

(2015) 03 DEL CK 0133

In the Delhi High Court

Case No : CUSAA 24, 25, 26, 27, 28, 29 and 30/2014

Mahender Jain and Others

APPELLANT

Vs

The Commissioner of Customs (Import and General)

RESPONDENT

Date of Decision : 20-03-2015

Acts Referred:

Customs Act, 1962 — Section 108, 111, 112, 112 (b), 112(b)

Citation : (2015) 321 ELT 604

Hon'ble Judges : R.K. Gauba, J.;S. Ravindra Bhat, J.

Bench : Division Bench

**Advocate : Shailendra Bhardwaj and Aroma S Bhardwaj, for the Appellant;
Satish Kumar, Sr. SC, Advocates for the Respondent**

Judgement

S. Ravindra Bhat, J.—In these appeals the grievance articulated is in respect of order dated 22.10.2013. It appears that the previous order of the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT") dated 25.11.2011 was set aside (to the extent of the appeals filed by these assessees) in CUSAA No. 8/2011 and connected cases on 25.4.2012.

2. The Court had directed re-examination of the contentions and issues urged by the present appellants holding that the reasoning contained in para 27 of the CESTAT's order was insufficient. In these circumstances the CESTAT considered the contentions urged on behalf of the present appellants. There was a divergence of opinion between the two members of CESTAT which led to a reference to a third member. The third member agreed with the view of the member who held that the appeals required dismissal. The CESTAT's majority orders modified the direction vis-?-vis penalty reducing it from Rs. 5 lakhs to Rs. 2.20 lakhs in each case.

3. On 28.8.2000 Olga Kozireva, a Uzbek National, was intercepted at Delhi airport, attending to smuggle a large quantity of prohibited Chinese silk. Her statement under Section 108 led the agencies unraveling a network of smuggling which had in the past managed to ensure that similar large quantities of article

were smuggled in on several occasions. During the course of investigation statements of those suspected, including Olga Kozireva and other foreign nationals Dil Agha, Mamoor Khan, Nazira, Valichko were recorded. They were of diverse nationalities i.e. from Kazakhstan and Afghanistan. On the basis of these statements, the statements of certain custom officers too were recorded. The investigations led the summoning of call details from various service providers; besides, the statements of transporters and shopkeepers in Chandni Chowk and other places were recorded eventually on 9.1.2000. Eventually, show cause notices were inter alia issued on 23.8.2001 to the present appellants-all of them are textile traders in Chandni Chowk. The statements of these appellants too had been recorded in the course of investigations. The appellants replied denying various allegations.

4. After considering the submissions of the parties-which included those on behalf of present appellants/traders, the adjudicating Commissioner on 27.9.2007 imposed penalty upon each of them to the tune of Rs. 5 lakhs. Whilst doing so, the Commissioner in a 317 page order on 27.9.2007 exhaustively analysed the materials available in respect of each noticee. The noticees as mentioned earlier were not only the offenders i.e. smugglers of the prohibited articles, but also those part of the conspiracy, such as customs officers and the receivers/traders. The Commissioner discussed the statements, the call detail records in respect of each of the noticees and in his adjudication order, made a detailed analysis in charts and tables for the sake of convenience to link the role of each of the noticees. Some noticees were exonerated whereas in respect of the others guilt was established. The findings in respect of the present appellants were summarized as follows :

"546. The show cause notice has also been issued to 8 persons (Noticee No. 26 to 33) alleging that these noticees were involved in knowingly acquiring, possession, dealing or selling of smuggled silk textiles rendering them liable for penal action under Section 112(b) of the Customs Act, 1962. These 8 persons are, namely, Nitish Kedia @ Bunt, Anup Singh, Khem Singh, Arun Dokania, Gopal Dokania, Mahender Jain, Sanjiv Jain and Anudeep Singh, all traders of textiles operating in Chandni Chowk, Nai Sarak and Model Town areas. The evidence against these noticees is analyzed as below:

(i) Abdul Qahar, an Afghan National, who used to buy silk textiles from them and carrying it to Afghanistan has testified in his statement dated 30.11.2000 against the traders named above. One of the noticees, Anudeep Singh has admitted in his statement dated 8.12.2000 that he purchased imported silk fabrics from one Afghan, who introduced himself as Khan.

(ii) All of these noticees have also been in touch with Mamoor Khan on telephone.

(iii) Gopal Prasad Dokania in his statement dated 5th Jan., 2001 has admitted that he knew Mamoor Khan and that he purchased silk fabrics from him.

(iv) Nitish Kedia in his statement recorded on 5th Jan., 2001 has admitted

knowing Mamoor Khan but he denied that he had purchased silk fabrics from Mamoor Khan.

(v) Anup Singh in his statement dated 15th June, 2001 admitted knowing Mamoor Khan and Dil Agha but did not deal with it in purchasing of silk fabrics.

(vi) Mahender Jain in his statements dated 19th Jan., 2001 and 1st Feb., 2001 admitted to knowing Mamoor Khan but denied having any dealing related to silk fabrics. Statement of Khem Singh was also recorded but no material facts emerged from him.

547. When we proceed to evaluate the above evidence, I find that Abdul Qahar has stated that he was purchasing silk fabrics from most of the above noticees which was exported to Afghanistan through Kultar Exports. However, most of the noticees while admitting to knowing Mamoor Khan and having some small dealing with him but have denied any knowledge about the passenger like Olga K., or smuggled nature of the imported goods. A perusal of Section 112(b) of the Customs Act, 1962 lays down that possession, removal, keeping, selling, purchasing etc. of imported goods is punishable under Section 112(b) only if the person dealing with such goods knows or has reason to believe that such goods are liable for confiscation under Section 111 of the Act *ibid*.

548. A perusal of above provision shows that the crux of the matter is whether the noticee had the knowledge that he is involved in possessing, removing, keeping, selling, purchasing, etc. of imported goods that are liable for confiscation under Section 111 of the Customs Act, 1962. The traders have explicitly denied that they had any knowledge in this regard. However, on the other hand, the testimony of Abdul Qahar who was one of the points of contact for delivery of contraband silk textiles brought in by Olga K. and her group to these traders is clear and unambiguous that the traders were aware of the illegal activities of Olga K. and her associates.

Let us now examine whether any evidence exist to support this testimony of Abdul Qahar. In this regard, the examination and evaluation of the telephonic conversation records as available in the Table No. 10 and 11 may shed some light on the situation. For example, it can be seen that all the 8 noticees were regularly in touch with Mamoor Khan and Dil Agha on their Mobile No. 9811135921 and 9811065897 respectively. The number of calls exchanged is indeed very large and runs into hundred of calls, if taken together as evident from Table No. 10. The noticees have not denied these telephonic conversations and they have indeed in many cases even accepted dealing with Khan for purchase of silk textiles. The significance of Table No. 11 which shows that these traders were in touch with Mamoor Khan, Dil Agha and passengers on the date when they actually arrived in India with their heavy baggage. For example, when Olga K. and Shakista K. arrived by HY-151 at 12.51 PM on 27th Feb., 2000, 7 conversations took place between Sanjeev Jain and Mamoor Khan between 11.06 AM and 5.43 PM. Mamoor Khan also spoke to Anoop Khem Singh at 11.30 AM.

On the same date, Mamoor Khan and Nitish Kedia spoke twice with each whereas Mahender Jain and Mamoor Khan spoke thrice. Again Mamoor Khan also spoke to Anudeep Singh atleast once on this day. The next visit of Shahlo A. is shown on 10th April, 2000 at 9.19 AM and on the same date the records of telephonic conversation between Mamoor Khan on one hand and Mahender Jain, Anudeep Singh, Gopal Dokania and Nitish Kedia are also well documented. This list is only illustrative in nature and if all details are reproduced, it would be quite exhaustive. A careful perusal of this table shows that every time passengers came with heavy baggage to IGI Airport at Delhi, frequent exchange of calls took place between Mamoor Khan and Dil Agha on one hand and all the traders who are noticees on the other. None of the traders have offered any valid explanation of this uncanny coincidence of timing. In my opinion, this evidence lend corroboration (sic) and credence to the testimony of Abdul Qahar and on the basis of this evidence, the element of knowledge regarding the nature of goods can be easily imputed to these noticees. It is true that the evidence in the form of sale/purchase and other documents is not available; circumstantial evidence is adequate to impute knowledge of the illegal character of import of silk textiles which rendered them liable for confiscation under Section 111 of the Customs Act, 1962. Under the circumstances, I hold that Noticees No. 26 to 33 are liable for penal action under Section 112(b) for having knowingly involved themselves in possession/sale, purchase etc. and the goods which they had knowledge, were liable to confiscation under Section 111 of the Customs Act. 1962."

5. The appellants' grievance in respect of this order was considered by the Tribunal in its remand order. The member judicial Shri D N Panda after noticing the different categories of noticees who had approached the CESTAT and the nature of evidence against each one of them, was of the opinion that the Commissioner's order could not be faulted for the reason that the present appellants were not afforded the right of cross-examination of the witnesses who deposed against them; secondly, it concluded that the statements of such witnesses, considered together with the other material available in the form of details linking them with those involved in the smuggling racket were sufficient to establish their guilt. The relevant findings in this regard - which are similar, if not identical, are extracted below :

"12.5 Revenue led cogent evidence against the deals of the appellant which remained un-rebutted except technical pleas raised on flimsy grounds. Evidence gathered by Revenue were not more piece of papers but well founded and stand to reason. Even statement recorded from Dil Agha who was produced before Metropolitan Magistrate on 16.07.2001 self speak appellant's active role in abetment of disposal of the smuggled goods knowing character thereof. He could not go out of the mess of smuggling racket having frequent telephonic contacts with them before and after of smuggled goods into India. His proximity to the offence was so nearer he could not remain far from the deal. He failed to state the reason why such contacts were made by him and why racketeer contacted him by phone.

12.6 It would be appreciated that no would prefer to make unwanted calls by his mobile to a stranger unless he knows the person to whom he called frequently shall fulfill his object. There was nothing presumption nor suspicion against the appellant by learned Adjudicating Authority to deal him under law. The appellant had thorough knowledge of the identity of the persons with whom he dealt and contacted him as per Table 10 and 11 of the Adjudication order. He was quite aware of the smuggling character of the goods supplied to him by Mamoor Khan. The appellant and his brother were in conversation with Mamoor Khan 259 times of call made and received from April 2000 till 28.8.2000. But he refused to identify the mobile numbers.

12.7 It is not necessary that investigation should ask the appellant leading question to defeat object of the Investigation meant to bring the offender to the fold of law. What that was relevant for the investigation were put to discover truth and make the case of investigation successful. Appellant's plea that other traders were not brought to the charge under law has no basis in view of the law laid down by Hon"ble High Court of Delhi in the case of Rajiv Kumar Sharma Vs. Commissioner of Central Excise Adjudication, holding that negative equality cannot be pleaded as a defence to any action which is in accord with law and justified. It was also held in that judgment that when the reason why telephonic conversation took place remained unexplained that does establish and corroborate a close relationship between: the parties to the calls. The appellant failed to lead any cogent reason why calls were made as appearing in Table 10 and 11 of the impugned orders.

12.8 The term "concerned" appearing in Section 112 of the Act has been explained by Apex Court in the case of Sachidananda Banerji V. Sitaram Agarwala - 1999 (110) ELT 292 (SC) laying down the law that this term is to be given wide interpretation and even if a person has no physical connection with the smuggled goods, he is liable if he is interested or consciously takes any steps to promote smuggling. In the present case the appellant promoted, smuggling acquiring and selling the smuggled goods consciously knowing origin of the goods and the oblique motive. It has also been laid down in the case of Sardar Sardul Singh Caveeshar Vs. State of Maharashtra, that an agreement between the conspirator need not be directly provide the offence of conspiracy which can be established by either direct or circumstantial evidence. There were reasonable grounds in the case of investigation to appreciate malafide of the appellant being in association with the smuggling racket and being familiar with the offending goods. As has been held in the case of Radha Kishan Bhatia v. UOI- 2004 (178) ELT 8 (SC) that it is immaterial what meaning be attributed to the word "concerned". It can have the meaning "interested" and it may also have the meaning "interested" and it may also have the meaning "involved" or "engaged" or "mixed up".

12.9 Appellant's interest in the smuggled goods could not be ruled out when credible statements of Abdul Qahar, Wali and Dil Agha recorded by investigation

discovered truth of the deals. Their statements remained un rebutted, unwarranting their cross-examination following the ratio laid down in the case of Surjeet Singh Chhabra Vs. Union of India and others, . Similarly, as has been held in the case of K. T. M.S. Mohammed and Others UOI - 1992 sec (3) 178 that merely because a statement is retracted that cannot be said to be involuntary or unlawfully extracted. It is for the maker thereof who alleges inducement, threat and promise etc to establish that such improper means has been adapted to.

12.10 Appellant lost his right to gain from the plea of retraction of statement by Abdul Qahar when truth of ill deal was established by Investigation. It has been held in the case of Naresh J. Sukhawani Vs. Union of India, that the statement of a person in the status of co-accused obtained u/s 108 of the Customs Act, 1962 forms material evidence. When Department has appraised the appellant of the results of investigation as also the evidence on record which militates against the appellant, burden of proof shifted to the appellant from investigation which does not get discharged if the appellant is not able to meet the inference arising therefrom following the ratio laid down in the case of Kanungo and Company Vs. Collector of Customs and Others, . Similarly investigation was not required to prove its case with mathematical precision or accuracy and need not be required to prove every link in the chain as has been held in the case of Collector of Customs, Madras and Others Vs. D. Bhoormall, . Accordingly failure of the appellant to come out with clean hands implicated him to charges rightly leveled against him in adjudication.

12.11 Penalty against the appellant was imposed under section 112(b) of the Act. If any person acquires possession of or in any way is concerned in carrying, removing, depositing, harboring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation, under section 111 of the Act, he is charged by that section. In the present case conscious knowledge of the trader appellant about character and nature of the goods illicitly imported and his deal there on was established by the seller racketeers. His ill will and deal satisfied essential ingredients of section 112 (b) of the Act. The appellant was aware of the origin and destination of goods demonstrating his intimacy with the racketeers by telephone contacts before and after arrival of the smuggled goods in India which come to record from Table 10 and 11 of show cause notice. Positive act of the appellant making conscious breach of law brought him to penal consequence of law. Perfect proof with mathematical precision, in this imperfect world seldom exists. Preponderance of probability was in favor of Revenue to hold the appellant guilty."

6. The other member, Sh. Rakesh Kumar was of the opinion that given the statutory mandate of Section 111, the revenue had to necessarily prove that each of the appellants knew that they were dealing in smuggling goods- an element which according to him had not been established in the facts of the case. The said learned Member was also of the opinion that the call details ipso

facto could not be sufficient to prove culpability. In view of this divergence of opinion, the matter was referred for the opinion of the third member. Sh. Sahib Singh in his order - extracted in para 32 of the common order in this case - noticed the statements of Abdul Qahar, Mamoor Khan, Dil Agha, Valichko and in the light of the statements made by some of the present appellants agreed with the order of Sh. D N Panda. As a consequence, the order of the Commissioner was upheld with a modification i.e. reduction of penalty from Rs. 5 lakhs to Rs. 2.2 lakhs.

7. The learned counsel urged that this Court should take note of the fact that CESTAT ignored the material circumstance that a cross-examination was denied to the appellants in respect of statements of witnesses who had deposed against them and (b) that the materials relied upon by them, on taking a cumulative view, could not lead to necessary proof of culpability.

8. Learned counsel submitted that in respect of the appellants the statements of witness Abdul Qahar was generic in the sense that he only mentioned that Olga Kozireva entrusted him with certain Chinese silk which used to be delivered to the traders; the appellants cannot be implicated based on this. Moreover, submitted counsel, amongst the appellants, the statements of Anoop Singh and Late Khem Singh admitted knowledge of and conversations with the foreign nationals. However, as far as others i.e. the other appellants were concerned, there was not a shred of evidence against them.

9. This Court notices that in the main case Sudhir Sharma V. UOI CUSAA No. 29/2011 the appeals of the custom officers who were aggrieved by the fact that they were not afforded the right to cross-examine the foreign nationals and had also contended that telephone records ipso facto could not establish their guilt among other arguments were rejected in the common judgment dated 27.02.2015. Those reasons also apply with equal force in the present appeals. The Court in the judgment had relied upon various rulings of the Supreme Court to conclude that the questions of law urged had to be answered against the appellants and in favour of the revenue.

10. In these appeals, we notice that the question of law sought to be urged is with regard to findings of evidence. The order of the Commissioner - as well as the CESTAT in each of the case of the appellants before us, has noted exhaustively the dates and time when the conversation between the appellants and the foreign nationals took place. The appellants argued that such conversations ipso facto cannot lead to any inference, much less adverse inference, of guilt. At the same time, the proximity of these conversations with the timing of the flights which landed at the relevant time, containing the consignments and commodities of prohibited items is a matter of record. Furthermore, the statement of Abdul Qahar, said to be generic, is a piece of evidence which weighs in against the appellants. That the appellants were traders in Chandni Chowk area who legitimately dealt in silk no doubt is a circumstance which has to be borne in mind. However, we notice that when

confronted with the telephone numbers, either there was denial or refusal to answer the queries of the investigators. In these circumstances, given the nature of the materials which were otherwise established, painstakingly collected evidence such as movement of trucks etc. and the statement of transporters of certain commodities, it cannot be said that the findings of guilt recorded by the Commissioner against the appellants were given in the absence of sufficient evidence.

11. For the above reasons this Court is of the opinion that no substantial question of law arises. The appeals are accordingly dismissed.