

GAHC030005122023



IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH
(Aizawl Bench)

Cus.Ref./1/2023

1. The Commissioner, Customs
(Preventive), NER, Shillong

Appellant

-Versus-

1. Sh. Eanam Ahmed Laskar
S/o Abdul Hannan Laskar (L)
R/o Sirajpur, District Karimganj,
Assam.

Respondent

For Appellant : Mr. Johnny L. Tochhawng, Advocate

For Respondent : Mr. B. Lalramenga, Advocate

Date of Judgment : 01.05.2024

BEFORE
HONOURABLE MR. JUSTICE NELSON SAILO
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA
JUDGMENT

(Mridul Kumar Kalita, J)

1. Heard Mr. Johnny L. Tochhawng, learned counsel for the appellant and Mr. B. Lalramenga, learned counsel for the respondent.
2. This Customs Reference has been registered on filing of an appeal under Section 130 of the Customs Act, 1962 by the Commissioner, Customs (Preventive), NER, Shillong, impugning the Order dated 06.07.2022, passed by the Customs Excise & Service Tax Appellate Tribunal (CESTAT), Eastern Zone, Kolkata, in Custom Appeal No. 75949/2021.
3. By order dated 19.03.2024, this Court, upon hearing the learned counsel for both the parties, had formulated the following substantial questions of law:-
 - i. *Whether the CESTAT erred in holding that the evidence collected by the Department could not establish the origin of the dry Areca nuts seized from the respondent.*
 - ii. *Notwithstanding that in view of the fact that Betel/Areca Nut is not a notified item under the provisions of Section 123 of the Customs Act, the Department had duly discharged its burden to prove that the seized goods have been smuggled into the Country by the respondent.*

- iii. Whether the learned CESTAT erred in law by accepting the GST documents submitted by the appellant in support of the goods belatedly which was only made during the adjudication proceedings and were not subjected to propose scrutiny by the Department.*
- iv. Whether the Order dated 06.07.2022 is otherwise perverse in law and therefore is required to be set aside.*

4. The facts relevant for consideration of the instant appeal, in brief, are as follows:

- i. That on 17.03.2020, the 46 Assam Rifles personnel, intercepted two trucks bearing Registration No. AS 11 DC 1411 and AS 11 AC 6857, respectively, carrying total 310 bags (18600 Kg) of dry betal nuts at Kawlhem, Mizoram and handed over the same to the Customs Preventive Force (CPF), Champai, Mizoram.
- ii. The drivers of both the seized trucks, namely, Saroj Uddin Laskar and Karim Uddin Laskar failed to produce any documents at the time of seizure of the vehicles. In their statements, which were recorded by the customs authority, they had stated, *inter-alia*, that they were carrying betal nuts from Kawlhem to Aizawl.
- iii. The seized betal nuts were suspected to be of foreign origin and its value is estimated to be Rs. 52,23,066/- and were believed to be brought into India from

Mayanmar through porous Indo-Mayanmar Border in violation of the provisions of the Customs Act, 1962. Thereafter, the custom officials had formally seized the 310 bags (18600 Kg) betal nuts as well as the vehicles on 18.03.2020.

- iv.** On 19.03.2020, the respondent Eanam Ahmed Laskar claimed the ownership of the seized 310 bags (18600 Kg) betal nuts and submitted an application for provisional release of the seized betal nuts. He also made a statement under Section 107 of the Customs Act, 1962.
- v.** By order dated 13.09.2021, passed by the learned Adjudicating Authority, i.e., the Commissioner of Customs, North Eastern Region, Shillong, the seized betal nuts were confiscated under Section 111 (b) & (d) of the Customs Act, 1962 with an option to redeem the same in terms of Section 125 (1) of the said Act. Penalty was also imposed on the respondent under Section 112 (b) of the Customs Act, 1962.
- vi.** Being aggrieved, by the order of the Adjudicating Authority, the respondent had filed an appeal before the Customs Excise & Service Tax Appellate Tribunal (CESTAT), Eastern Zone, Kolkata against the order of confiscation. The said appeal was registered as Custom Appeal No. 75949/2021.

vii. By order dated 06.07.2022, passed in Custom Appeal No. 75949/2021 the CESTAT had set aside the order dated 13.09.2021, passed by the learned Adjudicating Authority. The said order of the CESTAT has been impugned in the instant appeal by the appellant.

5. For the sake of convenience, the relevant portion of the impugned order is quoted herein below:

"4. The issue for consideration in the instant case is whether the revenue has established the allegation that the seized betel nuts are of foreign origin and are smuggled. On going through the records of the case, it is seen that revenue has not adduced any evidence to prove the allegation. Betel nut is not notified under Section 123 of the Customs Act, 1962 and therefore, the burden of proof lies with the Department to prove the same. It is not just enough to prove by negative inference. Allegation requires to be proved by cogent and positive evidence. I find no such positive evidence has been put forth by the Department. There is not even a reference or narration as to how and from where the impugned goods are smuggled.

5. The Tribunal, in the case of Customs Appeal No. 77344 of 2019 - Smt. Laltanpui vide Final Order No. 75659/2020 dated 09.12.2020 and in the case of Dharmendra Kumar Jha, [2016 (344) ELT 264 (Tri.-Kol)] held that betel nut being non-notified

commodity under Section 123 of the Customs Act, 1962 and the onus is on the Department that seized goods were in fact smuggled to India, but the Department has not discharged its burden. Same ratio applies to the case in hand.

6. In view of above, I find that the betel nut being non-notified goods; burden to prove the fact of smuggling lies on the Department, and same has not been discharged. In view of the above discussions, seizure of impugned betel nut is not justified and needs to be set aside. Therefore, the appeal filed by the Department is allowed with consequential relief, if any, as per law. "

6. Mr. Johnny L. Tochhawng, learned counsel for the appellant has submitted that the learned Appellant Tribunal has failed to appreciate the fact that in the voluntary statement of the respondent recorded under Section 107 of the Customs Act, 1962, he had categorically stated that he does not have any legal documents for the goods and that he had purchased the goods from a truck which was loaded with dry betal nuts at a rate of Rs. 130 per kg. He has also submitted that though the respondent has claimed to have purchased the seized betal nuts from M/s Emily Store, Bethel Veng, however, when his statement was recorded under Section 107 of the Customs Act, 1962, he never stated the said fact before the Customs Officials. Therefore, the learned Appellate Tribunal was wrong to believe

the concocted story made by the Appellant that he purchased the betal nuts from M/s Emily Store, Bethel Veng.

7. Learned counsel for the appellant has also submitted that the respondent is bound by the statement made by him under Section 107 of the Customs Act, 1962 and he cannot retract there from and make a different plea before the Appellate Authority. In support of his submission, learned counsel for the appellant has cited a ruling of the Apex Court in the case of ***Surajit Singh Chabra Vs. Union of India and others*** reported in ***(1997) 1 SCC 508***, wherein the Apex Court has observed that as the Customs officials are not police officers, the confession, made by a person before such officials are held to be binding on the maker of such confession.
8. Learned counsel for the appellant has submitted that the learned Appellate Tribunal has failed to appreciate the crucial fact that the place of interception of the vehicle transporting the dry betal nuts were at Kawlhem Village in Champhai district, Mizoram which is located near Myanmar border. It is also submitted by learned counsel for the appellant that the two main betal nut growing districts of Mizoram, namely, Mamit and Kolasib are not situated near Myanmar border and are situated far away from the Kawlhem Village. It is submitted by the learned counsel for the appellant that Mamit is situated about 290 kilometers from Kawlhem and Kolasib is at a distance of about 280 kilometers approximately from Kawlhem. It is

submitted by learned counsel for the appellant that it cannot be a case that the such huge quantity of betal nuts were transported from these betal nuts growing districts to Kawlhem and thereafter, again to be transported to Aizawl. Learned counsel for the appellant has submitted that such a huge quantity of seized betal nuts could not have originated from Kawlhem Village, where there is no betal nuts production, unless it were smuggled from across the border and the learned Appellate Tribunal had failed to consider this aspect.

- 9.** Learned counsel for the appellant has also submitted that the learned Appellate Tribunal, has erred in holding that the burden of proof lies with the Department to prove the allegations that the seized materials were smuggled materials by cogent and positive evidence. He submits that in fact, the Department is not required to prove its case beyond reasonable doubt but by the preponderance of probability.
- 10.** It is submitted by learned counsel for the appellant that the learned Appellate Tribunal had failed to consider the fact that in customs cases, the rigorous standard of proof beyond reasonable doubt is not required, and what is only required is proof by circumstantial evidence. Therefore, if there is a greater degree of probability that the seized goods are of foreign origin and are smuggled, the same is sufficient for the Department to seize and confiscate such goods. To fortify his submissions, learned counsel for the appellant has cited a ruling of the Apex

Court in the case of the "***Collector of Customs, Madras and Others Vs. D. Bhoormall***" reported in ***(1974) 2 SCC 544***, wherein it was observed by the Apex Court that the Department is not required to prove its case with mathematical precision to a demonstrable degree and all that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in existence of the fact in issue. It has thus, submitted that, though the appellant had discharged its burden of showing that, in all probability, the seized betal nuts were smuggled from the bordering Myanmar, however, the learned Appellant Tribunal was wrong in holding that the Department had failed to discharge its burden to show that the seized goods have been smuggled into the country by the respondent.

- 11.** Learned counsel for the appellant has also submitted that the learned Appellate Tribunal has also erred on relying on the GST documents submitted by the appellant belatedly, as at the initial stage, when the statement of the respondent was recorded under Section 107 of the Customs Act, 1962 no such GST documents were produced.
- 12.** The learned counsel for the appellant has, therefore, submitted that the impugned order dated 06.07.2022 passed by the learned Appellate Tribunal is perverse and therefore, required to be set aside.

- 13.** Learned counsel for the respondent has submitted that the only substantial question of law, which is there in this present appeal is as to whether the burden of proof to show that the seized areca nuts are not smuggled goods is on the respondent under Section 123 of the Customs Act, 1962 or it is for the Department to show that the seized betel nuts are of foreign origin and are smuggled goods, before it can be confiscated under Section 111 of the Customs Act, 1962.
- 14.** It is submitted by learned counsel for the respondent that the betel nuts are not notified goods under Section 123 (2) of the Customs Act, 1962 and therefore, the provision regarding burden of proof as contained in Section 123 of the Customs Act, 1962 is not applicable in this case.
- 15.** It is submitted by the learned counsel for the respondent that the burden of proof of the fact that the seized betel nuts were smuggled betel nuts is on the Department and it has to relieve the said burden by adducing positive evidence to that effect, which in the instant case it has failed and therefore, he submits that the learned Appellate Tribunal has not erred in setting aside the confiscation order by the impugned order.
- 16.** In support of his submissions, the learned counsel for the respondent has referred to an order passed by the CESTAT in the Custom Appeal No. 77344/2019, where in a similar case, the CESTAT had set aside the seizure of betel nuts on the ground that the betel nut is not a notified commodity under

Section 123 of the Customs Act, 1962 and the onus is on the Department that the seized goods were in fact smuggled to India which the Department had failed to discharge. The Customs Department had preferred an appeal against the aforesaid order, before the High Court of Meghalaya and by order dated 28.10.2021, passed in Customs Appeal No. 1/2021, the High Court of Meghalaya has upheld the aforesaid order of the CESTAT and dismissed the appeal. Against the said dismissal, the Customs Department again preferred a Special Leave Petition before the Supreme Court of India. However, by order dated 31.10.2022, passed in Special Leave Petition (Civil) Diary No.27003/2022, the Apex Court dismissed the said SLP.

17. Learned counsel for the respondent has also cited a ruling of a Division Bench of this Court in the case of the "***Commissioner of Customs (Preventive) and Another Vs. Smt. Nemluni***" (Judgment dated 02.06.2023 passed in Custom Reference Case No. 1/2022), wherein it was held that the initial burden to show that the materials seized are of foreign origin lies upon the Revenue Authority, if the said materials are not notified goods under Section 123 of the Customs Act, 1962.
18. It is submitted by the learned counsel for the respondent that as in the instant case the seized betal nuts are not notified goods under Section 123 (2) of the Customs Act, 1962, it was for the Customs Department to prove the foundational facts that the goods seized were smuggled goods, which the

Customs Department has miserably failed and therefore, learned Appellate Tribunal has not erred in passing the impugned order.

19. We have considered the rival submissions made by learned counsel for both the sides and have perused the materials available on record.
20. This is an appeal under Section 130 of the Customs Act, 1962. Though, by Section 30, read with the Schedule, Part IV-7 of the National Tax Tribunal Act, 2005, the Section 130 of the Customs Act, 1962 was repealed in the year 2005, however, the constitutional validity of National Tax Tribunal Act, 2005 was considered by the Supreme Court of India in the case of, **"Madras Bar Association Vs. Union of India"** reported in **(2014) 10 SCC 1**, wherein it has held the Sections 5, 6, 7, 8 and 13 of National Tax Tribunal Act, 2005 as unconstitutional and accordingly, the remaining provisions of the Act have also been rendered otiose and worthless and as such the provisions of the National Tax Tribunal Act, as a whole was set aside by the Apex Court. In view of the said judgment of the Apex Court the provisions of Section 130 of the Customs Act, 1962 regarding appeal to High Court have again been revived in the Customs Act, 1962.
21. Section 130 (1) of the Customs Act, 1962 is quoted herein below.

"(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 the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law."

22. From a bare reading of above provision, it appears that an appeal under Section 130 of the Customs Act, 1962 shall lie to the High Court only if the High Court is satisfied that it involves a substantial question of law. It also appears that the provision of Section 130 (1) appears to be in *pari materia* with Section 100 (1) of the Code of Civil Procedure, 1908. There are a catena of judgments of the Apex Court, which has held that the existence of a substantial question of law is a *sine qua non* for exercise of jurisdiction of the High Court under Section 100 of the Code of Civil Procedure, 1908.
23. Thus, applying the same logic to an appeal preferred under Section 130 of the Customs Act, 1962 it can be safely concluded that the existence of a substantial question of law is a *sine qua non* for exercising the jurisdiction by this Court under Section 130 of the Customs Act, 1962.
24. The Apex Court in the case of "***Chunilal v. Mehta & Sons Ltd. vs Century Shipping & Manufacturing Company Ltd.***" reported in ***1962 SCC Online SC 57*** has observed as follows,

"6. We are in general agreement with the view taken by the Madras High Court and we think that while the

view taken by the Bombay High Court is rather narrow the one taken by the former High Court of Nagpur is too wide. The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

- 25.** It appears that the question to be considered by this Court while exercising its powers under Section 130 of the Customs Act, 1962 has to be question of law and that too has to be substantial in nature. A question of fact may not be considered as a substantial question of law. However, there are a few exceptions to these general principle as observed by the Apex Court in the case of "**Chandana Impex (P) Ltd. Vs. Commissioner of Customs**" reported in **(2011) 7 SCC 289**, wherein it has observed as follows:

"14. *In Hero Vinoth v. Seshammal [(2006) 5 SCC 545] , referring to the Constitution Bench decision of this Court in Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg. & Mfg. Co. Ltd. [AIR 1962 SC 1314] as also a number of other decisions on the point, this Court culled out three principles for determining whether a question of law raised in a case is substantial. One of the principles so summarised is: (Hero Vinoth case [(2006) 5 SCC 545] , SCC p. 556, para 24)*

"24. (iii) The general rule is that the High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

- 26.** Thus, if the Appellate Tribunal has ignored the material evidence available on record or has acted on no evidence, same shall in light of the above observations made by the Apex Court

can be considered while deciding the substantial question of law so formulated by the High Court.

- 27.** Let us now consider the substantial questions of law formulated by this Court by its order dated 19.03.2024.
- 28.** For the sake of convenience, the substantial questions Nos. 1 and 2, formulated by this Court, by order dated 19.03.2024, are taken up for consideration, together.
- 29.** There is no dispute at the bar regarding the fact that the betal nut is not a specified good with regard to which the Central Government have issued any notification in the Official Gazette under Section 123 (2) of the Customs Act, 1962. Therefore, the provision regarding the burden of proof as mentioned in Section 123 of the Customs Act, 1962 is not applicable in this case. For all goods which are not notified under Section 123(2) of the Customs Act, 1962, it is for the seizing authority i.e., the Customs Department to show that the seized goods are smuggled goods.
- 30.** In the instant case, the learned Appellate Tribunal has held that since the betal nut is not notified under Section 123 of the Customs Act, 1962, the burden of proof lies with the Department to prove the same. It has also observed that the allegation requires to be proved by cogent and positive evidence and it has held that in the instant case, no such positive evidence has been put by the Department.

- 31.** On perusal of the materials available on record, it appears that the betal nuts were seized within the territory of India in Kawlbern and the only positive evidence which the Customs Department has produced, in this case, is the statement of the respondent which has been recorded under Section 107 of the Customs Act, 1962, wherein he has failed to produce any supporting documents for possessing the seized betal nuts. This Court is of considered opinion that mere failure to show supporting documents would not in itself imply that the seized betal nuts, which is a non-specified goods under Section 123 (2) of the Customs Act, 1962, are smuggled goods.
- 32.** The contention raised by the learned counsel for the appellant that at the time of seizure, the Customs Department has only to show *prima facie* that the seized goods are smuggled goods and it need not to prove the same beyond all reasonable doubt that seized articles are smuggled goods is not disputed by anyone. However, if we look at the impugned order passed by the learned Appellate Tribunal, it would reveal that it has nowhere observed that at the time of seizure of the goods, the Customs Department has to prove beyond all reasonable doubt that the same were smuggled. It has only observed that the allegation that the seized goods are smuggled is required to be proved by cogent and positive evidence by the Customs Department. However, in this case, no such cogent and positive evidence has been produced by the Customs Department and

their case lies merely on the failure on the part of the respondent to show the supporting documents, which in the considered opinion of the Court is not the correct proposition under the facts and circumstances of this case.

- 33.** In any view of matter, the question of law which is involved in this case is whether the burden of proof of showing that the seized goods are smuggled, in case of the goods, which are not notified under Section 123 (2) of the Customs Act, 1962 would be on the Customs Department or on the person from whom such goods have been seized. The said question has already been decided in a catena of judgments. Moreover, there is also no ambiguity in the statute also in that regard.
- 34.** In the case of "*Commissioner of Customs (Preventive) and Another Vs. Smt. Nemluni*" (*Supra*), a Division Bench of this Court has held that in case of betal nut, which is not a notified good under Section 123 (2) of the Customs Act, 1962, the initial burden to show that the materials are smuggled lies on the revenue authority. The question as to on whom the burden of proof would lie in case of goods not notified under Section 123 (2) of the Customs Act, 1962 is clear from the statutory provision contained in Section 123 of the Customs Act, 1962 itself and same has also been clarified by the Co-ordinate Bench of this Court in the aforementioned ruling. This Court is in full agreement with the observations made in the aforesaid case by the Co-ordinate Bench of this Court. The general principle to be

applied in determining as to on whom the burden of proof will lie for the goods, which are not notified goods under Section 123 (2) of the Customs Act, 1962, are well settled and the only question which the appellant has raised is as to whether those principles are applied in the instant case or not, which in the considered opinion of this Court, in itself, cannot be regarded as a substantial question of law. Hence, we are of the considered opinion that the question Nos. 1 and 2, formulated in this case, cannot be regarded as a substantial question of law which is not yet settled.

- 35.** As regards the third question framed by this Court, by order dated 19.03.2024, as to whether the CESTAT erred in accepting the GST documents submitted by the appellant in support of goods belatedly which are made during adjudication proceeding is in our considered opinion again a question of fact only and cannot be regarded as a substantial question of law.
- 36.** Moreover, if we peruse the impugned order, it would reveal that the learned Appellate Tribunal has not relied on the documents submitted by the respondent while coming to a finding in the impugned order. The Appellate Tribunal has based its finding of the impugned order only on the fact that the Customs Department has failed to produce any cogent and positive evidence to substantiate the allegations that the betal nuts which are seized in this case are smuggled betal nuts. Therefore, the third question formulated by this Court as per

the averments made in the Memo of Appeal by the appellant, in our considered opinion, is not a substantial question of law.

- 37.** As regards fourth question as to whether the impugned order dated 06.07.2022 is perverse in law. We are of the considered opinion that though the question of perversity may be looked into by this Court while exercising its jurisdiction under Section 130 of the Customs Act, 1962, however, the question of perversity would arise only if the decision arrived at by the Appellate Tribunal was based on no evidence at all. However, in the instant case, the perusal of impugned order would reveal that the confiscation order of the Adjudicating Authority has been set aside only because of the fact that the Customs Department has failed to prove by adducing cogent and positive evidence that the seized betal nuts were smuggled betal nuts.
- 38.** It appears that the betel nuts, in this case, were seized at Kawlhem which is within the Indian Territory and there is no material available, including any foreign markings on the bags in which the seized betal nuts were found to show that they are of foreign origin. There is also no credible expert opinion regarding origin of the goods. Merely, on the basis of presumption that as Kawlhem is near the international border and as Kawlhem is situated in a district which is not producing much betal nuts and is far away from the betal nuts producing districts of Mizoram like Kolasib and Mamit, it cannot be

concluded that the betal nuts which were seized in this case were smuggled into India.

- 39.** Moreover, in the instant case, though, the learned Appellate Tribunal has not taken into the considerations the documents produced by the respondent to show that the betal nuts were purchased from M/s Emily Store, Bethel Veng by the respondent, in reaching the conclusion arrived at in the impugned order, however, same cannot be ignored in toto unless there is some material on record to show that the said GST documents are fake.
- 40.** In any view of the matter, this is not a case where the learned Appellate Tribunal has arrived at its finding without any evidence on record or without any reasons being mentioned for arriving at the decision in the impugned order. Hence, in our considered opinion the impugned order passed by learned Appellate Tribunal cannot be treated as perverse. Accordingly, the last substantial question of law framed by this Court as regards perversity is also answered against the appellant.
- 41.** For the discussion made in foregoing paragraphs, and finding arrived at as well as reasons mentioned for the same, we are of the considered opinion that the instant second appeal is without any merit and is therefore liable to be dismissed.

42. Accordingly, this appeal is dismissed.

JUDGE

JUDGE

Comparing Assistant