

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.01.2021

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

Judgment Reserved On 08.01.2021	Judgment Pronounced On 25.01.2021
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C.M.A.No.752 of 2010

K.Rahuman Sait .. Appellant

-vs-

1.The Commissioner of Customs,
No.1, Williams Road,
Cantonment, Trichy.

2.The Registrar,
The Customs, Excise and Service Tax
Appellate Tribunal, Chennai. ... Respondents

Appeal under Section 130 of the Customs Act, 1962 against the order dated 22.09.2009, made in Final Order No.1340 of 2009 in Appeal No.C/339/99 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant :Mr.A.Thiyagarajan, Senior Counsel
:for Mr.S.Ramesh Kumar

For Respondents :R1 - Mr.T.Pramod Kumar Chopda,
Senior Standing Counsel

:R2 - Tribunal

JUDGMENT

This appeal has been filed under Section 130 of the Customs Act, 1962 (hereinafter referred to as "the Act"), challenging the correctness of the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai (for brevity "the Tribunal"), in Final Order No.1340 of 2009 in Appeal No.C/339/99 dated 22.09.2009.

2.The appellant has raised the following substantial questions of law for consideration of this Court:-

"1.Whether on the fact and in the circumstances of the case the hon'ble Tribunal was right in claiming penalty on the appellant only on the basis of the retracted statement without any independent corroborative is correct to law?

2.Whether on the facts and in the circumstances of the case the honourable Tribunal was right in not considering the judgment of the criminal courts at acquitting the appellant from all charges is connected law? and

3.Whether on the facts and in the circumstances of the case the honourable Tribunal was right in sustaining the penalty on the appellant and the co-accused were discharged from all charges and in the adjudication proceedings?"

3.Heard Mr.A.Thiyagarajan, learned Senior Counsel for Mr.S.Ramesh Kumar, learned counsel for the appellant/assessee and Mr.T.Pramod Kumar Chopda, learned Senior Standing Counsel for the 1st respondent/Revenue.

4.The appellant has filed this appeal challenging the order passed by the Tribunal, allowing the appeal filed by the appellant partly and reducing the penalty imposed under Section 114 of the Act on the appellant from Rs.25 Lakhs to Rs.15 Lakhs.

5.The officers of the Customs Department conducted search operations on 10.03.1998, in a godown at No.111, Ettaiyapuram Road, Tuticorin, and found cartons stacked in the Southern side of the godown. There were three persons present in the godown at the time of the search. One of the persons identified himself as Nathan, hailing from Trichy, and he had employed two other persons, viz., Selvaraj and Kalkan of Tuticorin for packing the goods. The said Nathan stated that 476 cartons, which were in the godown, contain Mangalore Roofing Tiles intended for export to Singapore. The officers opened the cartons and found sandalwood sticks and billets beneath straw packing and on examination of the godown, 419 cartons were found to contain sandalwood and 57 cartons were found to contain the Mangalore Roofing Tiles. Since there is a prohibition for export of sandalwood under the provisions of the Act as well as the Foreign Trade (Development and Regulation) Act and Import and Export Policy, 1997-2002, the sandalwood, which was valued at Rs.96,52,800/- as well as the Mangalore roofing tiles valued at Rs.10,00,000/-, were seized.

6.The said Kalkan had given a statement under Section 108 of the Act dated 10.03.1998, wherein, he had stated that Nathan had asked him to arrange two coolies to pack the tiles in the godown and accordingly, he, along with, Selvaraj, came to the godown to pack the tiles and he does not know anything about the sandalwood. This statement of Kalkan was corroborated by Selvaraj in his statement dated 10.03.1998. The Customs Officers, on further probe, found that the real name of Nathan was Rahuman Sait, the appellant before us.

7.In the statement recorded from the appellant dated 11.03.1998, he had admitted that his real name is Rahuman Sait and he came to know one Dhanapal through Raju, who is a load man. The said Dhanapal, dealt with illicit sandalwood and Raju gave him the mobile phone number of Dhanapal and he used to meet Dhanapal and discuss about smuggling of sandalwood to foreign countries and during one such meeting, Dhanapal informed the appellant that he was going to despatch sandalwood illicitly through Tuticorin and wanted suitable persons for the said job and suggested the name of Alexander, who was running a company called M/s.Gilburt Overseas Shipping Company at Tuticorin and that he met Dhanapal during December, 1997, who informed him that 10 tones of sandalwood was to be smuggled to Singapore and was packed in 200 bags and kept ready and that he contacted Alexander, who agreed to arrange for illicit export, that Dhanapal sent the 200 bags of sandalwood in three lots to Tuticorin, and that Alexander received the sandalwood and kept it in the godown and this sandalwood in godown was packed in cartons and arrangement was made to send the same to Singapore under the guise of tiles and even after two months, Alexander could not arrange for export of sandalwood and that the appellant met one Maideen of Mannadi, who was an exporter at Chennai and when he contacted Maideen, he informed the appellant that illicit export can be arranged through one Janarthanan @ Janar at Tuticorin through his relative Mohan and made arrangement to export and the appellant met Janar on 02.03.1998 and requested to arrange for a godown and he did so through his friend Hari and that Hari did not know anything about the sandalwood and the sandalwood belong to Dhanapal and he did not know from where and whom, Dhanapal got sandalwood and Dhanapal told him that the sandalwood was to be exported to R.N.Enterprises at Singapore and hence, the marking on the cartons was R.N.E and that he was using a fictitious name as Nathan and the seized visiting card bearing the name of Rahuman Sait, Managing Partner of Badhusa Tanning Company, belongs to him and the chit, which was seized from the room in the lodging house, was in his own handwriting with the fictitious name Nathan at No.15, Mohammed Road, Gandhi Market, Trichirappalli. On the backside of the chit, the seizes of cartons used for packing of sandalwood was written and blank letterheads were made by him to Dhanapal and he was asked by Dhanapal to put

marking on the cardboard boxes, as cartons were as less than 570 and no number after carton no.316 was assigned and Alexander procured some tiles and he asked Dhanapal to send 3500 more tiles, as packed boxes were less than 570 and on 09.03.1998, he met Janar and asked whether the shipping bill was ready and that Janar told him that the shipping bill was filed on 07.03.1998, and that two tones of sandalwood were also part of the tiles and the appellant informed Dhanapal and Maideen about the same.

8.The appellant, after about three months, sent letters to the Department dated 01.06.1998 and 01.07.1998, retracting the statement given by him on 11.03.1998. The Department has recorded the statement of several others and issued show cause notice dated 03.09.1998, proposing confiscation of the goods, which were seized and also proposing to impose penalty under Section 114 and Section 117 of the Act. There were totally 8 noticees and the appellant is the noticee no.1. After taking note of all the statements, including the retraction made by the appellant, the Original Authority viz., the Commissioner of Customs, Trichirappalli, held that the statement given by the appellant on 11.03.1998, was true and the appellant had failed to point out as to which portion of the statement, he has retracted. Further, on a thorough analysis of the statement dated 11.03.1998, and the retraction vide letters dated, 01.06.1998 and 01.07.1998, the Original Authority found that the appellant had changed his name to Nathan so as to avoid being detected, that he was in touch with Alexander and later with Janar for exporting of the sandalwood, that he was staying in a hotel at Tuticorin with a fictitious name and that the appellant had a tannery in Kumbakonam and he had no business activity in Tuticorin and his visit to Tuticorin was solely for facilitating smuggling of sandalwood.

9.Further, noting the statements of Kalkan and Selvaraj, the Original Authority concluded that it is the appellant, who had hired them for packing the sandalwood and disguised the same as roofing tiles and therefore, it was held that the statement of the appellant, as initially given on 11.03.1998, is true and has to be believed. Further, the Original Authority held that the appellant has played substantial part in the attempt to illicitly export sandalwood, that he was fully aware that sandalwood was a prohibited item for export, that the appellant was found in the godown while in the process of concealing the sandalwood under roofing tiles and that there is material to show that he was in constant contact with Dhanapal, Maideen and Janar and on the appellant's advice only, the shipping bill was filed by Janar and held that the retraction made by the appellant, vide his letters are only an afterthought and accordingly, rejected the same and levied penalty, vide order dated 29.04.1999.

10. Aggrieved by the same, the appellant filed appeal before the Tribunal. Parallely, prosecution was initiated against the appellant and others in C.C.No.2 of 2003 on the file of the Additional Chief Judicial Magistrate and the appellant was the fifth accused in the criminal case. The appellant and others, against whom penalty was imposed by the Original Authority, vide order dated 29.04.1999, filed stay petitions before the Tribunal in the pending appeal. The Tribunal, by interim order dated 05.10.1999, directed the appellant to pre-deposit a sum of Rs.10 Lakhs. The appeal filed by Janar was taken up by the Tribunal and an order was passed on 29.04.2005 allowing the appeal and setting aside the penalty levied on the said Janar. The Criminal Court, by judgment dated 23.05.2008, acquitted the appellant and other accused.

11. The appeal filed by the appellant before the Tribunal was taken up for hearing and it was partly allowed and the Tribunal reduced the penalty from Rs.25 Lakhs to Rs.15 Lakhs. The Tribunal noted that on the date when the search was conducted by the officers of the Customs Department in the godown, the appellant was present and the cartons, which were lying in the godown, were opened and found to contain sandalwood as well as Mangalore Roofing Tiles. Further, the Tribunal noted that the appellant implicated himself in his statement dated 11.03.1998, and the retraction of his statement was belated and the authority rightly rejected the same.

12. Further, the Tribunal noted that the role of the appellant is clearly brought out by the fact that he was present in the godown at Tuticorin, when the officers detected the concealment of sandalwood along with Mangalore Roofing Tiles and noted the statement given by the appellant himself. Therefore, the Tribunal held that the appellant is liable for penalty and the appellant's argument that there is no other evidence, except his own statement, was rejected. Accordingly, the findings rendered by the Adjudicating Authority that the appellant had contravened the provisions of Section 113 of the Act was confirmed. However, having regard to the totality of facts and circumstances of the case, including the value of the goods, which was approximately Rs.96,00,000/-, the Tribunal reduced the penalty to Rs.15,00,000/-.

13. Before us, the learned Senior Counsel had elaborately referred to the factual aspect, referred to the statement given by the appellant on 11.03.1998, the retraction letters, the order passed by the Tribunal in the case of Janar, who had filed the shipping bill, the order of acquittal by the Criminal Court and submitted that the Tribunal ought to have considered that except for the statement recorded from the appellant on 11.03.1998, there is no other incriminating material against the appellant and the same could not have been used to hold the

appellant guilty especially when, the appellant has retracted those statements at the earliest point of time.

14. Further, the learned Senior Counsel submitted that the appellant was only a worker and he had not violated any of the provisions of the Act and the order passed by the Tribunal imposing a penalty of Rs.15,00,000/- on the appellant is arbitrary and unreasonable. In support of his contention, the learned Senior Counsel referred to the decision of the Hon'ble Supreme Court in Collector of Customs, Madras & Ors. vs. D.Bhoormall [(1974) 2 SCC 544], with regard to the burden of proof while taking action to confiscate goods under the provisions of the Act.

14.1. Reliance was placed on the decision of the Hon'ble Supreme Court in K.T.M.S.Mohd. & Anr. vs. Union of India [(1992) 3 SCC 178], with regard to the effect of the statement, which was initially recorded from the appellant and subsequently, retracted and as to how the authority failed to take note of the retraction of the appellant, which was bonafide.

14.2. Reliance was placed on the decision in the case of K.I.Pavunny vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin [(1997) 3 SCC 721], to explain the effect of a statement recorded under Section 108 of the Customs Act.

14.3. Relying upon the decision in the case of Capt.M.Paul Anthony vs. Bharat Gold Mines Ltd. & Anr. [(1999) 3 SCC 679], it is submitted that when the facts are identical and the criminal prosecution was also initiated against the appellant, the Department ought not to have proceeded with the penalty proceedings and awaited the decision of the Criminal Court.

14.4. Reliance was placed on the decision in Gulam Hussain Shaikh Chougule vs. S.Reynolds, Supdt. of Customs, Marmgoa [(2002) 1 SCC 155], as regards the effect of the confessional statement recorded under Section 108 of the Act.

14.5. Further, by relying upon the decision in Vinod Solanki vs. Union of India & Anr. [(2008) 16 SCC 537], it is submitted that evidence brought on record by way of confession, which stood retracted, must be substantially corroborated by other independent and cogent evidence, which would lend adequate assurance to the Court that it may seek to rely thereupon.

15. It is submitted that the Adjudicating Authority failed to see that the confession, which was subsequently retracted by the appellant, was not corroborated by other independent and cogent evidences. With the above submissions, the learned Senior Counsel prayed for setting aside the order passed by the Tribunal.

16. Mr.T.Pramod Kumar Chopda, learned Senior Standing Counsel submitted that the Adjudicating Authority viz., the Commissioner of Customs, Trichirappalli, not only took note of the statement recorded from the appellant on 11.03.1998 under Section 108, but also took note of the belated retraction letters given in

June/July 1998, examined the other evidences available, which corroborated the retracted confession and then, held that the appellant was liable to be proceeded against. Therefore, it is submitted that the decisions, which were referred to by the learned Senior Counsel, cannot be made applicable to the facts and circumstances of the case and the Adjudicating Authority rightly held the appellant to be guilty of contravening the provisions of the Act and liable for penalty.

17.Further, it is submitted that the order passed by the Tribunal in the case of Janar was not accepted by the Department and they filed appeal before the Division Bench of this Court in C.M.A.No.93 of 2009, which was allowed by judgment dated 27.02.2015 and the said Janar was held to be liable to pay the penalty. Further, it is submitted that the order of acquittal, passed by the Additional Chief Judicial Magistrate, Madurai, in C.C.No.2 of 2003 dated 23.05.2008, was set aside in an appeal filed by the Department before the Madurai Bench of this Court vide order dated 19.10.2019, in Crl.A. (MD) Nos.58 and 59 of 2009.

18.Further, it is submitted that the Adjudicating Authority had afforded effective opportunity to the appellant to put forth his case and has passed a very detailed order taking note of all the facts and as such, no substantial question of law arises for consideration in this appeal especially when, the Tribunal re-appreciated the facts and confirmed the order passed by the Adjudicating Authority. With the above submissions, the learned Senior Standing Counsel prayed for dismissal of the appeal.

19.The first aspect, which we need to consider is whether the Adjudicating Authority was right in rejecting the retraction made by the appellant, vide letters dated 01.06.1998 and 01.07.1998 and holding the appellant guilty based on the statement given by the appellant dated 11.03.1998, and the other statements recorded from the other accused.

20.The Hon'ble Supreme Court in K.T.M.S.Mohd., while dealing with the statement recorded under Section 40 of the Foreign Exchange Regulation Act, 1973 (FERA), pointed out that the voluntary nature of any statement made either before the Customs 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. It was further pointed out that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. The burden of proof, to establish that improper means was adopted to record the statement, is on the maker of the statement and if the maker of the statement fails to establish his allegations of threat, inducement, 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. Further, it was held that the authority or any Court intending to act upon the inculpatory statement as a voluntary, one should apply his mind to the retraction and reject the same in writing. Further, it was held that if, the officers intend to take action against the deponent of the statement on the basis of his inculpatory statement, which has been subsequently repudiated, the officer concerned, must take both together, give finding about the nature of the repudiation and then act upon the earlier inculpatory statement.

21. In K.I. Pavunny, while considering a case under the Act, the Hon'ble Supreme Court explained the effect of the statement recorded under Section 108 of the Act and the action that may be taken by the Customs Officers under Section 135 of the Act. It was pointed out in the said decision that the collection of evidence under Section 108 and other relevant provisions relating to search and seizure are only for the purpose of taking further steps for confiscation of the contraband and imposition of penalty. The selfsame evidence is admissible in evidence on the complaint laid by the Customs Officers for prosecution under Section 135 or other relevant statutes. Further, it was held that there is no prohibition under the Evidence Act to rely upon a retracted confession to prove the prosecution case or to make the same basis for conviction of the accused. Practice and prudence require that the Court could examine the evidence adduced by the prosecution to find out whether there were any other facts and circumstances to corroborate the retracted confession. Further, it was held that it is not necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained in the confession statement. The Court is required to examine whether the confessional statement was voluntary, in other words, whether it was not obtained under threat, duress or promise and if the Court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true and if the Court, on examination of the evidence, finds that the retracted confession is true, that part of the inculpatory portion could be relied upon to base the conviction. However, prudence and practice require the Court should seek assurance getting corroboration from other evidence adduced by the prosecution.

22. In the preamble portion of this judgment, we had elaborately referred to the statement given by the appellant on 11.03.1998. The Adjudicating Authority noted the retractions given by the appellant, which was belated, that is, beyond three months, that too, by letters dated 01.06.1998 and 01.07.1998.

The Adjudicating Authority has done the exercise as required to be done by him and as pointed out by the Hon'ble Supreme Court in K.I.Pavunny. The Adjudicating Authority did not merely reject the retraction, but has taken note of the statement of the appellant recorded under Section 108, the stand taken by him in his retraction and the other statements and evidences, which were available and recorded during the search and seizure operations.

23. Upon examination of the evidence, the Adjudicating Authority found that the confessional statement is true. Furthermore, the appellant could not establish that the statement recorded from him on 11.03.1998 was obtained by threat, duress or promise. The burden of proof to show that the statement was recorded under threat, duress was on the appellant, which he had failed to discharge. Therefore, the Adjudicating Authority, having done a proper exercise in examining the statements and all other evidences, which were available before him, adjudicated the case and held the appellant's statement dated 11.03.1998 to be true. Furthermore, the appellant was present when the search and seizure operations were conducted. The statement of the other two persons, who were employed by the appellant clearly implicate the appellant with regard to the attempt to export prohibited items. Furthermore, it has been established that the appellant was aware of the fact that sandalwood is a prohibited item for export. Therefore, we find that there is no procedural error committed by the Adjudicating Authority and the Adjudicating Authority, after analysing the statement recorded from the independent witnesses, has rightly held that the appellant is guilty.

24. The appellant cannot place reliance upon the decision of the Tribunal in the case of Janar, the person who filed the shipping bill because, the order of the Tribunal in the case of Janar was reversed by the Hon'ble Division Bench of this Court in C.M.A.No.93 of 2009, dated 27.02.2015 in an appeal filed by the Department. Furthermore, the appellant cannot also fall back on the order of acquittal passed by the Criminal Court because, the same has been reversed and the appellant and others have been convicted pursuant to the judgment of the Madurai Bench of this Court in CrI.A.(MD) Nos.58 and 59 of 2009, dated 19.10.2019. In any event, the Adjudicating Authority is empowered to independently proceed and there is no requirement that he has to await the outcome of the criminal proceedings.

25. Considering the facts and circumstances of the present case, more particularly, when the present case arises under the provisions of the Act, the appellant cannot place reliance on the decision in the case of Capt.M.Paul Anthony, which was the matter concerning the service condition of the appellant

therein. The said decision is wholly inapplicable to the case on hand. The Tribunal, which is the last fact finding forum, has re-appreciated the factual matrix and rendered a finding that on the date when the officers of the Department conducted search operations in the godown at Tuticorin, the appellant was present and the cartons, which were lying in the godown, when opened, were found to contain sandalwood concealed along with Mangalore Roofing Tiles. Further, the admissibility of the statement recorded under Section 108 of the Act from the appellant on 11.03.1998, was considered by the Tribunal and it was held that the said statement is admissible and the belated retraction was rightly rejected by the Adjudicating Authority. Furthermore, the Tribunal found, on facts, that the role of the appellant has been clearly brought out by the fact that the appellant was present in the godown, at the time of search, when the officers detected the concealment of the sandalwood along with the Mangalore Roofing Tiles. Thus, we find that the factual matrix has been re-examined by the Tribunal and the appeal filed by the appellant was dismissed.

26. Thus, in the light of the above discussion, we have no hesitation to hold that there is no question of law, much less any substantial question of law arising for consideration in this appeal.

27. For the above reasons, the appeal fails and the same is dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

abr

To

1. The Commissioner of Customs,
No.1, Williams Road, Cantonment, Trichy.

2. The Registrar,
The Customs, Excise and Service Tax
Appellate Tribunal, Chennai.

+1cc to Mr.S. Rameshkumar, Advocate, S.R.No.3901
+1cc to Mr.T. Pramodkumar Chopda, Advocate, S.R.No.3968
AD(CO)
SM/05/03/2021

C.M.A.No.752 OF 2010