

(2011) 09 PAT CK 0125
In the Patna High Court
Case No : Misc. Appeal No. 393 of 2009

Md. Akhtar

APPELLANT

Vs

Commissioner of Central Excise, Customs and Service Tax,
Patna, C.R. Building, B C Patel Path, Patna-800001

RESPONDENT

Date of Decision : 09-09-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 173
Customs Act, 1962 — Section 107, 108(4), 111, 112, 119
Evidence Act, 1872 — Section 24

Citation : (2012) 1 PLJR 401

Hon'ble Judges : S.K. Katriar, J; Ahsanuddin Amanullah, J

Bench : Division Bench

Advocate : Sandeep Kumar, Santosh Kumar, Ajit Kumar, for the Appellant;
Archana Meenakshi, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Katriar, J

1. This appeal u/s 130 of the Customs Act, 1962 (hereinafter referred to as "the Act"), is directed against the order dated 22.12.2008, passed by the learned Customs, Excise and Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata, in Custom Appeal No.105/2008 (Md. Akhtar vs. Commissioner, Central Excise), whereby the order of the two authorities below have been upheld, and the order of confiscation of gold, and penalty, has been upheld. A brief statement of facts essential for the disposal of this appeal may be indicated. On 20.8.2000, at 17 hours, the appellant was detained by the police at Barauni. The local police informed the Customs authorities that the appellant was found secreting 9 bars of "Suisse" gold, weighing 90 tolas, between his sole and the socks which he was wearing with shoes. His statement u/s 107 of the Act was recorded on 20.8.2000, and his statement u/s 108 of the Act was recorded on 21.8.2000, and 9 bars of gold were seized. The authorities thereafter issued notice dated

12.2.2001 to the appellant to show cause as to why the gold in question be not confiscated, and appropriate penalty in accordance with law be not imposed on him. The appellant had shown cause wherein he had in substance stated that he was a mere carrier of contraband gold handed over to him at Raxaul by somebody, which in turn had to be handed over to another person at Benaras. On a consideration of the entire materials, the learned Joint Commissioner of Customs, Patna, being the adjudicating authority rejected the cause shown by the appellant by order dated 12.3.2002. The operative portion of the order is reproduced hereinbelow:-

Having regard to facts and circumstances of the case as discussed above and in exercise of powers conferred upon me u/s 122 of the Customs Act, 62. I pass the following orders:-

(i) I order for absolute confiscation of seized 9 pcs. of third country origin weighing 90 tolas u/s 111(d) of the Customs Act, 62.

(ii) I also order for absolute confiscation of seized adhesive tapes u/s 119 of the Customs Act, 62.

(iii) I impose penalty of Rs. 40,000/- (Rs. Forty thousand) only on the noticee Sri Md. Akhtar u/s 112 of the Customs Act, 62 which shall be paid within three months from the date of receipt of this order.

Sd/-

(S.K. Das)

Joint Commissioner

Customs, Patna

1.1. Aggrieved by this order of the learned first authority, the appellant preferred appeal before the learned Commissioner (Appeals), who dismissed the same by his order dated 11.1.2008. The appellant challenged the same by preferring appeal before the Tribunal which has been rejected by the impugned judgment and the order of absolute confiscation and penalty passed by the learned first authority, has been upheld.

2. While assailing the validity of the impugned order, learned counsel for the appellant submits that his statements under Sections 107 and 108 of the Act have been taken under duress. The cause shown by him has not been considered. He further submits that the materials on record do not show that the gold which the appellant was carrying was smuggled. He also submits that in view of the position that no person has come forward to claim ownership of the contraband goods, the same may be returned to him treating him to be the owner. He next submits that he was acquitted in the criminal case on the self-same facts. He further states that the entire onus in such a situation is on the Department that the seized goods are contraband goods. He lastly submits that he has no objection if the order of penalty is maintained, provided the gold is

released particularly because none else has come to claim its ownership.

3. Learned counsel for the respondent has supported the impugned order. She submits that the appellant has taken contradictory stand at various stages. She next submits that the stand taken by the appellant in the cause shown by him has been found by the authorities to be false. She submits in the same vein that the later stand amounts to retraction which in the present case was quite belated. She next submits that the statement u/s 108 of the Act is substantive evidence. She relies on the judgment of the Supreme Court in Naresh J. Sukhawani Vs. Union of India, . She further submits that burden of proof in terms of Section 123 of the Act is on the appellant. She relies on the judgment of the Supreme Court in Kanungo & Co. vs. Collector of Customs, [AIR 1972 SC 2136:1973(2) SCC 438]. In order to give any credence to the retracted statement, the same should above all satisfy the condition of having been made at the earliest possible opportunity. In the present case, it was made after unexplained delay of seven months. She relies on the judgment of the Supreme Court in Surjeet Singh Chhabra vs. Union of India [(1997)1 SCC 508. She also submits that the statements of the charged persons under the provisions of Sections 107 and 108 of the Act are admissible in evidence, and the conclusion of culpability can be based on such statements. She relies on the following reported judgments:-

(i) Naresh J, Sukhawani vs. Union of India, 1995 Supp.(4) SCC 663 = AIR 1996 SC 5

(ii) Kanhaiyalal Vs. Union of India (UOI),

(iii) Collector of Customs vs. D. Bhoormull, 1983(13) BLT 1546 (SC)

(iv) Commissioner of Customs vs. Ghanshyam Pd. Gupta, 2010(3) PLJR 343 (Prs. 7 and 11)

(v) Bhana Khalpa Bhai Patel vs. Asstt. Collector of Customs, Bulsar, 1997 (96) ELT 211 (SC) (Pr. 6)

She lastly submits that this Court should not normally sit in appeal with the formation of opinion by the authorities under the Act as to reasonable belief. She relies on the judgment of the Supreme Court in State of Gujarat vs. Mohanlal J. Porwal, (1987)2 SCC 364=AIR 1987 SC 1321 (Pr. 4).

4. Learned counsel for the parties jointly submit that the aforesaid submissions may be treated to be substantial questions of law for consideration in the present appeal.

5. We have perused the materials on record and considered the submissions of the learned counsel for the parties. We would first of all notice the statements made by the appellant at two different stages. His first statement u/s 107 of the Act was made on 20.8.2000, and the second statement was made u/s 108 of the Act on 21.8.2000. in both the statements, he admitted that gold had been seized

from his body which he was secreting between his sole and his socks which he was wearing with shoes. He said in both the statements that the same belonged to one Rajeshwar Giri at Raxaul (India), to be carried to Banaras. There is only material contradiction in these two statements, namely, in his statement u/s 107 of the Act. he gives his address to be 24 Parganas, West Bengal, whereas he has stated in his statement u/s 108 of the Act that his permanent address is District-Begusarai. He has stated that he is a petty carrier of contraband goods for remuneration for his livelihood. On this particular occasion, he was doing this job for a sum of Rs. 200/- only.

5.1. On the other hand, he stated in the cause shown by him on 23.2.2001. that he admits that the goods so recovered from his body which he was secreting in the aforesaid manner. He, however. stated that the same belonged to one Prabhu Nath Singh, which had been purchased from Dhan Cholia Sons, a dealer in gold, silver and ornaments manufacturer and commission agent, Chandni Chowk, Delhi, meant to be converted into jewellery.

6. On a consideration of the entire materials on record, the learned three authorities have consistently found that the appellant was admittedly carrying the 9 bars of gold on his body which he was secreting in his socks which he was wearing with shoes. Therefore, seizure and possession of the contraband goods from the possession of the appellant on 20.8.2000, is admitted. The learned authorities have further found that on enquiry it has transpired that his permanent residential address is district of Begusarai. They have further found that the money receipt allegedly issued by Dhan Cholia Sons was false and fabricated document. They have further found that nobody has come forward to stake ownership to the goods in question. In such a situation, one can safely presume that the appellant was the owner of the goods which he had smuggled from a country of third origin and was brought into India surreptitiously. This has to be read with the position that at every stage of the proceedings before the learned authorities under the Act, as well as before us, the appellant has been insisting for release of the gold in his favour, inter alia, for the reason that none else has come forward to claim ownership of the same.

7. The scope and sweep of the provisions of law relevant in the present context have been the subject matter of a large number of authoritative pronouncements of the Supreme Court and the High Courts. It has been held that the statements u/s 108 of the Act are in the nature of substantive evidence, and culpability of the concerned persons can be based on the same. It has been held by the Supreme Court as follows in paragraph-? of the judgment in Bhana Khalpa Bhai Patel (supra):-

7. An attempt was made to contest the admissibility of the said statements in evidence. It is well settled that statements recorded u/s 108 of the Customs Act are admissible in evidence vide Romesh Chandra Mehta Vs. State of West Bengal, , and K.I. Pavunny vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin, 1997 (90) ELT 241 (SC)=(1997)3 SCC 721."

The Supreme Court has observed as follows in Naresh J. Sukhwani (supra):-

4. It must be remembered that the statement made before the Customs officials is not a statement recorded u/s 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials u/s 108 of the Customs Act. That material incriminates the petitioner inculpating him in contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculpates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency, out of India. Therefore, we do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine.

8. The Supreme Court has observed in K.I. Pavunny vs. Assistant Collector (supra), on the issue of evidentiary value of retracted confessional statements under the Act. Paragraphs-5 to 8 of the judgment are relevant and reproduced hereinbelow:-

5. The primary question, as referred to us for consideration, is whether the retracted confessional statement, Ext.-P-4, by the appellant is inadmissible in evidence u/s 24 of the Evidence Act and what is the scope for its consideration? Section 24 of the Evidence Act deals with admissibility of the confession. It reads as under:-

24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceedings.- A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have, been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making if he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

6. A bare reading of the above provision would indicate that for application of Section 24 of the Evidence Act, the following ingredients are required to be established: (a) the statement in question is a confession; (b) such confession has been made by an accused; (c) it has been made to a person in authority; (d) it was obtained by reason of any inducement, threat or promise proceeding from a person in authority; (e) such inducement, threat or promise must have reference to the charge against the accused person; and (f) the inducement, threat or promise must be, in the opinion of the Court sufficient to give an accused person grounds which would appear to him to be reasonable by supposing that by making it he would gain any advantage or avoid any evil or a temporal nature in reference to the proceedings against him.

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8. In *Ramesh Chandra Mehta vs. State of W.B.*, (1969)2 SCR 461: AIR 1970 SC 940, a Constitution Bench of this Court held at p. 466 that the Customs Officers are entrusted with the powers specifically relating to the collection of customs duties and prevention of smuggling and for that purpose they are invested with the power to search any person on reasonable suspicion, to summon, X-ray the body of the person for detecting secreted goods, to arrest a person against whom a reasonable suspicion exists that he has been guilty of an offence under the Act, to obtain a search warrant from a Magistrate, to collect information by summoning persons to give evidence and produce documents and to adjudge confiscation. He may exercise these powers for preventing smuggling of goods dutiable or prohibited and for adjudging confiscation of those goods. For collecting evidence the Customs Officer is entitled to serve summons to produce a document or other thing or to give evidence and the person so summoned is bound to attend either in person or by an authorised agent, as such officer may direct, is bound to state the truth upon any subject respecting which he is examined or makes a statement and to produce such documents and other things as may be required. The power to arrest, the power to detain, the power to search or obtain a search warrant and the power to collect evidence are vested in the Customs Act. He is empowered to investigate into the infringement of the provisions of the Act primarily for the purpose of adjudicating forfeiture and penalty. He has no power to investigate into an offence triable by a Magistrate, nor has he the power to submit a report u/s 173 of the Code of Criminal Procedure (for short "the Code"). He can only make a complaint in writing before a competent Magistrate. The above law was laid down under the Sea Customs Act, the predecessor of the Act. The ratio therein equally applies to the powers exercised by the Customs Officer is not a police officer nor is he empowered to file charge-sheet u/s 173 of the Code though he conducts enquiry akin to an investigation under some of the provisions of the Code. His acts are in the nature of civil proceedings for collecting evidence to take further action to adjudicate the infringement of the Act and for imposition of penalty prescribed thereunder which would be self-evident from sub-section (4) of Section 108.

9. The Supreme Court has observed in *Kanhaiyalal vs. Union of India* (supra), that specialized enactments like Narcotic Drugs and Psychotropic Substances Act, and the Customs Act, are meant to deal with the special situations and circumstances.

10. The Supreme Court has observed in *Collector of Customs vs. D. Bhoormull* (supra), that the department is not required to prove its case with mathematical precision. All that is required is that the occurrence and complicity of individuals should be established to such a degree or probability that a prudent man may, on its basis, believe in the existence of the fact in issue. A Division Bench of this Court had the occasion to rely on the same in *Commissioner of Customs vs. Ghanshyam Pd. Gupta* (supra), to which one of us (S.K. Katriar, J.) was a party. Paragraph-7 of the judgment is relevant in the present context and is reproduced hereinbelow:-

7. Law is equally well settled that in all such quasi-judicial proceedings, the rules of evidence do not apply with its rigors. 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. 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 Gupta. We will have to deal with this contention at the appropriate stage.

11. In such a situation, and in view of the foregoing discussion, we are clearly of the view that the department was able to discharge its primary onus by recording the appellant's voluntary statement u/s 107 of the Act, read with the appellant's statement u/s 108 of the Act which is in the nature of substantive evidence, with which the onus passed on to the appellant in terms of Section 123 of the Act. The appellant has not in the least discharged the onus of proof on him. He admitted recovery of the contraband goods from his person on 20.8.2000. He made different statements at different stages of the proceedings. His defence that it was purchased from Dhan Cholia Sons, Delhi, has been found to be false leading to the irresistible conclusion that it was contraband goods, having been smuggled from a country of third origin. In the result, we do not find any merit in this appeal. The appeal is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.