
(2011) 08 PAT CK 0121

In the Patna High Court

Case No : Misc. Appeal Nos. 399 and 400 of 2006

Shri Brahmdeo Poddar and Sri Umesh Kumar Poddar

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 12-08-2011

Acts Referred:

Citation : (2011) 08 PAT CK 0121

Final Decision : Dismissed

Judgement

S.K. Katriar, J.—These two appeals u/s 130 of the Customs Act, 1962 (hereinafter referred to as "the Act"), arise out of a common order dated 29.3.2006, passed by the learned Customs, Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata, in Appeals CSM-22 and 23 of 2005, whereby the two appeals preferred by the present appellants u/s 129A of the Act have been dismissed by a common order, and the orders of the learned first authority and the learned appellate authority have been affirmed.

2. A brief statement of facts essential for the disposal of this appeal may be indicated. On 14.10.2002, on specific information, the officers of D.R.I., Muzaffarpur, intercepted a truck bearing Registration No. UP-07D-3417, at Nawgachia Zero Mile (Bhagalpur), loaded with 205 bags of Copper scrap dust allegedly of 3rd country origin weighing 14,800 Kgs. Dushyant Singh, the driver of the truck, disclosed and made voluntary statement u/s 107 of the Act before the officers that the goods in question were brought from Birat Nagar (Nepal), and subsequently loaded on the truck near India Gate, Jogbani, through M/s Raj Carrying Corporation, by Brahmdeo Poddar (appellant of M.A. 399 of 2006), with another person, namely, Pappu Poddar, on 13.10.2002. Mohan Singh, another witness, in his voluntary statement also corroborated the statement of the driver. The driver produced consignment note of M/s Raj Corporation, and Bill of M/s Umesh Scrap & Waste Agency (Jogbani). As the driver/Khalasi of the truck failed to produce any document in support of legal import/possession of the recovered contraband copper scrap dust of 3rd country origin, the consignment

valued at Rs. 7,40,000/-, and the truck valued at Rs. 5,00,000/-, were seized u/s 110 of the Act *ibid*. The driver in his affidavit dated 27.12.2002 before the Notary, confirmed commission of the offence, and further stated in his affidavit that he became the victim of fraudulent activities and forgery committed by M/s Raj Carrying Corporation, and the appellant of M.A. 399 of 2006.

2.1. Umesh Kumar Poddar took the stand that he had purchased the same from local hawkers, and produced purchase memos etc. in support thereof. During the course of statement u/s 108 of the Act, Akhlaq Ahmad, the owner of the truck, stated that the driver ignorantly loaded the contraband consignment on the truck. On enquiry, no firm in the name & style of M/s Umesh Scrap & Waste Agency could be located at Jogbani. Further, the whereabouts of local hawkers as per the purchase memo of Umesh Kumar Poddar could not be traced.

3. On a consideration of the entire materials on record, the learned Joint Commissioner of Customs, Patna, being the learned adjudicating authority and the first authority, disposed of the matter by his order dated 24.5.2004. The operative portion of the order is reproduced hereinbelow:--

Having regard to the facts and circumstances of the case and the power conferred upon me u/s 122 of the Customs Act, 1962, I hereby pass the following orders:--

(1) Order for absolute confiscation of 14,800 kgs. Copper Scrap Dust of 3rd country origin u/s 111(d) of the Customs Act, 1962. I do not give any option to redeem goods as they are imported in violation of prohibition u/s 11 of the Customs Act, 1962.

(2) I abstain from fixing any value to the seized goods.

(3) I order for confiscation of the seized Truck bearing Regn. No.UP-07D-3417 of Indian origin valued at Rs. 5,00,000/- u/s 115(2) of the Customs Act, 1962. I give an option to the owner of the vehicle to redeem the same on payment of fine of Rs. 10,000/- (ten thousand only) which shall be exercised within 60 (sixty) days of passing of this order.

(4) I impose penalty u/s 112(b) of the Customs Act, 1962 upon the following notices:--

(i) Sri Pappu Poddar Rs. 20,000/- (twenty thousand)

(ii) Sri Brahmdeo Poddar Rs. 20,000/- (twenty thousand)

(iii) Sri Umesh Kf. Poddar Rs. 30,000/- (thirty thousand)

(iv) M/s Raj Carrying Corporation Rs. 20,000/- (twenty thousand)

(v) Sri Mohan Singh Rs. 2,000/- (two thousand only)

(vi) Sri Dushyant Singh Rs. 3,000/- (three thousand only)

(5) I do not impose penalty on Notices 5, 8, 9, 10 to 13 in view of above discussions.

4. Aggrieved by this order, the two appellants preferred separate appeals in terms of Section 128 of the Act, which have been dismissed by a common order dated 21.12.2004, passed by the learned Commissioner (Appeals), Customs & Central Excise, Patna, who affirmed the order of the learned first authority. Aggrieved by the order, the appellants of the two appeals before us preferred separate appeals before the learned Tribunal, which have been rejected by a common order and impugned in the present appeals.

5. While assailing the validity of the impugned order, learned counsel for the appellants submits that the Copper scrap dust is not a notified item u/s 123 of the Act. He next submits that the entire onus is on the department to prove the culpability of the appellants which it has not been able to discharge, as a result of which involvement of the appellants cannot be deemed in law to have been established. He next submits that the appellants have been able to put up worthwhile defence, namely, the goods were purchased locally which has been disbelieved on untenable grounds. He also submits that no foreign mark was found on the bags containing the products. He lastly submits that the goods were loaded in India and, therefore, the appellants cannot be held responsible for the activity which preceded thereto in a different country or countries.

6. Learned counsel for the respondents has supported the impugned order. Relying on the provisions of Section 11(2)(c), she submits that the aim and object of the Act is to prevent unauthorised and surreptitious import of goods in our country. She has taken us through the materials on record including the three orders in question to satisfy us that the circumstances do exist on record to lead to the conclusion that the two appellants were, involved in illegal import of the goods in question from a third country through Nepal. She relies on the following reported judgments of the Supreme Court:--

(i) In *Balkrishna Chhaganlal Soni Vs. State of West Bengal*,

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

6.1. She also submits that the prohibition to smuggle goods unauthorisedly from third country through Nepal is completely banned. She relies on the judgment of the Supreme Court in *Sheikh Mohd. Omer Vs. Collector of Customs, Calcutta and Others*,

6.2. She next submits that, in view of the nature of transactions which come under scrutiny under the Act, the department is not required to prove the culpability of the appellants with mathematical precision. She relies on the judgment of the Supreme Court in *Collector of Customs, Madras and Others Vs. D. Bhoormall*, She also submits that the conduct of the appellants in the present case clearly lead to the conclusion that they were the owner of the goods, and were smuggling the same. She relies on the judgment of the Supreme Court in

Issardas Daulat Ram and Others Vs. The Union of India (UOI) and Others, (paragraph 5). She lastly submits that the burden of proof in such matters has been indicated by the Supreme Court in Kanungo and Company Vs. Collector of Customs and Others, (paragraphs 13 and 14).

7. Learned counsel for the parties submit in one voice that the aforesaid issues may be treated to be substantial questions of law which arise for adjudication in the present appeals.

8. We have perused the materials on record and considered the submissions of the learned counsel for the parties. It appears to us that the issues of facts are concluded by the concurrent findings recorded by the three learned authorities under the Act. It appears to us that the customs officials had intercepted the vehicle on 14.10.2002, and found that the same was loaded with 205 bags of copper scrap dust weighing around 14,800 kgs. of third country origin. Sample of the same was sent for chemical analysis. On a reasonable belief that these goods were sought to be smuggled into India, the Officers seized the goods and investigated the matter further. On completion of investigation, the officers issued show-cause notice to the appellants before us, and on adjudication, the goods were absolutely confiscated and penalties were imposed on them. On appeal, the learned Commissioner concurred with the view of the learned adjudicating authority. Their appeal before the learned Tribunal has also been rejected and impugned herein.

9. Before we proceed further, we should be clear as to the mode and manner of proof required under the Act. The Supreme Court has observed in *Kanhaiyalal vs. Union of India* (supra), that the Narcotic Drugs and Psychotropic Substances Act, 1988, the present Act etc., are specialized enactments meant to deal with special circumstances, and have various provisions in *Pari Materia* with each other. Provisions of Section 67 of N.D.P.S. Act are substantially in *Pari Materia* with Sections 107 and 108 of the Act. A conviction can be maintained solely on the basis of a confession made u/s 67 of N.D.P.S. Act. Therefore, on the basis of *A Priori* reasoning, a conviction can be maintained on the basis of confession under Sections 107 and 108 of the Act.

10. In *M/s Kanungo & Co. vs. The Collector of Customs, Calcutta*, (supra), the Supreme Court has made significant observations which afford useful guidance for disposal of such matters, paragraphs 13 and 14 of which are reproduced hereinbelow:--

13. There is also no force in the Second point because we do not read the impugned order as having wrongly placed the burden on the appellant. What the impugned order does is that it refers to the evidence on the record which militates against the version of the appellant and then states that the appellant had not been able to meet the inferences arising therefrom. In our opinion, the High Court was right in holding that the burden of proof had shifted on to the appellant after the Customs Authorities had informed appellant of the results of

the enquiries and investigations.

14. This also disposes of the first point. As we have said, the burden was on the Customs Authorities which they discharged by falsifying in many particulars the story put forward by the appellant.

11. The judgment of the Supreme Court in *Collector of Customs, Madras and Others vs. D. Bhoormull* (supra), provides significant guidelines for disposal of such matters. Paragraphs 30, 31, 35 and 40 of the same are reproduced hereinbelow for the facility of quick reference:--

30. It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it--"all exactness is a fake." El Dorado of absolute Proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to the probabilities of the case.

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered, to use the words of Lord Mansfield in *Blatch vs. Archar*, (1774)1 Cowp. 63 at p. 65, "According to the Proof which it was in the power of one side to prove and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible, for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

35. It is not correct to say that this is a case of no evidence. While it is true that no direct evidence of the illicit importation of the goods was adduced by the Department, it had made available to the Collector several circumstances of a determinative character which coupled with the inference arising from the dubious conduct of Baboothmull and Bhoormull could reasonably lead to conclusion drawn by the Collector that they were smuggled goods. These circumstances have been set out by us earlier in this judgment. We may recapitulate only the most salient among them.

40. In the case before us, the circumstantial evidence suggesting the inference

that the goods were illicitly imported into India, was similar and reasonably pointed towards the conclusion drawn by the Collector. There was no violation of the rules of natural justice. The Collector had given the fullest opportunity to Bhoormull to establish the alleged acquisition of the goods in the normal course of business. In doing so, he was not throwing the burden of proving what the Department had to establish, on Bhoormull. He was simply giving him a fair opportunity of rebutting the first and the foremost presumption that arose out of the tell-tale circumstances in which the goods were found, regarding their being smuggled goods, by disclosing facts within his special knowledge.

(Emphasis added)

12. It is thus evident on the basis of the authoritative pronouncements of the Supreme Court that the Act is a specialized enactment to deal with special situations and special circumstances with its own mode and manner of proof, and may be a departure from the traditional laws of the land. This is not an Act where the authorities, or for that matter the Court, are dealing with culpability of a person's action within the country, are really dealing with activities which have taken place beyond the frontiers of the country, and are within the special knowledge of the suspects. It is further evident that, after the authorities under the Act had informed them of the results of enquiry and investigation, the entire onus shifts to the appellants to prove their non-involvement in the matter. The Supreme Court has further observed that the authorities may not be aware about the origin of the products. The suspected persons may alone be aware of the clandestine transactions and, therefore, collusion between the persons in India and Nepal and beyond may be presumed. The Supreme Court has further observed that the Act does not expect the department to prove culpability with mathematical precision. Once the enquiry has revealed the culpability of the appellants, then the onus entirely shifts on them to prove their non-involvement in the matter.

13. Applying the aforesaid principles of law to the facts and circumstances of the present case, the materials on record clearly suggest that the truck had been hired by the two appellants, who are father and son doing a joint business, and had arranged for transportation of the goods in question packed in gunny bags in hand-carts from Nepal. The same were loaded in trucks at Jogbani, part of Indian territory at the Indo-Nepal border, and were intercepted at Naugachia town in the State of Bihar (India). The appellants were informed of the conclusions of the enquiry. We are thus convinced that the department was able to discharge its primary onus about involvement of the appellants. Thereafter the onus shifted to the appellants to rebut the conclusions of the enquiry.

14. We now pass on to the defence set up by the appellants in an effort to discharge their onus. 14,800 Kgs. of copper scrap dust had been seized. According to the defence of the appellants, they had purchased 385 kgs. of dust from the local market at Jogbani in India for which they had furnished memo given by local suppliers. This aspect of the matter has been dealt with by all the

three authorities who have concurrently rejected the defence on the ground that there is no factory in and around Jogbani dealing with copper, nor there is any factory operating in Nepal. Furthermore, the receipt was produced only regarding 385 Kgs. of copper scrap dust which on enquiry by issuing notices and summons elicited no reply from the so-called suppliers, and the learned authorities concluded that it is a forged and fabricated document. In such a situation; we entirely agree with the concurrent findings of the three learned authorities under the Act that the item in question has been brought to Nepal from a different country and wherefrom, at the instance of the appellants, were smuggled into India and was detected. In such a situation, we are convinced that the department had acted with due care and caution, made meaningful enquiry, and came to the aforesaid conclusions which were conveyed to the appellants. They had never demanded to cross-examine the driver and the Khalasi who had made the statements and formed the bed-rock of the enquiry. In other words, the statements made by the driver and Khalasi took the shape of substantive evidence in terms of Section 108 of the Act. The defence set up by the appellants was limited to 385 kgs., which was found to be unsubstantiated. The balance of the goods remained completely uncovered and in law stood admitted by non-traverse.

15. Learned counsel for the appellants submits that the item in question is not notified under the provisions of the Act. The relevant portion of Section 11 of the Act is reproduced hereinbelow:--

11. The power to prohibit importation or exportation of goods.

xxx xxx xxx

xxx xxx xxx

(2) The purposes referred to in sub-section (1) are the following:--

xxx xxx xxx

xxx xxx xxx

(c) the prevention of smuggling.

16. The present case is covered by the notification of Government of India, bearing Notification No. 9/96-CUS, dated 22.1.1996, the relevant portion of which is reproduced hereinbelow:--

In exercise of the powers conferred by sub-section (1) of Section 11 of the Customs Act, 1962 (52 of 1962), and in supersession of the Notification No. 76/F, No. 80/83/65-LCI, dated the 19th June, 1965, published in the Gazette of India vide No.GSR 848, dated the 19th June, 1965, the Central Government, being satisfied that for the prevention of smuggling it is necessary so to do, hereby prohibits the import from Nepal to India of goods which have been exported to Nepal from countries other than India:

17. It is thus evident on a perusal of this notification issued in terms of Section 11(1) of the Act that the Government of India has imposed complete ban on import of goods which has origin in a third country and brought to Nepal, and then sought to be smuggled into India. The three learned authorities under the Act have concurrently found, with which we entirely agree, that the circumstances indicate that the goods in question had been brought to Nepal from a different country and had been smuggled into India. The circumstances leading to this conclusion have been indicated in the orders in question, namely, there is no factory dealing in copper either in or around Jogbani or Nepal, which leads to the irresistible conclusion that the same has been brought to Nepal from a different country and then smuggled into India.

18. We now pass on to the last and yet very significant issue in the present case. The present appeals have been preferred under the provisions of Section 130 of the Act which, inter alia, provides as follows:--

130. Appeal to High Court.--(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

xxx xxx xxx

xxx xxx xxx

(9) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this Section.

(Emphasis added)

19. The expression "substantial question of law" occurs in Section 130 of the Act, Section 260A of the Income Tax Act, and Section 100 of the Code of Civil Procedure. A Division Bench of this Court to which one of us (S.K. Katriar, J.) was a party, had the occasion to consider the scope and sweep of Section 260A of the Income Tax Act, in the judgment dated 30.3.2011, passed in Misc. Appeal No. 657 of 2010 (Deputy Commissioner of Income Tax vs. Sulabh International Social Service Organisation), since reported in 2011 (3) B.B.C.J. 117. We should first of all emphasise that the scope and sweep of the said provisions of the three enactments is one and the same. Relying on the judgments of the Supreme Court, this Court held that the scope and sweep of Section 260A of the Income Tax Act is very narrow and appeal in this Court shall be maintainable if a substantial question of law arises for consideration. The expression "substantial question of law" has not been defined anywhere in the statute, but it has acquired a definite connotation through various judicial pronouncements. The conditions mentioned in Section 260A must strictly be fulfilled before an appeal

can be maintained thereunder. This Court had pressed to observe that the second appellate forum u/s 100 of the CPC is the third forum for the litigant, whereas it is the fourth forum for the litigant under the Income Tax Act. The same is the position under the Act.

20. We take this opportunity to clarify the following observation made in paragraph 7 of the judgment in Deputy Commission of Income Tax vs. Sulabh International Social Service Organisation:--

...One author has gone to the extent of observing that unlimited number of appeals is only permissive of substituting one speculation on facts for another.

We wish to clarify that observations to the aforesaid effect have been made by Mr. Justice Felix Frankfurter, celebrated Judge of the Supreme Court of U.S.A., in James C. Rogers vs. Missouri Pacific Rail Road Co., 352 U.S. 500=1 Led. 2nd 493.

21. In view of the foregoing discussion, we have no manner of doubt that the issues are concluded by findings of facts. No question of law, much less a substantial question of law arises for adjudication in the present appeals. These two appeals are fully covered by the judgment of this Court in Deputy Commission of Income Tax vs. Sulabh International Social Service Organisation (supra).

22. In the result, we do not find any merit in these two appeals and are dismissed. In the circumstances of the case, there shall be no order as to costs.

Ahsanuddin Amanullah, J.

23. I agree.