ORDER OD – 12, 13, 15 & 16

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CUSTOMS)
ORIGINAL SIDE

CUSTA/22/2023
IA NO: GA/2/2024
COMMISSIONER OF CUSTOMS (PREVENTIVE), KOLKATA
VERSUS
SHRI SANJAY KUMAR GOND

CUSTA/23/2023
IA NO: GA/2/2024
COMMISSIONER OF CUSTOMS (PREVENTIVE), KOLKATA
VERSUS
SHRI AMIT GHOSH

CUSTA/24/2023
IA NO: GA/2/2024
COMMISSIONER OF CUSTOMS (PREVENTIVE), KOLKATA
VERSUS
SHRI AKASH JAGDISH ISSRANI

CUSTA/25/2023
IA NO: GA/2/2024
COMMISSIONER OF CUSTOMS (PREVENTIVE), KOLKATA
VERSUS
SHRI AJAY KUMAR GOND

BEFORE :
THE HON'BLE CHIEF JUSTICE T. S. SIVAGNANAM
AND
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 24th April 2024.

Appearance:

Mr. Bhaskar Prosad Banerjee, Advocate
Mr. Tapan Bhanja, Advocate
... for the appellant.

Mr. Arijit Chakrabarti, Advocate
Mr. Prabir Bera, Advocate
Ms. Swati Singh, Advocate
... for the respondent in CUSTA/22/2023,

CUSTA/23/2023 and CUSTA/25/2023.

Mr. Nilotpal Chowdhury, Advocate
... for respondent in CUSTA/24/2023.

By this judgment and order, CUSTA/22/2023, CUSTA/23/2023, CUSTA/24/2023 and CUSTA/25/2023 are disposed of.

The appeals were heard analogously since in all the appeals the challenge is to a common order passed by the Learned Tribunal dated 13.02.2023 in Order Nos.75055 to 75058 of 2023. The revenue has raised the following substantial questions of law for consideration:-

*A.* *Whether the order of the Learned Tribunal is totally perverse and contrary to the records since the foundational factual aspect relating to the seizure of gold of foreign origin and the persons involved thereat have been ignored, bypassed and not considered by the Learned Tribunal?*

*B.* *Whether the reverse burden of proof under Section 123 of the Customs Act, 1962 is a mandate upon the accused for discharging the onus of holding smuggled foreign origin gold and unaccounted cash?*

We have elaborately heard Mr. Bhaskar Prosad Banerjee, learned senior standing counsel, assisted by Mr. Tapan Bhanja, learned advocate for the appellant/department, Mr. Arjit Chakraborty and Mr. Nilotpal Chowdhury, learned advocates for the respondents in the appeals.

The learned advocate appearing for the respondents raised a preliminary objection to the maintainability of these appeals on the ground that they are far below the monetary limit fixed by the CBEC for preferring appeals before this Court. It is not in dispute that the penalty which has been imposed on the respondents in CUSTA/22/2023, CUSTA/23/2023 and CUSTA/25/2023 is Rs.5 lakh and the penalty imposed on the respondent in CUSTA/24/2023 is Rs.10 lakh. Thus, applying the circular issued by the Board, the revenue cannot pursue the appeals. However, Mr. Banerjee, learned senior standing counsel assisted by Mr. Tapan Bhanja, learned advocate for the appellant, would contend that when a question of law is raised, regardless of the monetary limit, the court can entertain the appeal. In the light of the said submission, we are required to examine as to whether any substantial question of law arises for consideration in these appeals.

The respondents in CUSTA/22/2023, CUSTA/23/2023 and CUSTA/25/2023 are Havildars working in the Customs Department and the respondent in CUSTA/24/2023 is a private individual.

The Learned Tribunal, in our opinion, has elaborately considered the factual position and has recorded that the three Havildars were arrested on 07.03.2017 at about 22.00 hours and summons were served under Section 108 of the Customs Act, 1962. The statements are said to have been recorded from the three respondents on 07.03.2017 in the office of DRI, Kolkata. On 08.03.2017, the three accused were produced before the Chief Metropolitan Magistrate, Kolkata and the Tribunal has observed that there is no lock-up facility in DRI, Kolkata and the overnight detention of the accused persons was illegal. Subsequently, when the three respondents were produced before the Chief Metropolitan Magistrate on 14.03.2017, during the production after first remand, all three of them have retracted the statements recorded on 07.03.2017 which, according to them, were extracted from the DRI officials upon inflicting physical and mental torture during such prolonged detention. Earlier, on 08.03.2017, the Chief Metropolitan Magistrate, while remanding the respondents amongst others to judicial custody till 14.03.2017, directed the Superintendent, Presidency Correctional Home to allow the Investigating Officer of DRI, Customs to enter into the jail premises for interrogation and also allow them to reduce the statements, if any, of the accused persons in writing in course of the interrogation. Though such was the order passed by the court on 08.03.2017, the Investigating Officer of DRI visited the jail premises only on 13.03.2017 and has made the endorsement stating that 'interrogation done' but all the six accused refused to give statement. Again, by order dated 14.03.2017, the Chief Metropolitan Magistrate ordered that DRI officials are permitted to examine the accused in judicial custody and they are also authorised to record statements, if made. The DRI did not make any attempt to interrogate the respondents and/or record statements while they were in judicial custody. While granting bail by order dated 11.04.2017, the Chief Metropolitan Magistrate imposed a condition that the respondents have to meet the Investigating Officer once a week until further order. The said condition has been complied with by the respondents, which appears to have been not disputed by the department at any stage of the proceedings. Thus, the question remains as to whether solely based on the retracted statements, the respondents could have been imposed penalty. The Learned

Tribunal took note of the decision of the Hon'ble Supreme Court in the case of *Vinod Solanki v. Union of India [2009 (233) E.L.T. 157 (S.C.)],* examined the facts of the case and found that the burden is on the revenue to establish the voluntary nature of the statement recorded on 07.03.2017 since the same stood retracted before a competent court. That apart, in spite of several orders passed by the court, the DRI did not take any step to record the statements and it is more than after a lapse of three months that the show-cause notice was issued. Thus, the aspect regarding burden of proof has been examined by the Learned Tribunal based upon the facts of the case and thus we find there is no substantial question of law arising on this issue.

So far as the respondent in CUSTA/24/2023 is concerned, he has been held liable for payment of penalty solely based upon the statements given by the three Havildars who have succeeded before the Tribunal and we have declined to interfere with the finding on the ground that there is no substantial question of law arising for consideration. If that be so, the appeal in CUSTA/24/2023 is also to meet the same fate as the three appeals. It is pointed out by Mr. Banerjee that in the adjudication order, the authority has clearly brought out that the respondent in CUSTA/24/2023 is a habitual offender/violator. However, the penalty has been imposed on the said respondent with regard to a specific instance, which, though may not be so palatable, that itself would not be sufficient to hold the respondent guilty of the offence and the case has to be tested on the given facts and circumstances. Therefore, we find no question of law arising for consideration in CUSTA/24/2023 as well.

The Havildars, the respondents in the three appeals, have been proceeded departmentally and it appears that a major penalty has been imposed, challenging which, they have approached the Central Administrative Tribunal. In our view, the present judgment can have no impact on the disciplinary proceedings which have been initiated, as it is settled legal principle that the burden of proof in a criminal proceeding and that in a disciplinary proceeding are different and both can proceed simultaneously.

With the above observations, the appeals stand dismissed.

The connected applications also stand closed.

(T. S. SIVAGNANAM, C.J.)

(HIRANMAY BHATTACHARYYA, J.)

sm / S. Kumar