

(1999) 09 KAR CK 0036
In the Karnataka High Court
Case No : TRC No. 1 of 1986

Sri Bahubali

APPELLANT

Vs

Collector of Central Excise

RESPONDENT

Date of Decision : 09-09-1999

Acts Referred:

Customs Act, 1962 — Section 111 (d), 129 A
Evidence Act, 1872 — Section 106, 112, 114, 24

Citation : (2000) 72 ECC 60 : (2000) ECR 441 : (2000) 120 ELT 59 : (2000) 2 KCCR 1333

Hon'ble Judges : V.K. Singhal, J; T.N. Vallinayagam, J

Bench : Division Bench

Advocate : G. Chander Kumar, for the Appellant; Madumita Bagchi, ACGSC, for the Respondent

Judgement

T.N. Vallinayagam, J.—The following questions have been raised;

"Whether on the facts and circumstances of the case, the Tribunal was justified in Section 106 and 114 of the Evidence Act ?"

2. On information that the applicant herein and his cousin Sripad Baburao Kambhoj were transporting contraband gold by train No. 85, on 16-4-64, and were due to alight at Yeshwanthpur, railway station at about 5.45 p.m. the Central Excise Department proceeded to Yeshwanthpur Police Station and found the appellant and his cousin alighting from the train in question. A search was carried out and 30 gold biscuits slabs weighing 10 tolas each, bearing foreign marks "Johnson Mathey London 99.0 - 10 Tolas" on one side and "Mocatta-Goldsnid Ltd. London" on the other side. The same was seized on 16-4-64 under mahazer. On 7-4-64, a culminated in an order of absolute confiscation by the Collector of Central Excise and Customs, Bangalore, u/s 111(d), penalty of Rs. 2,500/- u/s 112 of the Act.

3. The appeal u/s 129-A of the Customs Act to set aside the order dt. 29-7-82,

was dismissed by the Central Excise and Customs Appellate Tribunal. South Range at Madras on 25-6-83 confirming in entirety the order of confiscation as well as the penalty imposed by the Collector of Central Excise and Customs.

4. It is submitted, Section 123 of Customs Act is applicable to the facts of this case. The statement recorded from the application Bahubali D. Kambhoj is admissible in evidence and the same is not hit by Section 24 of the Evidence Act. The acquittal given in Criminal case filed against the appellant on the ground that the seizure was not on the basis of a reasonable belief by the seizing officer and therefore Section 123 is not applicable. Such finding rendered by the Criminal court is binding on the Tribunal. On the other hand, the senior Standing counsel for the Department submitted that the applicant is guilty of contravention of the provisions of the Customs Act, de hors Section 123 of the Act. The Criminal Court has not given a finding on merits with reference to the contraband nature of the gold in question. The burden is on the applicant to offer convincing and satisfactory explanation as to the possession of a huge quantity of gold slabs with foreign markings and statutory presumption under Sections 106 and 114 of the Evidence Act. the ruling of the Supreme Court reported in Collector of Customs, Madras and Others Vs. D. Bhoormall, , to the following :

"..the prosecution of 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 put is "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 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".

".. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guard, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person and in the result prove him guilty".

It is also submitted that the Supreme Court in State of Maharashtra Vs. Natwarlal Damodardas Soni, highlighted the proposition that illegal importation of gold into the country within the meaning of Section 111(d) of the Customs Act could be presumed under Sections 106 and 114 of the Evidence Act, if the totality of facts proved could warrant such a presumption. However, the

observation of the Supreme Court to the following effect was also relied upon.

" It is true to law that even in cases where Section 123(1) of the Customs Act is not attracted, the prosecution can discharge its burden by establishing circumstances from which a prudent man, acting prudently, and infer that in all probability the goods in question were smuggled goods, and the accused had the requisite guilty knowledge in respect thereof. The leading case is; Bhau Ram Vs. B. Baijnath Singh and Others, . In that case, in reaching the conclusion that the gold had been smuggled, the Collector of Customs considered the credibility of the story put forward by the appellant about the purchase of the gold and also the conduct of the appellant in trying to get the gold melted so as to reduce its fitness by mixing silver with it, in an attempt to approximate the resultant product to licit, gold found in the market. The ratio of this decision was followed by this court in Labhchand Dhanpat Singh Jain Vs. The State of Maharashtra, . The appellant accused therein was trying to enter the railway compartment at Bombay station. Seeing his nervousness, the Railway Police questioned him and searched his person and recovered nine bars of gold with foreign markings. The accused put forward an incredible story with regard to the possession of the gold. This court held that in the circumstances of the case, an inference could very well be drawn that the gold must have been imported after the law passed in 1948, restricting its entry, that the burden of proving an innocent receipt of gold lay upon the appellant u/s 106 Evidence Act and that the totality of facts proved is enough to raise a presumption u/s 114. Evidence Act; that the gold had been illegally imported into the country, so as to be covered by Section 111(d) of the Customs Act".

The ratio in the ruling of the Supreme Court in Balumal Jamnadas Batra Vs. State of Maharashtra, - with reference to the applicability of Sections 114 and 106 of the Evidence Act dehors Section 123 of the Customs Act, 1962. It is further submitted that the acquittal in the criminal court is based merely on non-applicability of Section 123 of the Customs Act on account of the usage of the word "suspicion" in the deposition of the "seizing officer as a prosecution witness. The Criminal Court has not gone into the question nor given a finding that the appellant did not transport contraband gold with foreign markings nor has the criminal Court accepted as a fact the explanation of the accused in the Criminal prosecution.

5. Heard the counsel.

6. In the case of State of Mysore v. Abdul Hafeez, reported in 1967 M.L.J. 506, the question that arose for consideration was whether a criminal court acting u/s 517 of the Code of Criminal Procedure 1898 can set at naught a confiscation order dehors the provisions contained in the Indian Wireless Telegraph Act. The question was answered in favour of the State on the ground that the view taken by a number of High Courts in this country is that the general provisions of Section 517 do not apply to cases under statutes in which special provisions for forfeiture have been made. In the case of State v. Abdul Hasheed AIR 1967 Mys

231, it was held that Section 517 was controlled by subsection (2) of Section 5 of the Code of Criminal Procedure, 1898 and consequently, the powers of forfeiture of confiscation exercisable by the authority named in a special enactment cannot be rendered nugatory by a Criminal court in exercise of its power u/s 517 of the 1898 Code.

7. The case in *Bhoormal Premchand Vs. Collector of Customs, Madras*, , relied upon by the applicant to the following proposition does not apply to the facts of this case.

"It is true that u/s 178A of the Sea Customs Act a statutory condition has been imposed upon the accused of establishing his innocence, namely, that the gold was not smuggled; in other words, the burden of proof on the accused is fixed. It cannot be altered nor does it shift during the course of the enquiry. But when once the accused has placed all the available materials before the Customs authorities and also when the Customs authorities are possessed of all the materials as a result of the investigation, after certain stage, the burden of proof imposed on the accused shifts on to the Customs authorities to prove that it was smuggled gold".

8. In *Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others*, the Supreme Court held that :

"On the principles underlying Evidence Act burden to establish the fact is cast on the person concerned and if he fails to establish or explain those facts, an adverse inference may be drawn against presumptive evidence adduced by the prosecution or with the persons."

Such an inference would rebut the initial presumption of innocence in favour of that person and in the result prove him guilty. In that case Supreme Court considered the position of innocent man as follows :

"A minor point was urged in support of the above contention that Section 132 contains provisions which are likely to affect even innocent persons. For example, it was submitted, an innocent person who is merely in custody of cash, bullion or other valuables etc. not knowing that it was by a raid for the purposes of search and seizure. That cannot be helped. Since the object of the search is to get at concealed incomes, any person, who is in custody without enquiring about its true nature, exposes himself to search. Sub-section (4) of Section 132 shows the way how such an innocent person can make the impact of the search on him bearable. All that he has to do is to tell the true facts to the searching officer explaining on whose behalf he held the custody of the valuables. It will be then for the Income Tax officer to ascertain the person concerned under Sub-section (5)."

9. In the dictum of the Supreme Court in case of *Labhchand Dhanpat Singh Jain Vs. The State of Maharashtra*, , the Supreme Court relied on *Issardas Daulat Ram and Others Vs. The Union of India (UOI) and Others*, wherein the conduct of

the accused and the incredible version set up by him were enough to saddle the accused with necessary knowledge of the character of the goods found in his possession. On the above facts the Apex Court found that:

"in the circumstances of the case, an inference could very well be made that the gold must have been imported after law passed in 1948 restricting its entry; that the burden of proving an innocent receipt of gold lay upon the appellant u/s 106, Evidence Act and the totality of facts proved is enough to raise a presumption u/s 114. Evidence Act that the gold had been illegally imported into the country so as to be covered by"

10. In case of *Balumal Jamnadas Batra Vs. State of Maharashtra*, , the Apex Court held that :

"the very appearance of the goods and the manner in which they were packed indicated that they were newly manufactured and brought into India very recently from another country. The inscriptions on them and writing on the boxes were parts of the state in which the goods in unopened boxes were found from which inferences about their origin and recent import could arise. The conduct of the accused, including his untruthful denial of their possession, indicated consciousness of their smuggled character or mens rea. In any case, there was some evidence, to enable the Courts to come to the conclusion that the goods must have been known to the accused to be smuggled even if he was not a party to a fraudulent evasion of duty."

11. In *Collector of Customs, Madras and Others Vs. D. Bhoormall*, , the Supreme Court As observed as follows :

"...the prosecution of 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 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."

12. In *State of Maharashtra Vs. Natwarlal Damodardas Soni*, , the Apex Court highlighted the proposition that :

"illegal importation of gold into the country within the meaning of Section 111(d) of the Customs Act could be presumed under Sections 106 and 114 of the Evidence Act, if the totality of facts proved could warrant such a presumption."

13. The petitioner relied upon following dicta, in *Amba Lal v. Union of India and Ors.* reported in AIR 1961 SC 264 (V 48 C 37). It was held that:

"Section 106 of the Evidence Act also in terms does not apply to a proceeding under these Acts. If Section 106 of the Evidence Act is applied, then, by analogy, the fundamental principles of criminal jurisprudence must equally be invoked. If so, it follows that the onus to prove the case against the accused is on the customs authorities. Where the custom's authorities do not discharge the burden, the order of confiscation is bad."

14. In *P. Channappa v. Mysore Revenue Appellate Tribunal, Bangalore* and Ors. reported in AIR 1966 Mys 68 (V 53 C 18), it was held that:

"When a particular charge had been enquired into and found against by a competent criminal court, Tribunals constituted under other enactments, cannot again enquire into the same charge, so long as the acquittal before the Criminal Court is not on any technical ground, but on merits."

15. In the case of *Santosh Gupta Vs. Union of India*, , it was held that:

"the petitioner has produced two receipts under which she has purchased the zoom lenses. The person who passed the receipts unfortunately was not traceable, but the owner of the Asha Studios on whose behalf the receipts were passed has been examined. He has stated that he has not issued the receipts, but the material on record shows that he had signed two receipts at the instance of one film producer, Mr. Talwar by name, but did not know for what purpose the said receipts had been passed. It is not the case of the Department that the receipts are totally bogus. On a preponderance of probabilities, therefore, the petitioner had discharged the burden, if any, which lay upon her, it is not understood why this explanation given by her could not have been accepted, especially when there is no other evidence coming forth from the side of the Department itself as to attract the punitive action u/s 111(d) of the Customs Act."

16. The respondent-Department also relied upon the following dicta for the proposition that reference becomes academic. In the case of *Commissioner of Income Tax, Bombay City-H, Bombay v. Ramchand Jethmal*, it was held that:

"as the finding recorded by the Tribunal that the amounts which were sought to be brought to tax by way of deemed dividends fell outside the Divali year ending on October 31, 1956, and that for purposes of deemed dividends a different accounting year could not be adopted had been accepted by the revenue, that finding could not be disturbed and, therefore, the questions referred as to whether the amounts were properly treated as deemed dividend under section."

17. In the case of *Additional Commissioner of Income Tax Vs. S. Krishnaswamy Reddiar*, , it was held:

"(1) that, as found by the Tribunal, the department had not categorically established that the subsidy bore the character of income in which case alone the actual expenses could have been adjusted [against the receipt of the subsidy and this question had not been specifically challenged in the reference]. The conclusion of the Tribunal, therefore, became final;

(2) the department had challenged only the alternative finding of the Tribunal that since the matter could not have been the subject matter of consideration before the AAC, it could not be urged before the Tribunal in the appeal " preferred by the (sic)

(3) the question referred was, therefore, academic in nature and need not be answered."

18. In the case of Commissioner of Income Tax, West Bengal Vs. Jardine Henderson Ltd., , the Supreme Court held that:

"This is undoubtedly a question of law, but we find that it is wholly academic to refer it, because it has been found by the Tribunal as a fact and which finding has become final, that no part of the borrowings was made for the purpose of earning dividend and hence there was no question of deduction of any interest for the purpose of arriving at the net income by way of dividend. The question sought to be referred by the Commissioner does not, therefore, arise for consideration on this finding of fact reached by the Tribunal and it is wholly unnecessary to call for a reference as contended by the Commissioner."

19. In the case of Upper India Publishing House (P) Ltd. Vs. Commissioner of Income Tax, Lucknow, , the Supreme Court held that

"The question whether the particular expenditure on rent is excessive and unreasonable or not is essentially a question of fact and does not involve any issue of law and hence we are of the view that the second question ought not to have been directed to be referred by the High Court. But if the second question could not form the subject-matter of a reference, then obviously the first question becomes academic, because Section 40A(2)(a) cannot have any application, unless it is first held that the expenditure on rent was excessive or unreasonable. We, accordingly, allow, the appeal and set aside the order of reference made by the High Court. There will be no order as to costs of the appeal.

20. In the case of Commissioner of Income Tax Vs. Land Corporation of Bengal P. Ltd., , it was held that:

"In the first order of the Tribunal there was not finding that an amount received on the forfeiture of an advance to purchase immovable property was of a revenue character. As a result of two subsequent miscellaneous petitions, the Tribunal categorically observed that it had not decided whether the receipt was assessable income. On a question regarding the year in which the receipt was assess: It was held that the question was academic and the High Court would not answer it."

21. In the case of State of Maharashtra Vs. Natwarlal Damodardas Soni, , the Supreme Court, at paragraph 18 of the Judgment, has observed as follows :

"It is trite law that even in cases where Section 123(1) of the Customs Act is not

attracted, the prosecution can discharge its burden by establishing circumstances from which a prudent man, acting prudently, may infer that in all probability the goods in question were smuggled goods, and the accused had the requisite guilty knowledge in respect thereof. The leading case is Bhau Ram Vs. B. Baijnath Singh and Others, . In that case, in reaching the conclusion that the gold had been smuggled, the Collector of Customs considered the credibility of the story put forward by the appellant about the purchase of the gold and also the conduct of the appellant in trying to get the gold melted so as to reduce its fineness by mixing silver with it, in an attempt to approximate the resultant product to licit gold found in the market. The ratio of this decision was followed by this Court in Labhchand Dhanpat Singh Jain Vs. The State of Maharashtra, . The appellant-accused therein was trying to enter the Railway compartment at Bombay Station. Seeing his nervousness, the Railway police questioned him and searched his person and recovered nine bars of gold with foreign markings. The accused put forward an incredible story with regard to the possession of the gold. This Court held, that in the circumstances of the case, an inference could very well be drawn that the gold must have been imported after the law passed in 1948, restricting its entry, that the burden of proving an innocent receipt of gold lay upon the appellant u/s 106, Evidence Act and that the totality of facts proved is enough to raise a presumption u/s 114, Evidence Act; that the gold had been illegally imported into the country, so as to be covered by Section 111(d) of the Customs Act."

22. It is seen that the Criminal prosecution ends in acquittal either being given the benefit of doubt or otherwise on technical grounds. Such an order of acquittal cannot be pressed into service. Further it is also found that the acquittal of the Criminal court in respect of one of the two parties namely charge u/s 136 of the Customs Act against the appellant is on a technical ground that presumption u/s 123 of the Customs Act was not applicable. But the Criminal Court has not considered the applicability of Section 106 and 114 of the Evidence Act vis-a-vis applicant.

23. In the light of the above, the reference is answered against the assessee and in favour of the revenue.