GAHC010099062022

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Cus.Ref./1/2022

THE COMMISSIONER OF CUSTOMS (PREVENTIVE) AND ANR.
N.E.R, 110, MAHATMA GANDHI ROAD, SHILLONG-793001, MEGHALAYA.

2: THE ADDITIONAL COMMISSIONER OF CUSTOMS PREVENTIVE
NE REGION

110 MAHATMA GANDHI ROAD
SHILLONG-793001
MEGHALAYA

VERSUS

SMTI. NEMLUNI
D/O- SUANGKHANKAPA, R/O- H/NO. 228, BETHEL VENG, CHAMPAI,
MIZORAM-796321.

Advocate for the Petitioner : MR. S C KEYAL

Advocate for the Respondent : MR N DASGUPTA

Linked Case : Cus.Ref./3/2022

THE COMMISSIONER OF CUSTOMS (PREVENTIVE)
N.E.R 110
MAHATMA GANDHI ROAD
SHILLONG
793001
MEGHALAYA

2: THE ADDITIONAL COMMISSIONER OF CUSTOMS PREVENTIVE
N.E.R 110
MAHATMA GANDHI ROAD
SHILLONG
793001
MEGHALAYA
VERSUS

RONNIE ZOLIANNGURA
S/O RAMAN MODAK
WARD NO. 4
LALA TOWN
PO LALA
DIST HAILAKANDI
ASSAM
788163

Advocate for : MR. S C KEYAL
Advocate for : appearing for RONNIE ZOLIANNGURA

Linked Case : Cus.Ref./2/2022

THE COMMISSIONER OF CUSTOMS (PREVENTIVE) AND ANR.
N.E.R
110
MAHATMA GANDHI ROAD
SHILLONG-793001
MEGHALAYA.

2: THE ADDITIONAL COMMISSIONER OF CUSTOMS PREVENTIVE
NE REGION
110 MAHATMA GANDHI ROAD
SHILLONG-793001
MEGHALAYA.
VERSUS

SUBIR MODAK
S/O- RAMAN MODAK
WARD NO. 4
LALA TOWN
P.O. LALA
DIST. HAILAKANDI

ASSAM-788163.

Advocate for : MR. S C KEYAL
Advocate for : MR N DASGUPTA appearing for SUBIR MODAK

BEFORE

HON'BLE THE CHIEF JUSTICE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellants :Mr. S. C. Keyal, Sr. Standing Counsel
For the Respondent : Mr. N Dasgupta, Advocate

Date of Hearing : 25.05.2023

Date of Judgment : 02.06.2023

JUDGEMENT & ORDER (CAV)

(A.D. Choudhury, J)

1. Heard Mr. SC Keyal, learned Senior standing counsel for the appellants. Also heard Mr. N Dasgupta, learned counsel for the respondent.

2. The present appeals under Section 130 of the Customs Act, 1962 are preferred assailing Final Order No. 75680-75682/2021 dated 10.11.2021 passed by the learned CESTAT, Kolkata in Custom Appeal No. 75235/2021 (Cus. Ref No. 1/2022), Custom Appeal No.75234/2021 (Cus. Ref. No. 2/2022) and Custom Appeal No. 75236/2021 (Cus. Ref. No. 3/2022).

3. This batch of appeals were taken up for final determination together as the initial cause of action arose on similar factual background, the show cause notices issued to the parties/respondents are common and also the orders under challenge. All the Appeals were admitted by this court the under its order dated 16.02.2023 framing the following substantial questions of law:

> "*(i) Whether the CESTAT, Kolkata, erred in law in holding that the standard of proof as envisaged under Section 123 of the Customs Act, 1962 is the best beyond reasonable doubt?*
>
> *(ii) Whether the CESTAT, Kolkata, has erred in law in setting aside the order of confiscation when seized goods were found to be unfit for human consumption as per test report of Export Inspection Agency, Kolkata, under Food and Standard (Food Products Standards and Food Additive) Regulations, 2022?*
>
> *(iii) Whether findings of the CESTAT, Kolkata are perverse under the present facts and circumstances of the case?"*

4. The basic facts leading to filing of the present appeals as pleaded by the appellant are summarized as follows:

(i) On the basis of intelligence input, the DRI Officers of Silchar searched a godown, however nothing was found. While returning back, they intercepted seven trucks loaded with betel nuts suspected to be of foreign origin. Out of these seven trucks, two trucks were detained near Bairabi Railway Crossing area, three trucks were detained at Ramnathpur hill top and other two trucks were

detained at Ramnathpur area.

(ii) These trucks were brought to CRPF Camp, Dharamura and preliminary interrogations were made and all the occupants admitted that they had loaded the betel nuts in their trucks.

(iii) Another search was undertaken at one godown located at Bairabi and 196 bags of foreign origin betel nuts were recovered. All these trucks were brought to Silchar in the intervening night of 2nd and 3rd July, 2018 and kept at godown premises of one M/s NRD Enterprise Pvt. Ltd, Ramnagar, Khelma, Silchar.

(iv) The betel nuts were weighed and representative samples were drawn.

(v) None of the drivers/ helpers of the trucks and the caretaker/ owner of the godown could produce any document in support of the legal importation of the recovered betel nuts, believed to be of foreign origin on the reasonable belief that the said betel nuts were illegally imported into India from Myanmar Border in violation of the provisions of Customs Act, 1962.

(vi) The seven trucks were also seized on the reasonable belief that they are liable to confiscation under Section 115(2) of the Act, 1962.

(vii) Show cause notices under Section 124 of the Act, 1962 were issued to the parties for confiscation of goods under Section 111(b) & (d) of the Act, 1962 etc.

(viii) Thereafter, the appellant No. 2 i.e. Additional Commissioner of Customs (preventive), NER, Shillong directed the betel nuts recovered to be confiscated except from truck No. As-01 BC-8785 being found to be conforming with the prescribed standard. Penalties were also imposed under Section 112(b) (i) of the Act, 1962.

(ix) Being aggrieved by the original order dated 18.03.2022 passed by the adjudicating authority i.e. Additional Commissioner of Customs (Preventive) NER, Shillong, respondents filed appeals before the learned Commissioner (Appeals), CGST, Central Excise & Customs, Guwahati.

(x) The appellate authority under its order dated 31.12.2020 dismissed the appeal holding that seized goods were of foreign origin and the confiscation orders are legal.

(xi) Being aggrieved, the respondent preferred an appeals before the Appellate Tribunal and the Appellate Tribunal under its order dated 10.11.2021 allowed the appeals and set aside impugned orders with consequential relief to the appellants if any. Being aggrieved, the present appeal is preferred.

5. <u>Findings of the Adjudicating Authority:</u>

The Adjudicating Authority while passing the order dated 18.03.2020 concluded the following:

(i) The goods under seizure are undoubtedly of foreign origin. The statement of the noticees and report of

the forensic laboratory confirms the fact that goods are smuggled in nature.

(ii) There is a trend of smuggling of contrabands, specifically betel nuts from the neighboring countries into India, which is established from intelligence reports and regular seizures made by various agencies located in the Northeast region.

(iii) The noticees had failed to produce any document of legal importation/ transportation/ possession of the said goods and therefore, the betel nuts are illegally smuggled to India.

(iv) The confession by the noticees that goods were smuggled across the border into India rendered the seized goods of foreign origin and liable to be confiscated under provision of Section 111 of Customs Act, 1962.

6. <u>Finding of the Appellate Authority:</u>

The appellate authority reaffirmed the aforesaid finding and concluded the following:

(i) The appellants including those persons who have claimed ownership over the goods were unable to provide any contrary papers to prove that goods were purchased in Mizoram and were not of Myanmar origin.

(ii) The case in question is a case of transportation of areca nuts within the definition of commercial fraud as smuggling of areca nuts in such large commercial quantities itself shows that it is done for

commercial purpose.

(iii) The parties have not contested the penalties imposed on them and thus, proved that they have accepted the penalties for the act of illegal bringing of goods into the territory of India and the parties have impliedly accepted that the goods were of foreign origin and accordingly, forfeited their right to claim that the goods were of Indian origin.

7. <u>Findings of the Appellate Tribunal:</u>

The Appellate Tribunal reversed such decisions on appeal and the decision of the learned Appellate Tribunal can be summarized as follows.

(i) Undisputedly, the goods were seized within India at Assam Mizoram border. The GST Invoice, E-Way Bills etc. produced by the appellant were found to be not satisfactory by the adjudicating authority.

(ii) Under Section 123 of the Act, 1962, the burden to prove shall be shifted to the persons from whom the goods were seized, when the seizure was under reasonable belief that goods are smuggled and that the goods in question are gold or manufactures thereof or watches or any other class of goods which are notified by the Central Government in official Gazette. In the case in question, there is nothing on record to show that the betel nuts were notified under Section 123 (2) of the Act, 1962. That being the position, the appellants had no responsibility

to prove that seized betel nuts were not smuggled, even if they were of foreign origin and it is for the revenue to establish that the goods in question are smuggled.

(iii) From the definition of 'smuggling', it is clear that even when the goods are of foreign origin, if they have been imported and cleared for home consumption, they cease to be imported goods and the importer ceases to be importer and no duty can be assessed on such goods under Section 17 of the Customs Act.

(iv) The burden of proof shifts to the importer or owner of the goods, only when such goods are notified under Section 123 and betel nuts are not notified goods under Section 123.

(v) The department has not proved the case that goods were smuggled goods.

8. <u>Arguments advanced on behalf of the appellants</u>:

Mr. S.C. Keyal, learned counsel for the appellants argues the followings:

(i) The department has been able to prove their case in as much as the respondent has admitted that the areca nuts were received in Champhai, Mizoram, which were brought on horse load in the night.

(ii) The learned CESTAT has insisted on the proof beyond reasonable doubt inasmuch as standard of proof as required under Section 123 of the Customs Act, 1962 is not to prove the case beyond reasonable doubt

but by mere preponderance of probabilities. The standard of proof in case of all other goods except notified goods should be preponderance of probability. It is enough when the department furnishes prima-facie proof of the goods being smuggled.

(iii) Thus, the learned tribunal has failed to appreciate that in the given fact and circumstances the department has proved the probability of the goods to be smuggled one.

(iv) It is also contended that the learned tribunal has failed to appreciate that areca nuts seized were not fit for human consumption and therefore, it cannot be released to the respondent. The learned tribunal has failed to take cognizance of the report of the Export Inspection Agency, Kolkata Laboratory, which reported that sample tested were damaged and were not in conformity under the provision of the Food Safety and Standard (Food Products Standard and Food Additive) Regulations, 2011. Therefore, a direction ought to have been issued to destroy the seized areca nuts as per disposal manual.

(v) Relying on the judgment of Hon'ble Apex Court in the case of ***Shah Gumman vs State of Andhra Pradesh*** reported in ***AIR 1980 SC 793***, Mr. Keyal submits that the presumption under Section 106 and 114 of the Evidence Act,1872 shall not be available in case of Section 123 of the Act, 1962.

9. <u>Arguments advanced on behalf of the respondent</u>:

Mr. N Dasgupta, learned counsel for the respondent argues the followings:

(i) In absence of any tangible evidence in support of the seizure, the learned Appellate Tribunal had rightly set aside the order of confiscation and had allowed the appeal of the respondents with consequential relief.

(ii) Betel nut is neither prohibited nor restricted goods as notified under Section 123 of the Customs Act, 1962, therefore, the burden lies on the Department to prove that goods were of foreign origin and that too not legally imported but smuggled. Therefore, the finding of the learned Appellate Tribunal cannot be said to be perverse.

(iii) The learned Appellate Tribunal is the final fact finding authority under Section 129 B (4) of the Customs Act, 1962. The learned Tribunal is not bound to explain the reason on which a decision has been arrived at, as per settled law.

(iv) Food test is alien to seizure and confiscation proceeding under the Customs Act, 1962, therefore, it cannot form part of being substantial question of law inasmuch as custom authorities are not entitled to draw the food sample, which is a highly specialized job.

(v) Betel nuts have non-consumption usage use as well as recognized by different authorities.

Therefore, the finding of the learned Appellate Tribunal cannot be faulted with on this count.

10. **Determination of this Court**:

(i) Section 123 of the Act, 1962 provides that where any goods included under Sub-section 2 of Section 123 are seized under the provision of the Act, 1962, on the basis of reasonable belief that the same are smuggled goods, then the burden of proving that they are not smuggled goods, shall lie upon the person from whose possession such goods have been seized and in a case, when another person claims to be owner thereof though such goods have not been seized from his possession, upon such claimant and in other cases on the person, who claims to be owner of the goods so seized.

(ii) Sub-section (2) of Section 123 clearly provides that Section (1) shall apply to gold and manufactures thereof, watches and any other classes of goods, which the Central Government may by notification in the official Gazette specify.

(iii) Therefore, the condition precedent is that the revenue authority must have a reasonable belief that goods seized were smuggled goods and fall under the category of goods enumerated or notified under Subsection 2 of Section 123 of the Custom Act, 1962.

(iv) In the case of the Union ***of India and Ors.***

vs M/s Magnam Steel Ltd. (Civil Appeal Nos. 9597-9599 of 2011) decided on 02.03.2023, Hon'ble Apex Court held that the power of search available under Section 105 of the Act, 1962, which confers power to search such premises upon an Assistant Commissioner of Custom and Deputy Commissioner of Custom subject to the condition that the officer must entertain reasons to believe that goods are liable to confiscation or documents relevant for such proceeding are secreted in any place. It was further observed that the person authorizing the search must express his satisfaction that the material is sufficient for him to conclude that search is necessary.

(v) In the case in hand it is undisputed that on the basis of a specific intelligence report the search was conducted in a Thermal Power godown at Bairabi but nothing was found. The In-charge of the godown in his recorded statement clearly declared that the godown belongs to the Thermal Power Department and no smuggled goods were stored therein.

(vi) However, while returning back, the officers on mere suspicion searched two stationary trucks and found them to be loaded with betel nuts and the drivers failed to produce any documents. On receipt of further information, three more betel nut trucks loaded with betel nuts were found at the hill top of the Ramnathpur area. Then they went to find out the driver of the said trucks.

Thereafter, further searches were conducted and two more trucks were found. Thus, accordingly, seven trucks loaded with betel nuts were seized.

(vii) It is also an admitted position that during examination GST Invoices and E-Way bills were produced.

(viii) Thereafter, another search was done in one godown at Bairabi where 196 bags of betel nuts believed to be of foreign origin were seized.

(ix) There is nothing on record to satisfy that the revenue officers had material before them to have satisfaction that the goods were of foreign origin and imported to India without due procedure.

(x) It is also an admitted fact that areca nuts or betel nuts are not a notified item under Section 123 (2) of the Act, 1962. That being so, the initial burden to show that the material seized is of foreign origin lies upon the revenue authority. In a given fact, such onus may shift to the assessee, however, the foundational fact that the goods seized are of foreign origin lies upon the revenue authority, when the same are not notified goods under Section 123.

(xi) The learned appellate tribunal has not held that standard of proof as envisaged under Section 123 of the Act, 1962 is beyond reasonable doubt. What it has concluded is that the burden of proof under Section 123 (1) of the Act, 1962 is not applicable, in the present case

for the reason that the seized goods suspected to be of foreign origin were not notified goods under Section 123 (2) of the Act, 1962 and such a view is the correct view. Therefore, the first question of law framed is answered against the appellant.

(xii) Coming to the question of perversity, as discussed hereinabove, it is clear that the revenue authority has failed to discharge its initial burden and also failed to lay the foundational fact that the suspected goods were of foreign origin. The GST Invoices etc were not believed by the Adjudicating authority as well as by the Appellate authority, however, why such documents were discarded is also not discernible from contents of both the decisions.

(xiii) There is nothing on record, to even have a prima-facie view that the goods were of foreign origin, more particularly for the reason that the goods were seized within Indian Territory and there is nothing including any foreign markings on the bags to even remotely suggest that the goods seized were of foreign origin. There is also no credible expert opinion regarding the origin of the goods. Therefore, only on the ground that different authorities in Northeast had made seizures of betel nuts in large quantities, it cannot be concluded in every individual case that such betel nuts are also of the foreign origin, without any tangible material being

available with the authorities.

(xiv) Therefore, in the considered opinion of this court the learned Tribunal has rightly come to the conclusion based on apropos appreciation of material available on record. Therefore, the decision of the learned Tribunal cannot be treated as perverse. Accordingly, the substantial question of law framed as regards perversity is also answered against the appellant and in favour of the respondents.

(xv) Coming to the point of quality of the seized betel nuts, it is reflected from record that immediately after the seizure, on examination by scientific expert, the goods were found to be fit for human consumption. However, in the second test conducted after almost seven months, the same goods were found to be not fit for human consumption. If that be so, it cannot be a concern of the Customs Authority to assail the decision of the Tribunal on the ground that the Tribunal ought not to have set aside the order of confiscation inasmuch as from the record itself it is established that the goods seized became unfit for human consumption during the period they were under seizure.

(xvi) If the confiscated goods are used for human consumption after its release, the same will give a different cause of action for different authorities to take action against those persons in accordance with law and it

cannot be within the jurisdiction and concern of the Customs authority. Accordingly, this substantial question of law is also answered against the appellant and in favour of the respondents.

(xvii) Accordingly, the present appeals stand dismissed being devoid of any merit. Parties to bear their own costs.

JUDGE **CHIEF JUSTICE**

Comparing Assistant