(2004) 07 CAL CK 0063

In the Calcutta High Court

Case No : Custa No. 7 of 2003

Commissioner of Customs (Prev.) APPELLANT

Vs

Sudhir Saha RESPONDENT

Date of Decision : 26-07-2004

Acts Referred:
Customs Act, 1962 — Section 123, 123(2)

Citation : (2004) 4 CHN 54 : (2004) 95 ECC 641 : (2004) 172 ELT 26

Hon'ble Judges : R.N. Sinha, J;D.K. Seth, J

Bench : Division Bench

Advocate : Kalyan Bandhopadhyay, for the Appellant;Vipul Kundalia, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Seth, J.—A point that has been urged by Mr. Kalyan Bandhopadhyay in this case is that whether Section 123 of the Customs Act, 1962 could be attracted in respect of non-notified goods shifting the initial burden on the person claiming to be the owner or from whom the goods were seized to undertake establishing a negative proof that the goods were not smuggled.

2. Learned Counsel for the respondent, however, opposes the said contention on the ground that the application of Section 123 is limited to the goods notified and those mentioned in Sub-section (2). He relied on the decision in Radha Kishan Bhatia Vs. Union of India (UOI) and Others, and Gian Chand and Ors. v. State of Punjab. 1983 ELT 1365 (SC) to support his contention.

3. The context of Section 123 would be the answer to the question. We need not search elsewhere. We may quote Section 123 beneficially hereafter :

"123. Burden of proof in certain cases--(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be --

(a) in a case where such seizure is made from the possession of any person,

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person:

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.]

(2) This section shall apply to gold [and manufactures thereof, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify."

4. The provision relates to the burden of proof in certain cases, therefore, it cannot have a general application and the opening sentence begins with the phrase "where any goods to which this section applies". Therefore, it relates to goods to which the section applies; and the section is made applicable by reason of Sub-section (2) to gold [and manufactures thereof] watches and any other class of goods that may be specified by the Central Government by notification in the Official Gazette. Therefore, Section 123, which is departure from the normal rule of evidence, is applicable only in respect of certain cases where Section 123, applies which has no general application. Under the rules of evidence one cannot be called upon to establish a negative proof. Burden always lies upon him who alleges a particular fact. Particularly when the provision is penal in nature, the burden lies on the prosecution. Section 123 curbs out exception to the general rule of evidence and creates a special rule applicable to the cases contemplated under Sub-section (2) viz: gold and manufactures thereof and notified goods. Section 123 does not apply to non-notified goods in respect whereof the general rule of evidence is to be followed.

5. In the present case, admittedly, beetle-nuts seized is not a notified goods u/s 123. Therefore, Section 123 cannot be attracted to the goods seized in the present case on account of its being non-notified. Section 123 applies only in respect of goods, which are smuggled goods and smuggled goods means something suggesting their foreign origin and their recent importation from abroad, as was held in Shanti Lal Mehta v. Union of India 1983 (14) ELT 17I5 sc . In the present case, goods are of foreign origin, which is an admitted fact. Though allegedly the owner had admitted the goods to be smuggled but ultimately he retracted his statement, therefore, in such circumstances, the burden of proof lies on the department as was held in Santosh Gupta Vs. Union of India,

6. However, the decision in Gian Chand (supra) deals with a different subject which has no manner of application in the present case. There it was not a question as to whether the goods seized was a notified goods or not. On the other hand, it was not seized by the Customs Authorities but was seized by the police and then was transferred to the Customs Authorities. Therefore, on that

ground Section 178A of the Sea Customs Act corresponding to Section 123 of the Customs Act, 1962 was held not to be applicable. The decision in Radha Kishan Bhatia (supra) also deals with different aspect of the case and has no manner of application in the present case.

7. As discussed above, we find that the learned Tribunal (CEGAT) has approached the point rightly. No question of law appears to be involved in this case. The application is, therefore, dismissed. No costs.