(2004) 03 AHC CK 0175

In the Allahabad High Court

Case No : C.M.W.P. No''s. 351 and 357 of 2004

Hem Chandra Jain APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 19-03-2004

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 161
Customs Act, 1962 — Section 108

Citation : (2004) 2 AWC 1853

Hon'ble Judges : R.S. Tripathi, J;M. Katju, J

Bench : Division Bench

Advocate : Daya Shanker Mishra and Chandra Kesh Mishra, for the Appellant; B.N. Singh and S.S.C., for the Respondent

Final Decision : Dismissed

Judgement

M. Katju, J.—These writ petitions are being disposed of by a common judgment.

2. The petitioner is challenging the Impugned order of the Commissioner of Customs Lucknow dated 11.11.2003, Annexure-6 to the writ petition.

3. Heard learned counsel for the parties.

4. The petitioners were issued a show cause notice dated 5.12.2002 vide Annexure-1 to the petition. In this notice it was alleged that acting on the basis of some information, the officers of the Directorate of Revenue Intelligence Lucknow and Varanasi reached Mughal Sarai, Railway Station along with two independent witnesses on 7.6.2002 at about 7.45 a.m. and Intercepted two persons travelling by North East Express Train. These two persons revealed their names as Sanjeev Agarwal and Nirmal Jain. They were served with a notice u/s 102 of the Customs Act, 1962, to the effect whether they would like to be searched in the presence of a Magistrate or a Gazetted Officer, in response to which they requested that they should be searched in presence of a Gazetted

Officer. Hence they were searched in the presence of a Gazetted Officer, being the Senior Intelligence Officer, Directorate of Revenue Intelligence, Varanasi. A search of their Brief Case and Hand Bag resulted in the recovery of 26 pieces and 25 pieces of Foreign Marked Gold Biscuits in packing tapes which were concealed in their Brief Case and Hand Bag. The accused persons were interrogated by the officers of the Directorate of Revenue Intelligence before the two witnesses. They disclosed that the recovered 51 pieces of Foreign Marked Gold Biscuit belonged to one Hemchandra Jain and his two sons, namely Ramjee Jain and Ajay Jain for whom they were transporting such smuggled gold biscuits since the last four months. They further informed that for the current trip they had boarded the North East Express Train at Allahabad on 5.6.2002 and on reaching Jalpaiguri Road Station they contacted one person called Manoj and took delivery of the recovered gold biscuits from his residence and concealed the same in their Brief Case and Handbag and thereafter both of them returned to Jalpaiguri Road Station and boarded the North East Express Train again for Allahabad. They further informed that Manoj and another person Mahendra alias Narendra used to bring the gold biscuits from Nepal through Pani-ki-Tanki border and they used to transport the same up to Allahabad. They further informed that they were not aware about the mode of financial transaction. They could not produce any documents pertaining to this foreign marked gold biscuits and they stated they had no such valid document pertaining to the gold biscuits in their possession and they admitted that the said gold biscuits had been smuggled from Nepal and had not suffered customs duties of customs.

5. Thereafter registered valuer of Varanasi was called and he valued these gold biscuits of total value of Rs. 32,27,049.

6. Sanjeev Agarwal in his voluntary written statement tendered before the Senior Intelligence Officer, Directorate of Revenue Intelligence, Varanasi u/s 108 of the Customs Act, 1962, on 8.6.2002 reiterated what he had deposed earlier. He further deposed that he was working in a shop called Anoop Bhander Kendra located opposite Mansarover Hotel, Allahabad, on a monthly salary of Rs. 1,500 which was owned by Hemchandra Jain and also by his two sons Ramjee Jain and Ajay Jain. He further stated that oil and ghee is sold in the said shop and said Hemchandra Jain and his two sons also illicitly dealing in smuggled Gold Biscuits of Foreign Mark which are smuggled in from Nepal in the said shop. He was involved in the transportation of smuggled Gold Biscuits smuggled from Nepal from New Jalpaiguri to Allahabad since the last four months at the behest of the said Hemchandra Jain and his sons Ajai Jain and Ramjee Jain. He was getting Rs. 500 per trip from them in addition to the expenses. Hemchandra Jain and Ajay Jain had informed him that the said foreign marked gold biscuits had been illicitly smuggled from Negal to India by Manoj and there are no valid import documents in respect of the same. Before boarding the train at New Jalpaiguri he used to Inform the said Hemchandra Jain and his sons over the telephone and thereafter either of them used to come to the Railway Station in a white coloured Maruti Van bearing registration No. UP-70/1617. Their telephone numbers was also

disclosed. Similar statement was given by Nirmal Kumar Jain also.

7. The petitioners replied to the show cause notice vide Annexures-2 and 2-Ka and ultimately the impugned order dated 11.11.2002 was passed.

8. We have carefully perused the impugned order Annexure-6 to the petition. In this order it is stated that personal hearing in the case was fixed for 12.3.2003 but nobody attended. Again personal hearing was fixed for 28.2.2003 but again no body turned up. Hence, the case was fixed for personal hearing on 5.5.2003 and this time Shri Sudhir Kumar Mehta appeared on behalf of Manoj Kumar Shah and Mahendra Kumar Jain and submitted a written brief. Personal hearing was also fixed for 27.6.2003 but none of the other persons to whom notices were issued, (i.e., the petitioners) appeared. Then the case was fixed for 29.8.2003 but again nobody appeared. It was again fixed for 23.9.2003 but no one appeared for the hearing.

9. The reply of Ajai Jain and Ramji Jain is Annexures-2 and 2-Ka to the petition. Annexure-3 is a copy of the application of Hemchandra Jain praying for adjournment on the ground of illness of his counsel. Another application was moved on 23.9.2003 copy of which is Annexure-5 to the petition in which again prayer for adjournment was made on the ground that his counsel was 111.

10. In our opinion sufficient opportunities had been given to the petitioners. If their counsel was ill another counsel should have been engaged but the Commissioner cannot be expected to keep adjourning the case again and again. In the impugned order there is a detailed discussions of the facts. Nirmal Jain and Sanjeev Agarwal were caught read handed with smuggled gold biscuits in their possession for which they could not show any valid documents. Their statements clearly incriminate the petitioners, and there was no good reason to disbelieve them.

11. No doubt Nirmal Jain and Sanjeev Agarwal subsequently retracted the statement but we are not satisfied that there was a genuine retraction. In K.I. Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin, , it was held that even a retracted confession can be relied upon if found to be voluntary and truthful. In the present case we are satisfied that the statements of Nirmal Jain and Sanjeev Agarwal were voluntary and truthful. In Naresh J. Sukhawani Vs. Union of India, , it was held that a statement before a Customs official is not a statement to a police officer u/s 161, Cr. P.C., and hence it is a material plece of evidence which can be used to incriminate a co-accused.

12. We cannot sit in appeal over the order Impugned. The impugned order has been passed on relevant evidence on record. There is no error of law apparent on the face of the record and hence we cannot interfere with finding of fact recorded in the impugned order. The scope of interference in writ Jurisdiction is limited. There is no force in these petitions and the petitions are dismissed.