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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on : 14.01.2015

+ CUS.A.A.1/2015, C.M. NOS.687-688/2015

SHRI M.P. GOENKA

.....Appellant

Through: Sh. Prakash Gautam, Advocate.

versus

COMMISSIONER OF CUSTOMS (PREVENTIVE)

...Respondent

Through: Sh. Kamal Nijhawan, Sr.
Standing Counsel with Sh. Sumit Gaur,
Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. This is an appeal under Section 130 of Customs Act, 1962 against the final order dated 15.09.2014, rejecting Customs Appeal No. C/147 & 195/2009-CU(DB) passed by the Central Excise and Service Tax Appellate Tribunal (CESTAT), New Delhi, whereby the penalty imposed by the Commissioner of Customs (Preventive), was affirmed.

2. The appellant is an authorized representative of a sole proprietary concern, viz. Adiya Trading Company. He conducts the business of that firm, i.e. cotton and polyester fabric procurement,

from traders in Mumbai as well as retail and distribution in Delhi. The appellant had entered into an arrangement with M/s. Prakash Transport for storage of his goods in their godown (i.e. M/s. Prakash Transport), for a set period, subject to hire charges payment. On 23.01.1998, at around 1 PM, a Maruti van numbered DL 6CB 5069 was intercepted at the Ring Road. An investigation found that the van carried bundles of cloth (6174.90 metres of silk fabrics of Chinese origin), which were valued at ₹38,94,304/-. No legal authorization of purchase could be traced. These goods were seized. The driver, one Ranjan Sarkar, and another person, one Sanjay Maheshwari, were found in the van.

3. After various enquiries, and recovery of other material, Sanjay Maheshwari recorded a voluntary statement under Section 108 of the Customs Act, stating that in August 1997, the appellant, (whom Sanjay Maheshwari referred to as RN Goenka) had contacted him over the phone, and offered him a reasonable margin on bulk sales of Chinese silk. Accordingly, a series of transactions ensued, and Shri Goenka delivered 9000 metres of Chinese silk to Sanjay Maheshwari; Sanjay Maheshwari was further due to pick up 11,000 metres from Prakash Transport, Kishan Ganj, but was unable to do so. The Prakash Transport godown was searched, but nothing was found.

4. On 27.1.1998, the Customs again searched the godown, and this time took into possession 206 bales of polyester curtain and suiting cloth. Consequently on 29 and 30.1.1998, the appellant was taken into custody, and a confessional statement was recorded by

him. The next day – i.e. 31.1.1998, the appellant was produced before the court, where he retracted his confessional statement. Thereafter, the Customs issued him a Show Cause Notice with respect to the polyester curtain and suiting cloth goods. On 17.07.1998, a Show Cause Notice was also issued to the appellant (and others) in respect of the Chinese silk goods. There were, therefore, two separate Show Cause Notices and two separate proceedings, one related to Chinese silk and the other to polyester cloth.

5. On 04.02.2000, the Commissioner of Customs passed an order in respect of the polyester goods, and imposed a penalty. On 28.09.2000, the Commissioner of Customs also passed an order against the appellant in the case relating to Chinese silk, and imposed a penalty. Both orders were challenged in appeal. With respect to the Chinese silk case, on 3.4.2003, the appeal of the appellant was allowed, and the order dated 28.09.2000 was set aside and remanded back for fresh consideration, in order that the witnesses be cross-examined. Separately, on 01.07.2003, the appellant and others were exonerated on merits, in the case related to the polyester goods. According to the CESTAT, there was enough evidence to demonstrate that the appellant's confessional statement was extracted through coercion, and that there was no corroborative evidence to prove his guilt. On 12.10.2006, the appeal of the Customs against this order was dismissed.

6. The proceedings on remand (in the Chinese silk case) were decided by the Commissioner of Customs (Preventive), and on

15.01.2009, an order was passed imposing a penalty of ₹5 lakhs on the appellant. Notably, the Commissioner accepted the prior order dated 01.07.2003 in the polyester goods case, to the effect that M.P. Goenka's confessional statement was made under duress, and that, therefore, it could not be the sole ground for implicating him. The Commissioner further noted that the allegations regarding the smuggling of polyester goods were dropped because no other corroborative evidence could be found against M.P. Goenka.

7. At the same time, the Commissioner found that Sanjay Maheshwari's confessional statement was not obtained under duress. There was no medical evidence showing that fact, and the retraction itself was vague and unsubstantiated. Invoking the well-established principle that the burden of proving duress is upon the party alleging it, the Commissioner held that it could not be said that the confessional statement was extracted involuntarily, or that it lacked evidentiary value.

8. Following the Supreme Court decision in *K.I. Pavunni vs Assistant Commissioner*, 1997 (90) ELT 241 SC, the Commissioner held that since a customs officer was not a police officer, the maker of the confessional statement under Section 108 of the Customs Act was bound by it. In addition, the Commissioner found that the recovery of the silk goods had not been disputed, and was corroborated by the statement of G.D. Maheshwari, the father of Sanjay Maheshwari. The Commissioner then observed:

"42.4.1. The argument (para 22(iv)-(vii)) that in view of the retraction of Shri. M.P. Goenka and Shri. Sanjay Maheshwari there is no independent evidence to establish the involvement of the two persons with the smuggled Chinese Silk is also without merit.

42.4.2. Firstly it is seen that the retraction of the Co-noticee Shri Sanjay Maheshwari has no weight and his confessional statement is binding. Secondly, as has been held by CESTAT in the other case of polyester curtain cloth, it has to be seen whether in view of Shri. M.P. Goenka's retraction, there is any corroborative evidence to establish his involvement in the smuggling of Chinese Silk.

42.4.3. In his statement Sanjay Maheshwari refers to the supplies of Chinese Silk by Goenka from Kathmandu which he sold on commission basis. In the cross examination also, notwithstanding his several flip flops, and contradictions, he confirms quite categorically that he did have transaction with Goenka, that these were on commission basis and not on purchase/sale basis, that these were of Chinese silk, that the transaction were on phone, that Goenka's man used to collect the payments. (Queries 26, 27, 31, 53, 54, 56-57, 64-65). These are also part of his confessional statement. He also reiterates the fact of transactions of Chinese silk with Goenka in the reply to SCN as also in the Final synopsis.

42.4.4. Apart from this, I find that the statement of Sanjay Maheshwari that 11000 meters of Chinese Silk was to be delivered on 22.1.98 and thereafter actually delivered on 23.1.98. The reasons for this change are such as within his particular knowledge, but the facts are confirmed independently, by the statements of Suresh Attree, Godown keeper and V.K. Jindal, Manager of M/s. PTC. The statements of these two persons has never been retracted. The panchnama drawn for recovery of delivery

register and delivery slips of M/s. PTC has not been assailed. Though Suresh Attree was not cross examined, Shri. Jindal was Jindal's cross examination has not contradicted his statement that Delivery order for 11 bales was received on 22.1.98 from M/s. ATC for delivery of 11 bales to Virpal and that corresponding delivery slip was issued to the Godown keeper. Suresh Attree's statement corroborates the issue of M/s. PTC delivery slip and the fact of delivery of 11 bales to Monu Haldar on 23.1. 98 for which the signature was taken on the register. Since these documents were resumed on the night of 23.1.98, there cannot be an argument that the same were manipulated.

42.4.5. Thus apart from the inculpatory statement of the co-noticee, there are sufficient corroborative statements and documentary evidence to establish that 11 bales or cloth were delivered from the godown hired by M/s. ATC to Monu Haldar, who had brought it to M/s. RIN. That these were Chinese silk is established from the Panch nama, the tags and labels recovered and statement of Shri. G.D. Maheshwari. The inculpatory statement of Co-noticee establishes that 9000 meters had been delivered to him on 22nd morning, and that these bales were the balance quantity of Chinese silk to be sent by Goenka. It is a matter of record that Shri. M.P. Goenka has strong personal and business interests in Nepal and visits the country frequently, and it would certainly not be difficult to source such material from Nepal.

43.3. Coupled with the incriminating confessional statement of Sanjay Maheshwari, there can be no doubt that Shri. Goenka has knowingly dealt with smuggled Chinese silk cloth from Nepal. Therefore I find him liable to penalty under Section 112 (b)."

9. On this basis, the penalty of ₹5 lakhs was imposed upon the appellant. The appellant filed an appeal before the Tribunal,

numbered C/147 /2009-CU(DB), which was dismissed on 15.09.2014. The Tribunal held:

"13.1 It is a proved case of finding of Chinese silk in Maruti van as well as in the premises of Shri Sanjay Maheswari when the live link showing origin and movement thereof through the transporter Prakash Transport Company from Nepal supplied by Shri Anil Jatia to Shri M.P. Goenka was on record and that could not be rebutted. Arrival of such goods in India through Prakash Transport Co. and release thereof from that transporter on instructions of Shri M.P. Goenka through his person Shri Monu Haldar also could not be ruled out by the appellants.

13.2 Shri M.P. Goenka categorically brought out in his statement made on 21.09.1998 that when he visited Kathmandu, he came across on Shri Anil Jatia, one of the owners of Shri Annapoorna Textiles Ltd. and he was able to strike deal with him for Chinese silk to be supplied to Shri Sanjay Maheswari of Delhi on commission basis. Such fact comes out from paras 10.1 and 10.2 of the adjudication order. The connection of Shri Sanjay Maheswari with Shri M.P. Goenka to take delivery of goods came from Nepal through the transporter, Prakash Transport Co. was established and that remained uncontroverted. That proved the fact of arrival of Chinese silk from Nepal, which were delivered to him on instructions of Shri M.P. Goenka.

13.3 None of the appellants claimed the goods. The connection among Shri Anil Jatia, Shri M.P. Goenka and Shri Sanjay Maheswari brought out a close proximity to the deal of the Chinese origin silk found in Maruti van as well as in the premises of Shri Sanjay Maheswari. When they did not claim the ownership of the goods, their plea that the goods were not of Chinese origin is of no avail to

them since Revenue established live link between Shri M.P. Goenka and Shri Anil Jatia as to the movement and deal of the offending goods came from Nepal to India for delivery to Shri Sanjay Maheswari."

10. The appellant argues that the order of the CESTAT is based completely upon his confessional statement, which is vitiated due to duress and coercion, and was subsequently retracted in court. The appellant relies upon the judgments of the Supreme Court in *Vinod Solanki vs Union of India*, 2008 (233) ELT 157 and *Balwant Kaur vs Union Territory of Chandigarh*, AIR 1998 SC 139 for the proposition that reliance upon a retracted confession, without any corroborating material, vitiates a finding of guilt. He also argues that the exoneration of the other accused in separate enquiry proceedings relating to the polyester goods signifies that the finding of the CESTAT that there was a "live link" between himself and the other accused, also cannot stand. It was secondly urged that a consideration of the cross-examination of Sanjay Maheshwari would reveal that there was nothing in his deposition to implicate the appellant of wrongdoing.

11. On a consideration of the cases cited by the appellant, we do not find them to be of relevance in the present case. In *Vinod Solanki(supra)*, the case turned upon a retracted confession, that formed the basis of levying a penalty under the Foreign Exchange Regulation Act of 1973.

"It is a trite law that evidences brought on record by way

of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon. We are not oblivious of some decisions of this Court wherein reliance has been placed for supporting such contention but we must also notice that in some of the cases retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded."

And, subsequently:

"Whereas mere retraction of a confession may not be sufficient to make the confessional statement irrelevant for the purpose of a proceeding in a criminal case or a quasi criminal case but there cannot be any doubt whatsoever that the court is obligated to take into consideration the pros and cons of both the confession and retraction made by the accused. It is one thing to say that a retracted confession is used as a corroborative piece of evidence to record a finding of guilt but it is another thing to say that such a finding is arrived at only on the basis of such confession although retracted at a later stage."

12. Thus, *Vinod Solanki (supra)* merely holds that a retracted confession ought to be considered in light of the totality of circumstances, and – as a rule of prudence – ought to be corroborated by material evidence. As the extract from the Commissioner's order demonstrates above, this is exactly what the Commissioner concluded, before proceeding to examine the corroborative evidence. Consequently, *Vinod Solanki (supra)* is of no assistance to the appellant. Reliance was also placed upon the

judgment of the Supreme Court in *Balwant Kaur vs Union Territory of Chandigarh*, AIR 1988 SC 139. *Balwant Kaur (supra)* was a case about the probative value of an accomplice's testimony in a criminal case, and, therefore, bears no relevance to this case.

13. The evidentiary value of a confession to a customs officer was considered by the Supreme Court in *K.T.M.S. Mohammed. vs Union of India*, AIR 1992 SC 1831. In that case, the Court held:

"The core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the Custom Authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means that statement must be rejected brevi manu. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means has been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat etc. against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectively applying its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law, this Court in several decisions has ruled that even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the

provisions of the FERA or the Customs Act etc. the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order will be vitiated."

14. In *K.I. Pavunny v. Asst. Collector (HQ) Central Excise Collectorate, Cochin* 1997 (90) ELT 241 SC the Supreme Court held:

"Even though the Customs officers have been invested with many of the powers which an officer in charge of a police station exercises while investigating a cognisable offence, they do not, thereby, become police officers within the meaning of Section 25 of the Evidence Act and so the confessional statements made by the accused persons to Customs officials would be admissible in evidence against them.

... the object of the Act is to prevent large-scale smuggling of precious metals and other dutiable goods and to facilitate detection and confiscation of smuggled goods into, or out of the country. The contraventions and offences under the Act are committed in an organised manner under absolute secrecy. They are white-collar crimes upsetting the economy of the country. Detection and confiscation of the smuggled goods are aimed to check the escapement and avoidance of customs duty and to prevent perpetration thereof. In an appropriate case when the authority thought it expedient to have the contraveners prosecuted under Section 135 etc., separate procedure of filing a complaint has been provided under the Act. By necessary implication, resort to the investigation under Chapter XII of the Code stands excluded unless during the course of the same transaction, the offences punishable under the IPC, like Section 120-B etc., are involved. Generally, the evidence in support of the violation of the provisions of the Act

consists in the statement given or recorded under Section 108, the recovery panchnama (mediator's report) and the oral evidence of the witnesses in proof of the offences committed under the Act has consistently been adopting the consideration in the light of the object which the Act seeks to achieve."

15. Still later, in *Gulam Hussain Shaikh Chougule vs S. Reynolds* (2002) 1 SCC 155, the Supreme Court held:

"The ban contained in section 25 of the Evidence Act is an absolute ban. But it must be remembered that there is no ban in regard to the confession made to any person other than a police officer, except when such confession was made while he is in police custody. The inculpatory statement made by any person under Section 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinised by the court in the same manner as confession made by an accused person to any non-police personnel."

16. The orders of the Commissioner (Preventive) and the CESTAT, in our opinion, are entirely in accordance with the law declared by the Supreme Court. Both the appellant and Sanjay Maheshwari retracted their confessional statements to the customs officer. In the polyester goods case, it was found that the appellant's confessional statement was extracted under duress, and because there was no other corroborative evidence, he was exonerated. In the Chinese silk case, which is before us, this conclusion was accepted by the Commissioner (Preventive), who then went on to

examine the corroborative evidence present. One important piece of corroborative evidence was the confessional statement of Sanjay Maheshwari with respect to which, on an analysis of the facts and circumstances of the case, the Commissioner found that there was no proof of duress, and that consequently, the retraction was invalid. We find no fault with the manner in which the Commissioner appreciated the evidence before him. The appellant was permitted to cross examine Sanjay Maheshwari, which he did, extensively. In this connection, it was urged that the said individual had admitted not having met the appellant at all and consequently his deposition could hardly have implicated the former. While this is correct, yet that admission is to be viewed in the context. Sanjay Maheshwari also stated that though he had not met the appellant, he had conversed with him.

17. The appellant, therefore, is incorrect in arguing that his order of penalty was based entirely on his retracted confession. On the contrary, his confession was *not* taken into account in deciding upon his involvement in the offence. What was taken into account was:

- a. The confessional statement of Sanjay Maheshwari, directly implicating the appellant
- b. Statements of the godown keeper and manager of M/s. Prakash Transport
- c. Documentary evidence, such as the *panchnama* drawn for recovery of delivery register and delivery slips of MIs.

18. The Commissioner (Preventive) found that all these pieces of evidence were mutually corroborative, and on that ground, imposed the penalty order upon the appellant.

19. Here, this Court notes that proceedings under tax legislation such as the FCRA or the Customs Act do not require the prosecution to discharge the criminal-law burden of proof beyond reasonable doubt. Under such proceedings, a balance of probabilities is satisfactory. In *Radheyshyam Kejriwal vs State of West Bengal*, (2011) 3 SCC 581, the Supreme Court held:

"A person held liable to pay penalty in adjudication proceeding can not necessarily be held guilty in criminal trial. Adjudication proceedings are decided on the basis of preponderance of evidence of a little higher degree whereas in a criminal case entire burden to prove beyond all reasonable doubt lies on the prosecution... it is trite that standard of proof required in criminal proceedings is higher than that required before adjudicating authority."

20. It is not the task of this Court, exercising its appellate power in cases involving substantial questions of law, to review or second-guess (or even third guess, at times) the factual findings based on evidence considered by the lower authorities, but only to correct an order if it is based on irrelevant or manifestly incorrect construction of the facts or if based on mis-appreciation of law or on non-application of mind. In the present case, this Court sees no reason to interfere with the concurrent findings of the Commissioner (Preventive) and the CESTAT which are both reasoned, correctly

stating the law, and citing relevant evidence and reasoning in order to arrive at their conclusions. Resultantly, the appeal fails and is dismissed along with the pending applications.

**S. RAVINDRA BHAT
(JUDGE)**

JANUARY 14, 2015

**R.K. GAUBA
(JUDGE)**

