances of the case on the basis of appreciation of evidence in accordance with law would justify intervention by the court on reference with the finding of the Tribunal?

2. The short fact is that the customs authority after having raided the business place of the respondent seized certain electronic goods and at the time of raiding the respondent could not explain their source of collection of the goods as those were prima facie found to be imported materials. On account of failure the goods were seized, and appropriate authority issued show cause notice and thereafter on receipt of the explanation the first authority held that the goods are liable to be confiscated as those are clandestinely imported. The Commissioner (Appeals) on consideration of the facts and circumstances of the case and also the statement recorded by the raiding officials and the partners of the respondent firm came to the conclusion that the goods are neither notified one nor the same could be classified to be of smuggled character. Therefore the order of confiscation as well as penalty was set aside. The revenue thence took this matter on appeal to the Tribunal. The learned Tribunal upheld the judgment and order of the first appellate authority [2003 (256) E.L.T. 908 (Tribunal)]. It appears in addition thereto the learned tribunal on fact found that the goods are not notified or prohibited goods within the meaning of Sections 113 and 111 nor they were found to be of smuggled character as it is a pre-condition for issuance of such action u/s 123 of the Customs Act.

3. The learned Tribunal also found on fact that these goods are no doubt branded imported goods and the same were available in market in plenty, hence the smuggled character cannot be presumed and it was also held by the learned tribunal that when the imported goods are available in the market in plenty presumption is in favour of lawful importation of the goods. Under these circumstances, the learned Tribunal held that the revenue has failed to discharge its burden to prove that these goods were of smuggled character, or to bring an action u/s 111 read with Sections 113 and 143 of the Customs Act.

4. Mr. Chatterjee appearing for the revenue submits that the learned Tribunal has wrongly and further on misconception of law has shifted the burden upon the revenue. On the facts and circumstances of the case and particularly in view of admission made by the partners of the respondent firm it was the burden of the respondent to tell the authority about the source of procurement of the materials which are admittedly of foreign varieties. No document or material was produced regarding the source of collection. It is the special knowledge u/s 106 of the Evidence Act of the respondent regarding the source of procurement by producing necessary documents. According to him once such burden is discharged, then the burden shifts on the revenue to prove otherwise. In view of the contention, we are now to examine the only point as to whether in this case the burden of proof lies with the respondent as required u/s 106 of the Evidence Act.

5. The learned Tribunal is the last fact finding authority. The provision of Section

106 of the Evidence Act while we seriously take notes of the legal argument of Mr. Chatterjee, will be applicable when on the facts and circumstances of the case no other person was or is in position to tell the truth about the fact in issue except that person. But in a case if other person is in position to prove the fact in issue, then obviously Section 106 of the Evidence Act cannot be pressed into operation. For example, whether a particular person is the father of a particular person in absence of former, can only be proved by the mother of the person who is instrumental to giving birth to the child, because the couple had only special knowledge and none else. Hence degree of knowledge of the person would be such that it will not be possible for an other person to testify with all conditions. On the aforesaid given legal proposition as we have discussed, we now examine whether the facts and circumstances of the case would fall within the said category?

6. The learned Tribunal on fact found that the goods are not of smuggled character nor the same are notified goods by which bringing of the goods is strictly prohibited. It has also been held by applying the principle of law that when the goods are actually available in market in plenty, the presumption is in favour of lawful importation. Relying on the fact finding that the goods are not of smuggled character and available in the market in plenty, we hold mere possession of the goods by anyone else cannot be said to have been brought by clandestine import which calls for action under the Customs Act. The learned Tribunal after going through the statement recorded by the officials and the partners of the firm which is described to be confession or admission, held that there has been no concession on the point that the goods are smuggled. Moreover, we do not think any admission contrary to the provisions of law can be accepted by any court of law to write judgment.

7. In the facts and circumstances of the case it was the burden of the revenue to prove that the goods are smuggled One for which action was called for, and when such burden was not discharged by the Revenue, shifting of burden in this case is not warranted. The learned tribunal in our view has come to correct finding of both fact and law.

8. Mr. Chatterjee has cited a Supreme Court decision in support of the proposition of shifting of burden in the case of State of West Bengal Vs. Mir Mohammad Omar and Others etc., and also the judgment of the Division Bench of this court on this point. We are of the view that those two decisions were rendered on factual basis. The principle of law explained in these two judgments cannot be doubted nor be disputed, but the applicability of the same has to be examined in the context of the factual aspect of each and every matter.

9. It is true the procurement of the goods seized were made by the respondent but the failure to explain source the procurement cannot be attributed to be a clandestine procurement or nor can assume the character of smuggled goods. In order to attract Section 111 read with Section 123 the goods must be of smuggled character. On fact it was held that it was not to be found so.

10. The learned Tribunal adopted the consistent view of all the High Courts and the Supreme Court reported cases cited before it and the learned counsel for the respondent has drawn our attention to these judgments which we do not feel to reproduce. The recording of the learned tribunal while upholding the decision of the appellate authority does not call for any interference and we think any separate discussion in this regard unnecessary. Hence the appeal fails. The same is dismissed without any order as to costs.