IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:-
HON'BLE JUSTICE PARTHA SARATHI SEN

C.R.A. No. 325 of 1986
Sri B.K Ghosh
-Versus-
Sri Gobardhan Das Lohati

For the appellant:	**Mr.Rajdeep Mazumder,Ld. DSGI,** **Mr. Pritam Roy, Adv.**
For the respondent no.4 :	**Mr. Sahjahan Hossain, Adv.,** **Ms. Sanjida Sultana, Adv.,** **Mr. Sanwar Mallick, Adv.**
Last Heard on :	**24.01.2025**
Judgment on :	**31.01.2025**

PARTHA SARATHI SEN, J. : –

1. In this special leave to appeal as filed under Section 378(4) Cr.P.C the judgement and order of acquittal dated 13.12.1985 as passed in complaint Case no. C/5737 of 1976 (TR 932/1976) by the Learned Metropolitan Magistrate, 9th Court, Calcutta is impugned. By the said judgement and order the learned trial court found that the accused persons are not guilty under Section 135 (1)(b)(ii) of the Customs Act and under Section 85 of the Gold Control Act, 1968 read with the Section 8(1) of the said Act and thus acquitted the said accused persons under Section 248(1) CrPC. The complainant felt aggrieved and thus preferred the instant special leave to appeal.

2. It is pertinent to mention herein that during the pendency of the instant appeal the respondent nos. 1, 2 and 3 namely; Gobardhan Das Lohati, Narayan Das Lohati and Shrilal Lohati died on 24.03.2015, 27.09.2016 and 19.04.2018 respectively and thus the instant appeal stood abetted as against the said three respondents.

3. For effective adjudication of the instant appeal the facts leading to initiation of Case no. C/5737/1976 before the learned trial court is required to be dealt with in a nutshell.

4. One B.K Ghosh, the then Assistant Collector of Customs, West Bengal, Calcutta filed a complaint with the learned trial court on 11.07.1975 stating, inter alia, that in discharge of his duty as a public servant and after obtaining necessary sanction from the Collector of Customs Excise, West Bengal under Section 137(1) of the Customs Act, 1962 he had filed the said complaint against the accused persons for taking cognizance and for issuance of process against the accused persons for commission of offence under Section 135(1) (b)(ii) of the Customs Act, 1962 (hereinafter referred to as the said 'Act of 1962' in short) and under Section 85 of the Gold Control Act, 1969 read with Section 8 of the Gold Control Act, 1968 (hereinafter referred to as the said 'Act of 1968' in short).

5. It is the complaint case that on 10.07.1975 at about 10 a.m on the basis of a secret information the complainant along with other Customs officers of the concerned Divisional Preventive Unit, Calcutta went to the residence of the accused persons at 4/1/2B, Hari Prasad Dey Lane,

Calcutta 700007 as well as to a room on the first floor of 36, Dacca Putty respectively being the residential premises of the accused persons and a room in occupation of one Ratan Lal Lohati, the father of the accused persons respectively on the strength of a search order dated 08.07.1975 issued by the Assistant Collector of Customs, West Bengal, Calcutta.

6. It is the further complaint case that during such search the following items were recovered from the above mentioned house of the accused person namely; one piece of gold bar with the mark 'Swiss Bank Corporation' weighing 10 tollas or 116.600 grams valued at Rs.6000/- from one half steel almirah from the corner of a room, a small gold lump weighing 10.800 grams , gold lump in 12 pieces weighing 65.100 grams (out of which one piece bears marks of foreign origin) and three pieces of gold strips (pat) weighing 11.800 grams valued at Rs. 5000/- which were kept in a small envelop in a locker of a steel almirah in another corner of the room. It is the further complaint case that after such recovery those gold were seized by making proper inventory and at that time the accused no.1 Gobardhan Das Lohati made a voluntary statement before the Customs officers and independent witnesses that he was the 'karta' of the joint family and the said gold were purchased 4/5 years back on different dates from the different dealers of sona patti to meet the requirement of marriage of the female children of their family members.

7. It is the further complaint case that during such search and seizure no evidence could be laid by the accused persons with regard to their bonafide acquisition of gold and/or their possession and/or source of

importation and it was found that those gold were of foreign origin. The complainant further stated that the said gold were seized on a reasonable belief that those were smuggled and those were thus liable for confiscation under Section 111(d) of the said Act of 1962 and under Section 71 of the said Act of 1968.

8. On the basis of such complaint learned trial court conducted an enquiry and on being satisfied that there are prima facie materials against the accused persons framed charges on 24.02.1982 under Section 135 (1) (b) (ii) of the said Act of 1962 and also under Section 85 of the said Act of 1968 read with Section 8(1) of the said Act of 1968.

9. Since all the four accused persons pleaded their innocence the trial proceeded.

10. In order to bring home the charges on behalf of the complainant 12 witnesses have been examined. On behalf of the accused person one defence witness was examined. In course of the examination of the PWs several documents have also been marked as exhibits. On perusal of the cross-examination of the prosecution witnesses and the evidence adduced by the DW it appears that the defence case is based on clear denial and false implication.

11. For effective adjudication of the instant appeal some provisions of the said Act of 1962 are required to be looked into and those are quoted below:-

Section 2(34)

"(34) — "proper officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Customs;

Section 105

"105. Power to search premises.—(1) If the Assistant Commissioner of Customs or Deputy Commissioner of Customs, or in any area adjoining the land frontier or the coast of India an officer of customs specially empowered by name in this behalf by the Board, has reason to believe that any goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceeding under this Act, are secreted in any place, he may authorise any officer of customs to search or may himself search for such goods, documents or things.

(2) The provisions of the Code of Criminal Procedure, 1898 (5 of 1898), relating to searches shall, so far as may be, apply to searches under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the words "Principal Commissioner of Customs or Commissioner of Customs" were substituted."

Section 123

"123. Burden of proof in certain cases.— (1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be—

(a) in a case where such seizure is made from the possession of any person,—

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold and manufactures thereof, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify."

Section 135

"135. Evasion of duty or prohibitions.—(1) Without prejudice to any action that may be taken under this Act, if any person—

(a) is in relation to any goods in any way knowingly concerned in misdeclaration of value or in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods; or

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111 or Section 113, as the case may be; or

(c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under Section 113; or

(d) fraudulently avails of or attempts to avail of drawback or any exemption from duty provided under this Act in connection with export of goods, or;

(e) obtains instrument from any authority by fraud, collusion, wilful misstatement or suppression of facts and such instrument has been utilised by such person or any other person, he shall be punishable,—

(i)………

(A)……..

(B)……..

(C)…………

(D)………..

(E)………

(ii) in any other case, with imprisonment for a term which may extend to three years, or with fine, or with both

(2)……..

(3)………"

Gold Control Act, 1968

"Section 8. Restrictions regarding acquisition, possession and disposal of gold.

(1)Save as otherwise provided in this Act, no person shall-

(i)own or have in his possession, custody or control, or

(ii)acquire or agree to acquire the ownership, possession, custody or control of, or

(iii)buy, accept or otherwise receive or agree to buy, accept or otherwise receive, any primary gold,

(2)………….

(3)………….

(4)………….

(5)…………

(6)…………"

Section 16

"16. Declarations as to articles or ornaments.

(1)Save as otherwise provided in this Chapter, every person who owns, or is in possession, custody or control of, any article or ornament at the commencement of this Act, or acquires the

ownership, possession, custody or control of any article or ornament thereafter, shall make, within thirty days from such commencement or from such acquisition, as the case may be, or within such further period as the Administrator may, on sufficient cause being shown, allow, a declaration in the prescribed form as the quantity, description and other prescribed particulars of any article, or ornament, or both, owned, possessed, held or controlled by him:

Provided that no such declaration shall be required to be made where a person who, having owned, possessed, held or controlled any article or ornament before the commencement of this Act, has already made a declaration in relation to that article, or ornament, or both:

Provided further that nothing in this sub-section shall be construed as enabling any declaration to be made in respect of any gold for which the period prescribed or allowed under the law for the time being in force before the commencement of this Act had expired before such commencement.

(2)….

(3)….

(4)…

(5)…

(6)…..”

Section 27

“27. Licensing of dealers.

(1)Save as otherwise provided in this Act, no person shall commence, or carry on, business as a dealer unless he holds a valid licence issued in this behalf by the Administrator.

(2)A licence issued under this section,-

(a)shall be in such form as may be prescribed,

(b)shall be valid for such period as may be specified therein,

(c)may be renewed, from time to time, and

(d) may contain such conditions, limitations and restrictions as the Administrator may think fit to impose and different conditions, limitations and restrictions may be imposed for different classes of dealers.

(3)….

(4)….

(5)….

(6)…

(7)…

(8)…..”

12. At this juncture this Court proposes to deal with some factual aspects as involved in this appeal. For effective adjudication of the instant appeal a short description of PWs are required to be given.

13. PW1 is the complainant. PW2 is an inspector of Control Excise, Gold Control Circle, Calcutta. PW3 and PW4 are both Superintendents of Control Excise. PW5 is a Deputy Bullion Registrar, Gold Mint, Calcutta. PW6 is an Assistant Assay Superintendent, India Government Mint, Alipore. PW7 is an Inspector, Customs (Preventive) Calcutta. PW8 is a key maker. PW9 and PW10 are the inspectors of Customs. PW11 is an Assistant Collector of the Customs Department. PW12 is a hindi officer.

14. Since in the impugned judgement learned trial court has elaborately discussed the evidence of the PWs, this Court finds no necessity to recapitulate the self same evidence of the PWs all over again except to the extent the same is necessary for the disposal of the instant appeal.

15. PW1 being the Assistant Collector of Customs, Calcutta in course of his examination-in-chief stated that after obtaining necessary sanction from the Collector he lodged the said complaint and in his deposition he has also proved his signatures on the complaint as well as in the sanction for prosecution with the authority for filing the complaint under Section 97(1) of the said Act of 1968. His cross-examination is not much relevant for the disposal of the instant appeal. PW2 in his examination-in-chief stated that he being an inspector of Control Excise, Gold Control Circle used to issue license under Section 27 of the said Act of 1968. He further stated that a licensee is duty bound to furnish declaration under Section 16(1) of the said Act of 1968. He stated that no such license was taken by the accused persons. His cross-examination is also not much relevant. From the evidence of PW3 it reveals that on the relevant day he took the seized gold to the mint for the purpose of assay and in his presence samples were taken after making proper inventory. PW4 being another superintendent of Control Excise was a witness to the said inventory and to the process of taking sample for assay. PW6 being an Assistant Assay Superintendent, India Government Mint, Alipore in his examination-in-chief stated that he performed the assay of the samples and on the basis of his examination he prepared a report wherefrom it reveals that the gold in question was of foreign origin. PW7 being an inspector of Customs (Preventive) Calcutta was the leader of the raiding team. He testified that on the relevant day he along with his force raided the house of the accused persons at the aforementioned premises and during the raid he

recovered foreign gold bars weighing 204.300 grams from the steel almirahs placed in three rooms of the accused persons. He further stated that he found foreign mark of 'Swiss Bank Corporation' on such gold. He prepared the inventory. He also prepared the search list and served the copies of the same to the accused persons. He stated that the seized gold were smuggled gold and were of foreign origin and those were primary gold and the accused could not furnish any plausible explanation with regard to their bonafide possession of the said gold and/or illicit importation of the gold.

16. PW7 further stated that on the basis of secret information he came to learn that all the accused persons were engaged in smuggling of gold and other things like alcoholic liquor, silver and aluminium utensils. PW7 was cross-examined on behalf of the accused and in his cross-examination he stated that on the relevant day and hour in the said house he found all the accused persons and their old father. Subsequently he stated that when he went to the house of the accused person he found accused Gobardhan Lohati and Shrilal Lohati however the other accused persons were not there. PW9 being another inspector of the Customs in his examination-in-chief echoed the version of PW7. He stated that gold were seized on the reasonable belief that those gold were smuggled. In his cross-examination he further stated that at the time of search and seizure accused nos. 1,2 and 3 were present however accused no.4 appeared after the commencement of search. He further stated that

Gobardhan gave the keys of the two almirahs to them and the third almirah was opened with the help of key maker.

17. PW10 being an inspector of Customs is also a member of the raiding team. He echoes the version of PW7, PW9 and PW10. He also stated that gold which were seized from the house of the accused persons were primary gold and the accused persons could not discharge their onus under Section 123 of the Customs Act in respect of their possession of the said gold.

18. Accused no.3, Shrilal Lahoti is DW1. In his examination-in-chief he stated that the said premises is their tenanted accommodation and the tenancy stands in the name of their father. He further stated that on 10.07.1971 he left his house at 9 am and returned at 3:30 pm on receiving a telephonic message that his residence had been raided by the Customs officers. He found that the Customs officers were writing something on a paper. He also found some gold lying in front of the Customs officers. He further stated that his father stated to the Customs officers that his sons i.e. the accused persons knew nothing and he (the father of the accused persons) knew everything about the seized gold. He further stated that his father approached the Customs officers to record his statements however the Customs officers did not do.

19. On the basis of the evidence adduced by the prosecution and defence, both oral and documentary and after scrutinizing the same learned trial court passed the impugned judgement and order which is the subject matter of the instant appeal.

20. In course of hearing Mr. Pritam Roy, learned advocate appearing on behalf of the appellant at the very outset draws attention of this Court to the impugned judgment. It is submitted on behalf of the appellant that for no reason whatsoever the learned trial court had shifted the burden of Section 123 of the said Act of 1962 upon the complainant without considering the clinching evidence of PW7 who in his examination-in-chief categorically stated that the gold which were seized from the house of the accused persons are primary smuggled gold and of foreign origin which the learned trial court had completely overlooked. It is further submitted by Mr.Roy that the learned trial court misconstrued the provisions of Section 2(34) read with Section 105 of the said Act of 1962 in holding that the PW1 being an Assistant Collector/Commissioner has no authority to authorize PW7 to conduct search and thus the learned trial court had wrongly held that PW7 is not the proper officer to conduct such search and raid.

21. It is further argued by Mr. Ray that on conjoint perusal of evidence of PW7, PW9, PW10 and PW11 it would reveal that there were no inconsistencies in their evidence with regard to the said search and seizure and thus the learned trial court ought not have held that there were discrepancies in evidence of those witnesses. It is further argued by Mr. Roy that the learned trial court had wrongly held that non-availability of the key at the time of trial and non-explanation by the prosecution witnesses with regard to the third almirah have become fatal for the complainant. It is further argued by Mr. Roy that from the evidence of the

prosecution witnesses it would reveal further that all the four accused persons were in possession of the said house from where primary foreign gold was recovered and therefore the learned trial court was not at all justified in disbelieving the consistent testimonies of the prosecution witnesses.

22. Per contra, Mr. Hossain, learned advocate for the respondent no.4 submits before this Court that none of the prosecution witnesses in their respective depositions had made any whisper against the respondent no.4 herein regarding his involvement in the alleged crime. It is further argued by Mr. Hossain that though at the time of alleged search and seizure two independent witnesses were there but no explanation was forthcoming from the side of the complainant as to what prevented him to tender those independent witnesses in the witness box. It is further submitted that since alleged possession of the gold by the respondent no.4 is not at all proved by the evidence of the prosecution witnesses learned trial court is very much justified in holding that no burden lies upon the respondent no.4 under Section 123 of the said Act of 1962. In his next fold of submission Mr. Hossain further submits that the alleged confiscation of gold was not proved before the trial court in absence of any show cause notice. It is further submitted by him that the alleged statement of accused Gobardhan (since deceased) has got no evidentiary value since it was not recorded in course of enquiry.

23. On careful consideration of the entire materials as placed before this Court and after giving due thought over the submissions of the

learned advocates for the contending parties, it appears to this Court that the learned trial court is not at all justified in holding that PW7 is not a proper officer within the meaning of Section 2(34) of the said Act of 1962 inasmuch as it reveals from the evidence of PW1 i.e the complainant before the learned trial court that at the material time he was posted as an Assistant Collector and in that capacity he had authority to authorize PW7 to conduct search at the aforementioned premises under Section 105 of the said Act of 1962.

24. The next question which arises for consideration before this Court is as to whether the complainant before the learned trial court is at all successful to shift the onus upon the respondent no.4 to discharge his burden with regard to his alleged possession of the gold which according to the complainant were smuggled and of foreign origin and also primary gold.

25. On close scrutiny of the evidence of all the prosecution witnesses it reveals that PW7 being the leader of the raiding team and PW9, PW10 and PW11 being the officials of the Customs Authority and being the members of the raiding team in their respective cross-examination categorically stated that at the time of the alleged search and seizure they had reasonable belief that the recovered gold were smuggled, primary in nature and of foreign origin. It is their consistent version that the said gold were recovered from premises no. 4/1/2B Hara Prasad Dey Lane, Calcutta 700007 which belongs to the accused persons. However, it appears to this Court that no evidence was adduced by the prosecution at

all that the respondent no.4 herein used to occupy the said premises along with his three brothers and father at the relevant time.

26. On careful scrutiny of the evidence of the prosecution witnesses and the exhibits, more specifically Exhibit 8 and Exhibit 9 being the inventory and search list, this Court finds no signature of the respondent no.4 herein on such exhibited documents to substantiate that he was at least present at the said house at the time of the alleged search and seizure.

27. As rightly pointed out by Mr. Hossain that from Exhibit 9 being the search list it would reveal that one Hari Krishna Aggarwala and one Sunil Kumar Saha were the two witnesses to the alleged search and seizure and for the best reason known to the complainant they were also not tendered in the witness box as PWs.

28. It thus appears to this Court that before the learned trial court the prosecution has led practically no evidence with regard to the alleged possession of the house in question by the respondent no.4 herein along with other accused persons who are now no more in earth.

29. It thus appears to this Court that before the learned trial court the complainant had failed to discharge its primary onus in establishing that at the material time the respondent no.4 was an occupant of the said premises and thus this Court holds that the learned trial court is very much justified in not placing the burden under Section 123 of the said Act of 1962 upon the respondent no.4.

30. In view of the discussion made hereinabove this Court thus finds that the learned trial court is absolutely justified in acquitting the present respondent no.4 from the charges as framed against him.

31. The instant appeal has thus got no merit at all and is thus dismissed.

32. The impugned order and judgement of acquittal dated 13.12.1985 as passed in complaint Case no. C/5737 of 1976 (TR 932/1976) by the Learned Metropolitan Magistrate, 9th Court, Calcutta is hereby upheld.

33. Department is hereby directed to transmit the trial court record along with a copy of this judgement to the trial court forthwith.

34. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

(Partha Sarathi Sen, J.)