

(1995) 10 CAL CK 0002

In the Calcutta High Court

Case No : Matter No's. 40 of 1993 and 2442 of 1994

Rup Chand Jain

APPELLANT

Vs

Collector of Customs (Preventive)

RESPONDENT

Date of Decision : 31-10-1995

Acts Referred:

Customs (Amendment) Act, 1989 — Section 123(2)
Customs Act, 1962 — Section 123, 123(1)

Citation : (1996) 88 ELT 335

Hon'ble Judges : K.C. Agrawal, C.J;Chatterjee, J

Bench : Division Bench

Advocate : S.K. Bagaria and Joydev Chandra Saha, for the Appellant;S.K. Mitra and Ramesh Chowdhury, for the Respondent

Judgement

K.C. Agrawal, C.J.—This is a reference made at the instance of Rup Chand Jain (hereinafter referred to as the "Petitioner") against the order of the Collector of Customs. Originally, one question, was referred namely the following :-

Whether on the facts and in the circumstances of the case the provisions of Section 123 of the Customs Act, 1962 as applied by the Tribunal in the instant case is available to the department in view of the fact that at the time of hearing the case, the diamonds were not in the list of "Notified Items"?

2. Thereafter upon the application of the petitioner the High Court directed the Tribunal to refer following, two questions, by its Order dated 18-8-1995 :-

1. Whether the Tribunal was correct in holding that the applicant failed to discharge the burden of proving that the diamonds in question are not smuggled goods and whether the findings of the Tribunal in this regard is perverse?

2. Whether on the facts and in the circumstances of the case, the Tribunal was correct in upholding the levy of penalty upon the Applicant?

3. In this way, we are required to decide the aforesaid three questions, in this

reference which arise out of an order dated 6th July, 1993 passed by the Tribunal. The Tribunal dismissed the two appeals filed by Rup Chand Jain (petitioner) and Gunvant J. Mehta. As a result of dismissal the confiscation of diamonds and penalties imposed upon the appellants by the Collector of Customs were confirmed.

4. It is significant that a reference application has been filed by G. Mehta to the High Court against the said order of the Tribunal (CEGAT) which is pending.

5. The case of the petitioner before the Collector as also the Tribunal had been that loose diamonds under seizure mentioned at Sl. Nos. 6,9 to 13,15 & 16 of the search list were the part of the lot of 55.05 Cts. of cut and polished diamonds purchased by him from G. Mehta who in his turn got it from Arihanta Diamonds, Bombay. Both the Collector and Tribunal did not accept the case of the petitioner.

6. We are, however, to consider whether the petitioner discharged the burden of proof laid by Section 123 and the Tribunal erroneously did not consider the explanation offered.

7. Section 123 of the Customs Act provides as under :-

"123(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.

(ii) If any person other than the person from whose possession the goods were seized claims to be 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.

(c) This section shall apply to gold or diamonds, watches and any other class of goods which the Central Government may by Notification in Official Gazette specify."

8. Section 123 is a statutory exception to the general rule which requires the prosecution to prove the charges of which a person is alleged to be guilty. For applying u/s 123, however, it is necessary that the Customs Authority should have "reasonable belief. "Reasonable belief means "honest belief. Webster defines "reasonable" as meaning "just honest" (State v. Churchill, 100 P. 309, 314, 52 Wash. 210, quoting Tillery v. State, 5 S.W. 842, 24 Tex. App. 251, 5 Am. St. Rep. 882). It is not on the basis of pretence that Section 123 can be resorted to. The person who is found to be in possession of smuggled goods, he would be required to prove that the goods found in his possession is not of foreign origin.

9. The standard of proof required to discharge the legal burden depends upon whether the proceedings are criminal or civil, the standard being higher in the

former than in the latter. Lord Denning in *Bater v. Eater* -(1951) p 35 at p 36 said:

".... a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within the standard ... so also in civil cases the case must be proved by a preponderance of probability, but there may be degrees of probability within that standard."

10. In the instant case, the petitioner filed a number of documents to establish its lawful possession of the goods not being in breach of the Customs Act. The evidences relied on were in support of lawful acquisition of the diamonds, following evidences were produced before the Customs Authorities.

(a) Bill dated 20-1-1981 of Hindustan Diamond Company Limited (in short HDCL) upon Arihanta Diamonds as regards as sale of 329.40 Cts. of rough diamonds. HDCL is a Company sponsored by Government of India and had imported the said diamonds in rough condition and particular about the relevant import licenses were also mentioned in this bill.

(b) Sales Tax Declaration Form as regards the aforesaid sale in accordance with the provision of Section 12 of Maharashtra Sales Tax Act, 1959.

(c) Bill dated 2-3-1981 alongwith a letter dated 3-3-1981 of Arihanta Diamonds as regards sale of the aforesaid quantity of 329.40 Cts. of rough diamonds to Gunvant J. Mehta.

(d) Sales Tax Declaration Form u/s 12 of the Maharashtra Sales Tax Act, 1959 in respect of the aforesaid sale from Arihanta Diamonds to Gunvant J. Mehta.

(e) Names and other details about the various Karigars engaged by Gunvant J. Mehta for cutting and polishing the said quantity of 329.40 Cts. of rough diamonds. Upon cutting and polishing Gunvant J. Mehta obtained 81.10 Cts. of cut and polished diamonds.

(f) Bill dated 5-10-1981 from Gunvant J. Mehta as regards sale of 55.05 Cts. to the applicant out of the aforesaid cut and polished diamonds obtained from 329.40 Cts. of rough diamonds.

(g) Documents as regards payment of sales tax amounting to Rs. 6,324/- by Gunvant J. Mehta on sale of the said quantity of 55.05 Cts. of cut and polished diamonds to the applicant.

11. Correctness or genuineness of none of the aforesaid documents is in dispute. The grounds given by the Collector confiscating the diamonds were irrelevant and erroneous. The grounds given by the Collector were as under :-

(a) Since 55.05 Cts. of cut and polished diamonds out of the lot of 81.10 Cts. were sold by Mehta to the applicant for Rs. 51,950/- for the balance 26.05 Cts.

Mehta would have fetched about Rs. 25,000/- and thus Mehta would have incurred a loss of about Rs. 70,000/- in the transaction relating to the lot of 329.40 Cts. of rough diamonds.

(b) The submissions of Mehta to the effect that he had also purchased another lot of 415.80 Cts. of rough diamonds and that in the two lots together he had made a profit cannot be accepted. This finding was given by assuming that the lot of 415.80 Cts. was a part of another lot of 695.60 Cts. mentioned in HDCL's bill dated 20-1-1981.

12. What is strange in this case is that neither of the two authorities have discussed or considered the evidence mentioned above. Non-consideration of the above circumstance and evidences led to the erroneous conclusion holding that the petitioner did not explain the background of his possession of the diamonds. In the instant case, the applicant was in possession of the diamonds and as well as jewellery. In respect of the second item the Tribunal gave finding in favour of the petitioner by directing it to be released, whereas in the case of diamonds his view was different. Reasons for taking this view does not appear to be convincing and reliable. Had the Collector of Customs and Tribunal properly appreciated the evidence led by the petitioner the conclusion should have been that the burden of proof required by Section 123 had been discharged.

13. Before an accused can be called upon to prove that goods recovered from his possession are not smuggled goods, the prosecution has to establish that they were seized under Act in the reasonable belief that they are smuggled goods, merely because the accused admitted their possession would not shift the burden on him to disprove that the goods were smuggled goods. The Collector of Customs as well as the Tribunal committed an error in not applying the correct principles to appreciate whether the petitioner had established that the goods in his possession were not smuggled and were not of foreign origin. Series of transactions of purchase and transfer of goods established beyond all reasonable doubts that the goods were not smuggled.

14. Relying on the submission made by the appellant reliance has been placed on the decision of *Balumal Jamnadas Batra Vs. State of Maharashtra*, . The Counsel for the respondent attempted to distinguish this case on the ground that since the goods had not been notified by the Central Government the said decision did not apply.

15. The submission of the respondent's Counsel is not correct. In paragraph 5 of the decision of the aforesaid case, it is noted :-

"It is true that lighters and flints were notified as provided in Section 123(2) in the Official Gazette of 26-8-1967. Nevertheless, as the provisions of Section 123(1) of the Act only lay down a procedural rule, they could be applied when the case came up for trial before the Presidency Magistrate who actually decided it on 15-7-1969. Indeed, the complaint itself was filed on 30-10-1968."

16. From the observations of the Supreme Court quoted above it is clear that the goods seized in that case had been notified as provided by Section 123(2) of the Customs Act. The learned Counsel is not right in distinguishing this decision on the ground mentioned above.

17. What appears from the aforesaid decision is that since on the date of trial the goods seized had not been in the notified list. Presumption laid down by Section 123 did not apply. Emphasis of the Supreme Court was that the material time for drawing presumption was at the time of hearing of the instant case. The Collector's adjudication order was passed on 13-2-1991 after the amendment of Section 123(2) of the Customs (Amendment) Act, 1989, which came into force on 26th October, 1989.

18. However, in the instant case, we find that the Tribunal as well as the Collectors, were wrong in finding that the burden of proof laid down by Section 123 had not been discharged by the petitioner.

19. Consequently, the decision of the two Authorities were based on irrelevant considerations and that rendered the same to be illegal.

20. It was submitted by the learned Counsel for the respondent that the court has no power to interfere with a decision merely on the ground of errors of fact and in this case the error pointed out by the petitioner's Counsel was at the most an error of fact and not of law, much less the same being an error apparent on the facts of the record, even if we accept the submission of the respondent's Counsel that court exercising the same is not to act as an Appellate Authority and it would not ordinarily review findings of fact arrived at by Tribunal, by taking into account the irrelevant facts. The Supreme Court has held in a number of cases that the reference Court has power to set aside such order passed on consideration of irrelevant facts and on non consideration of materials on record. A finding suffered from such an obvious and patent error, in our view, is liable to be set aside and the High Court would be justified in going so. Collector's appreciation of the circumstantial evidence before him with which the Tribunal agreed was patently illegal and perverse. Consequently, the decisions given by the two authorities deciding three questions referred to us are liable to be answered against the department and in favour of the petitioner.

21. Question No. 1 is answered in the negative. The ingredients of Section 123 had been satisfied by the petitioner. Therefore, the Tribunal committed an error in applying the same and erred in holding that the burden had not been discharged by the petitioner.

22. Question No. 2 is answered in the negative by saying that the petitioner discharges the burden of proving that the diamonds were not smuggled goods and the finding recorded by the Tribunal is perverse.

23. Question No. 3 is answered in the negative and against the department. The imposition of penalty upon the petitioner was illegal and not justified.

24. We consequently allow the reference application by answering all the three questions in the negative and in favour of the petitioner. The case be decided in accordance with our opinion.

The appeal is allowed. There will be no order as to costs.