

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION
ORIGINAL SIDE

CUSTA/23/2022
IA No.GA/2/2022

COMMISSIONER OF CUSTOMS,
CENTRAL EXCISE AND SERVICE TAX,
SILIGURI

-Versus-

SHRI SUBODH DAS

CUSTA/24/2022
IA No.GA/2/2022

COMMISSIONER OF CUSTOMS,
CENTRAL EXCISE AND SERVICE TAX,
SILIGURI

-Versus-

SHRI BINOD KUMAR PANDEY

CUSTA/22/2022
IA No.GA/2/2022

COMMISSIONER OF CUSTOMS,
CENTRAL EXCISE AND SERVICE TAX,
SILIGURI

-Versus-

MD. TASHIN SAHA

CUSTA/25/2022
IA No.GA/2/2022

COMMISSIONER OF CUSTOMS,
CENTRAL EXCISE AND SERVICE TAX,
SILIGURI

-Versus-

SHRI ANIL KUMAR JAIN

CUSTA/26/2022

IA No.GA/2/2022

COMMISSIONER OF CUSTOMS,
CENTRAL EXCISE AND SERVICE TAX,
SILIGURI

-Versus-

SHRI BARUN SAHA

CUSTA/27/2022
IA No.GA/2/2022

COMMISSIONER OF CUSTOMS,
CENTRAL EXCISE AND SERVICE TAX,
SILIGURI

-Versus-

SHRI SURAJIT GHOSH @ MITHUN
GHOSH

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 14th March, 2023

Appearance :
Mr. Bhaskar Prasad Banerjee, Adv.
Mr. Tapan Bhanja, Adv.
...for the appellant/ Customs Authority.

Mr. Arijit Chakraborti, Adv.
Mr. Prabir Bera, Adv.
Mr. Deepak Sharma, Adv.
...for the respondent in CUSTA/ 23/2022.

Mr. Arnab Chakraborty, Adv.
Mr. Aniket Chaudhury, Adv.
...for the respondent in CUSTA/ 22/2022.

The Court : These appeals filed by the revenue under Section 130 of the Customs Act, 1962 (the 'Act') are directed against the common order passed by the Customs, Excise and Service Tax Appellate Tribunal, Kolkata, Regional Bench in

final order Nos.35842 to 75847 of 2021 and Miscellaneous Order No.75251 of 2021 dated 20th December, 2021.

The revenue has raised the following substantial questions of law for consideration:

- I. *Whether the order of the Learned Tribunal is totally perverse, contrary to the records and not going through the exhaustive investigation by wrongly holding that the instant case does not fulfill the requirement of Section 2(39) of the Customs Act, 1962 regarding "smuggling" in relation to impugned goods and subsequent invocation of Section 111 of the said Act?*
- II. *Whether the order of the Learned Tribunal is erroneous, acted with perversity and observed contrary to the records, committed violation of the principles of natural justice, as would be evident in paragraphs No.15, 16, 17 and 18 of the Tribunal's order and such factual findings are totally contrary and different to the factual findings of the adjudication order as is discussed and evident in grounds no. III, XIV, XV, XVI, XIX of the memorandum of appeal?*
- III. *Whether the order of the Learned Tribunal is perverse and contrary to law since the respondent herein had full knowledge of the smuggling and had deliberately and willfully involved himself in the smuggling activity and for his acts of omission and commission rendered the said goods liable for confiscation and consequent imposition of penalty upon the respondent under section 112(a) and 112(b) of the Customs Act, 1962?*

- IV. Whether the order of the Learned Tribunal is illegal and contrary to law when admittedly the subject goods have been improperly imported into India through unauthorized route and comes under the smuggled goods defined in section 2(39) of the Customs Act, 1962 read with section 111 of the said Act?
- V. Whether the Learned Tribunal committed gross error in not appreciating that the statements recorded under Section 108 of the Customs Act, 1962 during course of enquiry were made voluntarily without vitiating any of the premises as envisaged in Section 24 of the Evidence Act, 1872 and the same are having evidentiary value to prove the impugned goods were of smuggled nature?
- VI. When the statements made under section 108 of the Customs Act, 1962 before the Customs officer is not covered by Section 25 of the Indian Evidence Act, 1972 and when such statement has not been obtained under threat, whether the cross examination is sustainable?
- VII. Whether there is perversity and inherent error of jurisdiction in the order of the Learned Tribunal since the Respondent could not beyond reasonable doubt discharge the burden that the said goods are not smuggled by providing genuine documents and admittedly the adjudicating authority was not satisfied about bonafide ownership of the Respondent in respect of the said goods, the consequent release of the said goods to the Respondent cannot be sustained in law?

We have heard Mr. Bhaskar Prasad Banerjee, learned counsel assisted by Mr. Tapan Bhanja, learned Advocate for the appellant/Customs Authorities and Mr. Arijit Chakraborty, Mr. Prabir Bera, Mr. Deepak Sharma, Mr. Arnab Chakraborty, Mr. Aniket Chaudhury, learned Advocates for the respondent.

The first question which was considered by the learned Tribunal is as to on whom the burden of proof lies in establishing that the goods in question are smuggled goods. The Tribunal, in our view, rightly took into consideration the fact that betel nuts are not goods notified under Section 123 of the Customs Act. Hence, no adverse presumption against the respondents should be made about the said goods being smuggled or being of foreign origin. Therefore, the Tribunal rightly held that the burden is on the department to prove that the goods were of foreign origin.

In support of its conclusion, the Tribunal placed reliance on the judgment of this Court in the case of *Commissioner of Customs (Preventive), WB, Kolkata -vs.- Sudhir Saha*, reported in 2004 (172) ELT 26 (Cal.). In the said decision, the Court held that betel nuts which were seized are not notified goods under Section 123 of the Customs Act and the said provision applies only in respect of goods which are smuggled and smuggled goods means something suggesting that they are of foreign origin and their recent importation from

abroad. In this regard, reliance was placed on the decision in the case of *Shantilal Mehta vs. Union of India*, reported in 1983(14) ELT 1715.

The Tribunal noted that the facts of the case on hand were identical to that of the facts in the case of Sudhir Saha and that the burden of proof to establish the smuggled nature of the seized goods was on the department and taking note of the factual position, the Tribunal held that the department miserably failed to discharge the burden cast upon them. Further, the Tribunal took note of the finding recorded by the Commissioner in the adjudication order wherein it has been stated that there may be a possibility that the subject betel nuts too are of foreign origin and were smuggled to India. Commenting upon the said finding, the learned Tribunal, in our view, rightly held that this finding is based entirely on presumption for which there is no legal or factual basis disclosed. That apart, the Tribunal has also examined the other facts, namely, the statements which were recorded from the respondents at the first instance, which were subsequently retracted before the learned Magistrate. The Tribunal found that the statements initially recorded from the respondents who are semi-literate persons were identical and one was mirror image of the other and, therefore, the Tribunal rightly disbelieved those statements and in any event the same having

been retracted at the earliest point of time, held that the statements could not have been the basis of the adjudication. Further, on facts, the Tribunal found that the goods were seized far away from the international border in the interior of North Bengal from trucks/warehouses and also it is an undisputed fact that betel nuts are sold in the adjoining States of Assam and Manipur as well as north districts of West Bengal and their adjacent area. Therefore, the Tribunal came to the conclusion that in the absence of evidence on the contrary disclosed, it has to be concluded that the revenue has been unable to establish the smuggled nature of the seized goods and, thus, discharge the burden of proof cast upon the revenue in this respect.

Further, the Tribunal examined the other factual aspects and found that the documents on record show that the goods were purchased from local markets and/or from Mandi located in Jalpaiguri district of West Bengal. The said purchases of agricultural produce such as betel nuts are regulated by the respective District Regulated Market Committees and the Sub-divisional Officers in terms of the West Bengal Agricultural Produce Marketing (Regulation) Act, 1972. Further, the Tribunal noted that copies of the receipts issued by the Market Committees were on record evidencing that the market fee was paid by the respondents and, therefore,

concluded that the seized consignment had been purchased on payment of such cess under the Regulation Act of 1972. Furthermore, the bag containing the seized goods did not contain any foreign markings. Furthermore, the Tribunal noted that during the course of investigation undertaken by the DRI, no other incriminatory material was obtained either from the raids conducted or in course of interrogating witnesses that would indicate that the said goods were sourced from outside India.

Thus, based on presumptions and assumptions, it cannot be held that the goods were smuggled goods and in the absence of any evidence produced by the revenue to discharge the burden cast upon them, in our view, the Tribunal noting the facts of the case had rightly granted the relief in favour of the respondents. Furthermore, there was no testing of the seized goods through any accredited Agency for determining any constituent property or characteristic that would indicate or establish foreign origin of the said goods. The Tribunal noted that the only evidence on the basis of which the proceedings were initiated and the order of adjudication was passed against the nine respondents is based on a statement recorded from the respondent in CUSTA 22 of 2022. All the respondents were arrested and produced before the learned Chief Judicial Magistrate, Siliguri before whom the so-called voluntary

statements were retracted. The Tribunal noted that it is on record that the respondent in CUSTA 22 of 2022 had retracted the statements on 16th March, 2016 before the learned Additional Chief Judicial Magistrate, Siliguri before whom he was produced after arrest. Thus, in the absence of any independent evidence to bring home a charge of smuggling, the Tribunal set aside the adjudication order. Furthermore, the Tribunal noted that there was no discussion on the retraction of statements made on oath by the respondents and the witnesses who implicated the respondents were not produced for cross-examination in spite of a specific request made by the concerned respondent and this request was rejected on the ground that the occupants of the trucks had allegedly described the true facts in course of the statements recorded under Section 108 of the Act which were affirmed by the respondent in CUSTA 22 of 2022.

The next aspect which was examined by the Tribunal was whether the request of cross-examination could have been rejected. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in *Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata, 2015 (324) ELT 641 (SC)* wherein the Hon'ble Supreme Court had granted relief to the appellant therein on the ground that the denial of opportunity to cross-examine certain dealers goes to the root

of the matter and vitiates the entire proceedings. Thus, on a thorough factual analysis and noting the legal position, the Tribunal came to the conclusion that the department has failed to establish that the said goods are smuggled goods. The respondent in CUSTA 22 of 2022 claimed ownership of the seized goods and prayed for a direction to return the goods to him and the Tribunal analysed the documents and directed return of the goods.

Thus, in our considered view, the entire case is fully factual and, in our view, no substantial question of law arises for consideration. Therefore, we are left with no option except to affirm the order passed by the Tribunal and dismiss the appeals filed by the department.

Now, coming to the issue of return of the goods, admittedly, the goods are perishable in nature and the goods were seized on 1st march, 2016 and the question of returning the goods to the respondent in CUSTA 22 of 2022 at this juncture does not arise as the goods would be unfit for human consumption and it will be against the public interest to direct return of the goods. Therefore, to that extent, the order passed by the Tribunal stands modified giving liberty to the respondent in CUSTA 22 of 2022, namely, Md. Tashin Shah to seek for payment of the value of the goods by making an application before the concerned authority and if such

application is made within a period of thirty days from the date of receipt of server copy of this order, the said application shall be processed in accordance with law.

With the above observations, the appeals are dismissed. The connected applications for stay stand closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)