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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on : 20.04.2015

+ **CUS.A.A.8/2015**

SANJAY MAHESHWARI

.....Appellant

Through: Sh. C. Hari Shankar, Sr. Advocate with Sh.
(appearance not given).

Versus

COMMISSIONER OF CUSTOMS (PREVENTIVE)

.....Respondent

Through: Sh. Kamal Nijhawan, Sr. Standing Counsel.

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. The present appeal is directed against an order of the Customs, Excise & Gold (Control) Appellate Tribunal (CESTAT) dated 15.09.2014.
2. 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 collectively valued at ₹12,34,980/-. Follow-up searches at the appellant, Sanjay Maheshwari's residence resulted in the recovery of 13316.62 metres of silk fabric of Chinese origin, valued at ₹26,63,324/-. Resultantly, the combined value of the seized material was ₹38,98,304/-. Since no legal authorization of purchase could be traced, the goods were seized. Ranjan Sarkar, the driver, and the appellant, were found in the van.

After various enquiries, and recovery of other material, the appellant's voluntary statement under Section 108 of the Customs Act, 1962, was recorded. He stated that in August 1997, M.P. Goenka, (whom the appellant referred to as R.N. Goenka) had contacted him over the phone, and offered him a reasonable margin on bulk sales of Chinese silk. Accordingly, in a series of transactions Shri Goenka delivered 9000 metres of Chinese silk to the appellant. The latter 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. On 27.1.1998, the Customs officials again searched the godown, and this time took into possession 206 (136 + 70) bales of polyester curtain and suiting cloth. Consequently on 29.1.1998 and 30.1.1998, M.P. Goenka 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 M.P. Goenka (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.

3. 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 03.04.2003, M.P. Goenka's appeal 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, M.P. Goenka was exonerated on merits, in the case related to the polyester goods. The CESTAT, held that there was sufficient evidence demonstrating that Goenka'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.

4. The remanded proceedings (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. 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. It was 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. The adjudicating officer, however found that the present appellant'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. The Commissioner relied on the Supreme Court decision in *K.I. Pavunni v. Assistant Commissioner*, 1997 (90) ELT 241 SC, to say that 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 the appellant, 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 Halder 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 Halder, who had brought it to M/s. RIN. That these were Chinese silk is established from the Panchnama, 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)."

The CESTAT dismissed the appeal preferred by both the aggrieved parties. This Court had considered a challenge to the order of CESTAT, by M.P. Goenka, in CUS.A.A.1/2015 and dismissed the same on 14-01-2015.

5. Shri C. Hari Shankar, learned senior counsel argues that the impugned order is unsustainable in law. It was submitted that save and except the so-called confessional statement of the appellant, i.e. Sanjay Maheshwari, there was no tenable or credible material which could have established his culpability. Counsel highlighted the fact that the onus lay upon the Customs authorities to establish that what was seized was contraband, and prohibited items and the authorities fell into error in presuming it to be such. He also submitted that the statement under Section 108 was retracted at the very first available opportunity and, therefore, could not have been used to hold against the appellant. Lastly, counsel argued that the role of the appellant was only that of a commission agent, who sold the material supplied by M.P. Goenka; he was not involved in, or had abetted in the alleged smuggling operations. He relied on the decision of the Supreme Court in *A. Tajudeen v. Union of India* 2015 (317) 177 (SC) where it was held that statements made during a police or enforcement office raid, or contemporaneously, are suspect and if such statements are retracted subsequently, they “*ought not to be readily believable, unless there is independent corroboration of certain material aspects of the said statements, through independent sources..*” It was therefore argued that the entire recovery and *panchnama* recorded in this case could not have been relied upon to cast penal liability on the appellant.

6. We recollect that the appeal preferred by M.P. Goenka (CUS A.A. 1/2015) had relied on identical arguments, which had not been accepted by this Court. On that occasion, this Court had noticed the decision *Gulam Hussain Shaikh Chougule v. S. Reynolds* (2002) 1 SCC 155, when the Supreme Court held that:

"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."

This Court had also noticed the previous decisions in *K.T.M.S. Mohammed v. Union of India* AIR 1992 SC 1831 and *Vinod Solanki v. Union of India*, 2008 (233) ELT 157. Each of these decisions, as indeed *A. Tajudeen* (supra) stress upon the need for some extrinsic support to a retracted confessional statement; yet they do not conclude that the decision should be invariable, but rather based on analysis of the totality of circumstances of a particular case.

7. Whether the appellant was aware of the fact that he was involved in contraband goods, or was an innocent agent of the real culprit is therefore, a matter of fact, appreciation of which has been undertaken by two adjudicating authorities. Besides, the Court notes that the conclusions here were based not only on the retracted confessional statement but also based on the seizure –which was witnessed by the appellant's father, who recorded a statement (and who was cross-examined during the adjudication proceedings). Moreover, there was no material adduced by the appellant to substantiate the legitimate source of these seized goods; had they been purchased through acceptable channels, some support in the form of

invoices, receipts etc. would have invariably found their way into the record. The complete absence of such material or documents negates the appellant's arguments.

8. For the foregoing reasons, we are unpersuaded that in this case, we have to take a view different from the one expressed in M.P. Goenka's appeal (CUS A.A. 1/2015). No question of law arises for consideration. The appeal, being meritless is, therefore, dismissed.



S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

APRIL 20, 2015