Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Customs Appeal No.11776 of 2017

(Arising out of OIO-JAM-CUSTM-PRV-COM-003-17-18 dated 11/07/2017 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV))

Karan K Khoyani **.........Appellant**
Proprietor Of M/S Om Shanti Beads,
Om Krupa, Sant Kabir Road, Near Sardar School,
Rajkot, Gujarat

VERSUS

C.C.-Jamnagar(prev) **.........Respondent**
Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar, Gujarat

WITH
Customs Appeal No.11777 of 2017
(Arising out of OIO-JAM-CUSTM-PRV-COM-003-17-18 dated 11/07/2017 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV))

Dhirajlal P Khoyani **.........Appellant**
Proprietor Of M/S Om Bangles,
Dudh Sagar Road, Near Echjay Steels,
Rajkot, Gujarat

VERSUS

C.C.-Jamnagar(prev) **.........Respondent**
Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar, Gujarat

AND
Customs Appeal No.13015 of 2018
(Arising out of OIO-JAM-CUSTM-PRV-COM-003-17-18 dated 11/07/2017 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV))

Amit Babulal Jain **.........Appellant**
Prop. M/S Om Shanti Impex, 2,
Bombay Talkies Compound, Harukhan Road, Malad
Mumbai, Maharastra

VERSUS

C.C.-Jamnagar(prev) **.........Respondent**
Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar, Gujarat

APPEARANCE:
Shri. Vikas Mehta, Consultant for the Appellant
Shri. Sanjay Kumar, Superintendent (AR) for the Respondent

CORAM: **HON'BLE MEMBER (TECHNICAL), MR. RAJU**
HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA

Final Order No. 12082-12084 /2024

DATE OF HEARING: 03.09.2024
DATE OF DECISION:23.09.2024

SOMESH ARORA

The common facts in three appeals in which appellants Shri. Amit Babulal Jain proprietor firm of M/s. Om Shanti Impex has been subjected to penalty and Shri. Dirajala Khoyani proprietor of M/s. Om Bangles and Karan K Khoyani, Proprietor of Om Shanti Beads have been subjected to confiscation, redemption fine on goods and personal penalties, either as proprietor or as deemed owners of other firms, are as follows:-

2. On 21.05.2016, DRI placed under seizure (detained earlier on 16.05.2016), chatons from the premises of M/s. Om bangles, Rajkot and M/s Om Shanti Beads, Rajkot on the ground that Shri Dhirajlal P. Khoyani, who was present was unable to produce documents like Bill of Entry, invoice, etc. showing legitimate import of the said goods of Chinese origin, which were not otherwise notified items.

21. In statement dated 16.05.2016 of Shri Dhirajlal Khoyani, it was inter alia recorded that he had purchased the goods from M/s. Om Shanti Impex, Mumbai (Proprietorship of Shri Amit Jain). He admitted that he was not aware about any details of import by Shri Amit Jain. It was also recorded in his statement that goods were imported by way of mis-declaration (though it is an admitted position that Shri Dhirajlal Khoyani made no import).

2.2 Statement of Shri Amit Jain, Proprietor of M/s. Om Shanti Impex was recorded on 06.06.2016, wherein, he inter alia stated that he was a trader of chatons and had purchased the same from various importers and sold them to various buyers; that they never received or issued bill in this regard to avoid octroi, VAT/Sales tax; that he had purchased the goods found from possession of Shri Dhirajlal Khoyani from M/s. Kanak Dhara Agro Tech Pvt. Ltd., Indore; that he received delivery from said seller at Bhiwandi and dispatched the same to M/s. Om Shanti Beads, Rajkot by M/s. M. Vitthal Transporter.

2.3 Statement of Shri Gaurav Kushwaha @ Shri Indrajitsingh, Director of M/s. Kanak Dhara Agro Tech Pvt. Ltd. was recorded on 17.06.2016, wherein, he inter alia stated that he had sold imported chatons to Shri Dhirajlal Khoyani in two lots of 7.5 MT (directly) and 7.9 MT (through Shri Amit Jain) and at the time of sale, he had not issued any invoice.

3. DRI verified the details of 17 bills of entry produced by Shri Gaurav Kushwaha @ Shri Indrajit singh and found that there was variation (weight-wise) between the seized goods and goods covered by the said Bills of Entry. However it was pleaded by the appellants that 5868.13 Kgs and 2093.97 Kgs was respectively tallying. The Ld. Adjudicating Authority upheld the charge of smuggling and ordered for confiscation of goods under Section 111 (d), (f) and (l) of Customs Act,1962 and imposed penalty on the appellants under Section 112 (a) of Customs Act,1962. Aggrieved by the order appellants in present appeal have inter alia taken the following grounds:

3.1 That Ld. Adjudicating Authority has not cited any evidence to support the following findings on page 37 of appeal memo:

> *"16.3.3 .. Hence, I find that the seized goods were imported by mis-declaring and/or concealment with some other goods and hence, are smuggled goods…"*

Further, in para 18 (page 39 of appeal memo), Ld. Adjudicating Authority has found that:

> *"…I find that the fact which prevails in the subject case is that they all (i.e. Shri Dhirajlal Khoyani, Shri Amit B. Jain and Shri Gaurav Khushwah) have conspired in such a way that they arranged a game plan to evade the VAT/Octroi/Sales Tax..etc, which is forthcoming from their initial statementrs which reveals that they do not raise the invoice/Bills."*

3.2 In other words, the sale-purchase transactions between Shri Gaurav Khushwah, Shri Amit Jain and Shri Dhirajlal Khoyani have been duly acknowledged by Ld. Adjudicating Authority. Consequently, sale of chatons by Shri Gaurav Khushwah to Shri Dhiraj Khoyani is also confirmed.

3.3 The appellants also submitted that they produced a total of 17+7=24 Bills of Entry received from Shri Gaurav Khushwah before Ld. Adjudicating Authority along with a chart to show that goods were duly covered by the said Bills of Entry. It was also submitted that the goods are repacked after import and hence, markings on boxes were of no consequence. However, Ld. Adjudicating Authority, instead of citing any positive evidence to discharge their burden or to shift back onus on them regarding smuggling by any goods by any means, passed the impugned order, notwithstanding the provisions of Section 123 of Customs Act,1962.

3.4 The appellant relied upon the decision of Hon'ble High Court of Mumbai in the case of Commissioner of Customs (Preventive) versus Mahendra Singh Purohit, 2008 (225) ELT 426 (Bom.), which sustained the order of the Tribunal, wherein, it was inter alia held that even if the duty paying documents produced by the party did not tally with the description of the goods, still the onus was on the revenue to discharge the burden by producing positive evidence. In the absence of such evidence, the confiscation order cannot be sustained. Appellants also placed reliance on the decision of the Tribunal in the case of Dinanath Maurya versus Commissioner of Customs, Lucknow, 2001 (131) ELT 203 (Tri. – Kolkata), wherein, it was, *inter alia*, held that mere fact that the goods were of foreign origin is not sufficient to hold that they are smuggled goods and the failure of the possessor to show the legal acquisition cannot be held to be a circumstance against the appellant. The Revenue is required to produce positive and affirmative evidence showing illegal import of the goods.

SUBMISSIONS BY THE DEPARTMENT :-

4. A.R. in response vide its letter dated 11.09.2024 and 13.09.2024 *inter alia*, submitted as follows:-

4.1 Appellants have filed this appeal before Hon'ble Tribunal. Main contention of the appellants is that as Chatons are non-notified goods under Section 123 of the Customs Act, 1962, hence onus lies on the Department to prove that seized goods are smuggled. In this regard it is to submit that term 'Smuggling' has been defined under Section 2(39) of the Customs Act, 1962 which reads as under:

(39)"smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113;

5. Thus, the omission of any act which renders the goods liable to confiscation under Section 111 or Section 113 of the Customs Act, 1962, Such Act is 'smuggling' as per the Section 2(39) of the Act. In this case, seized chatons were in commercial quantity and Chinese origin, as confessed by concerned persons in their respective statements, corroborated by description found on the boxes of the Chatons. During the investigation and adjudication process, applicants had produced total 24 Bills of Entry in support of their import but it was not tallied with the seized goods. Hence, seized goods were imported by mis-declaring and/ or concealment with some other goods. Thus, the subject goods correctly fall under the definition of 'Smuggling' in terms of provision of Section 2(39) ibid.

5.1. The appellant relies upon the decision of Hon'ble High Court of Mumbai in the case of Commissioner of Customs (Preventive) versus Mahendra Singh Purohit, 2008 (225) ELT 426 (Bom.), thereby sustaining the order of Hon'ble Tribunal, wherein, it is inter alia held that even if the duty paying documents produced by the party did not tally with the description of the goods, still the onus was on the revenue to discharge the burden by producing positive evidence. In the absence of such evidence, the confiscation order cannot be sustained. In this regard it is submitted that present case is distinguished from the case mention above as in this case not only duty paying documents not matched with seized goods but also Department had produced the evidence that the Description on the packets placed in 204 boxes and the 251 boxes which were seized, indicates seized goods were Chinese origin. This facts are also confesses by the applicant. Therefore, onus is transferred to the applicant to discharge the burden of proof.

5.2. Appellant also relied on the decision of Hon'ble Tribunal in the case of Dinanath Maurya versus Commissioner of Customs, Lucknow, 2001 (131) ELT 203 (Tri. Kolkata), wherein, it is inter alia held that mere fact that the goods were foreign in origin is not sufficient to hold that they are smuggled goods and the failure of the possessor to show the legal acquisition cannot be held to be a circumstance against the appellant. The Revenue is required to produce positive and affirmative evidence showing illegal import of the goods. In this regard it is submitted that fact of the said case is different from the current case. In the case mentioned above Department had produced only statements of concerned persons who confessed the seized betel nuts were foreign origin wherein the current case not only applicants confessed in their statements that seized chaton were chinese origin but also description on the packets placed in 204 boxes and the 251 boxes which were seized, indicates seized goods were of Chinese origin. Now, onus is on the applicant to prove that seized goods were not illicit import and they have failed to prove the same.

5.3. Further, it is to submit that 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. In this regard, the following judgments are relied upon:

(a) Judgment of Hon'ble Madras High Court in the case of Conybio Healthcare (India) P. Ltd. in AIR 2023(383) E.L.T. 434 (Mad.)/202 1 Centax 97 (Mad.) wherein it is held that apart, under the Customs Act, 1962, strict rules of evidence under the provisions of Indian Evidence Act, 1872, do not strictly apply to quasi-judicial proceedings namely before the Adjudicating Authority under the Act. Finding of facts and conclusion thereon is to be determined on the principle of preponderance of probability. If the department makes out a case based on the aforesaid well settled principle of law of preponderance of probability, the proposal in the show cause notices can be confirmed.

(b) Judgment of Hon'ble High Court of Madras in the matter of JET UNIPEX in AIR 2020 (373) E.L.T. 649 (Mad.) wherein it is held that the Department is not governed by strict rules of evidence. The Department shall be governed by preponderance of probability and Customs Valuation Rules, 2007 read with Section 14 of the Customs Act, 1962.

(c) Further relying on the judgment of Hon'ble High Court of Gujarat in the case of Rama Nagappa Shetty in AIR 2020 (374) E.L.T. 683 (Guj.) wherein it is held that Statements Recorded before Revenue officer under Section 108 of Customs Act, 1962 admissible in evidence being not recorded before Police, and not hit by Section 34 or 30 of Indian Evidence Act, 1872.

(d) Judgment of Hon'ble Apex Court in the case of M/s. D. Bhoormull in AIR 1983 (13) E.L.T. 1546 (S.C.) wherein it is held that in the case of smuggled goods if no direct evidence of the illicit importation of the goods was adduced by the Department, circumstances of a determinative character which coupled with the inference arising from the dubious conduct of party, could reasonably lead to conclusion, that they were smuggled goods.

(e) Judgment of Hon'ble CESTAT Principal Bench in the case of M/s. Ganapati Rollings P. Ltd. in 2015 (315) E.L.T.91 (Tri. Del.) wherein clandestine removal of final product was in knowledge of applicant and cleared without payment of duty established from their initial statements demand upheld.

(f) Judgment of Hon'ble Tribunal Delhi in the case of Thermotech in 2014(4) ECS (62)(Tri-Del)(337-KB) wherein it is held that in a clandestine activity, it is not possible to unearth every piece of evidence and such standard of proof is not required for proving evasion of tax. The standard of evidence in a civil disput is preponderance of probability, not beyond any reasonable doubt.

(g) Judgment of Hon'ble Tribunal Ahmedabad in the case of Western India Ceramics Pvt. Ltd. in 2014(4) ECS(103)(Tri-Ahd)(103-KB) wherein it is held that in the case of admitted clandestine manufacture, on-accountal of stock properly and clearance of part of the goods through fictitious firm M/s. Labh Traders created by the appellant. The clandestine removal was corroborated by statement of the employees of the main appellant and other persons.

(h) Judgment of Hon’ble Appex court in the case of Alnoori Tobacco Products in 2004(170) E.L.T. 135(S.C.) wherein it is held that Judged do not interpret judgments they only interpret statutes observation of court have to be read in context in which they were stated and not as statue.

5.4 It was submitted that by nature, chatons do not bear any markings on them. They are identified by the description made on the boxes in which they are contained. In the present case, description found on the boxes clearly indicate that seized goods were of Chinese Origin. Further, Applicant is not the manufacturer but trader of chatons and has accepted in his statement that goods are of Chinese origin. However, he has failed to produce any valid document i.e. invoice/ bills of entry, in this regard. In the present case Department has proved that seized goods were of Chinese origin by virtue of the description found on the boxes and confessional statements of the applicants. 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. Therefore, onus was shifted on the applicants to prove that seized goods were not illicit import. It was submitted that identification and valuation of the Chatons are based on their size also. Therefore, allegation of the applicant that smuggled nature of the chatons was solely based on the alleged variation in term of size is baseless. but is an important criterion to identify the goods. Further, at the adjudication stage, Shri Gaurav Kushwaha, produced 7 additional Bills of Entry in which goods were not of Chinese origin. This shows applicant's desperate attempt to prove that seized chatons were legitimately imported and is an afterthought to misguide the Adjudicating Authority.

5.5 Further, the applicants failed to produce any valid documents which proved that goods were imported legally. Rather, Noticees in their statements confessed that seized goods were imported by way of mis-declaration and were of Chinese origin. They did not produce any documents ie. Bills/Invoice/Bills of Entry or any purchase documents of said foreign origin goods. They never received or issued bill in this regard to avoid Octroi, VAT/Sales tax. This clearly shows that they were involved in the fraud to evade the duty.

5.6 In various Judgments, Hon'ble Courts have observed that fraud vitiates everything and in the fraud cases Department is not required to prove its case with mathematical precision, but what is required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the facts in issue. Details of a few such Judgments are as under:-

i. Hon'ble Principal Bench, New Delhi in the Final Order No. 58563- 58568/2024 in the matter of M/s. C Cube Consulting Pvt. Ltd. and others held that case of fraud by forging transaction values to have illegal gain of Customs duty "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud.

ii. Hon'ble Apex Court in Case No. 2022 (382) E.L.T. 145 (S.C.) in the matter of M/s Munjal Showa Ltd. held that fraud vitiates everything.

iii. Hon'ble Tribunal Madras in case of 2016-TIOL-381-CESTAT-MAD in the matter of M/s DCW LTD held that demand of duty under Section 28(1) of the Customs Act, 1962 is liable in the case where goods which were cleared by the appellant by forged/fake DEPB licences and forged TRAS.

iv. Hon'ble Tribunal Kolkata in case of 2016-TIOL-457-CESTAT-KOL in the matter of M/s Eastern Silk Industries Ltd and others held that fraud vitiates everything and transferee is also responsible to pay duty against such scripts obtained fraudutantly.

v. Hon'ble Apex Court in Case No. 2015 (319) E.L.T. 546 (S.C.) in the matter of M/s Tata Iron and Steel Co. Ltd. held that fraudulent misdeclaration made by the original licence holder deliberately suppressing the fact of availment of Cenvat/Modvat credit Wrong declaration filed to the licensing authority to obtain endorsement of transferability of the licence to the appellant - Extended period of limitation available.

vi. Hon'ble Tribunal Delhi in case of 2011 (267) E.L.T. 57 (Tri. - Del.) in the matter of M/s Friends Trading Co. held that Public revenue not to suffer on account of fraud committed by someone else just because scrips successfully transferred to assessee after fraudulently obtaining same.

vii. Hon'ble High Court of Punjab & Haryana in case of 2011 (267) E.L.T. 33 (P & H) in the matter of M/s Friends Trading Co. held that Fraud or suppression continues if document is not genuine and contrary interpretation defeating legislative intention and will enable perpetuation of fraud.

viii. Hon'ble Principal Bench, New Delhi in case of 2010 (259) E.L.T. 693 (Tri. Del.) in the matter of M/s Sona Castings held that Public revenue not to suffer on account of fraud committed by someone else, just because he successfully transferred scrip to importer after obtaining same fraudulently.

ix. Hon'ble Apex Court in Case No. 2009 (235) E.L.T. 587 (S.C.) in the matter of M/s Aafloat Textiles (1) P. Ltd. held that Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence.

x. Hon’ble High Court of Calcutta in case of 2005 (184) ELT 339 (Cal.) in the matter of M/s. ICI India Limited held that Credit available on the strength of a valid DEPB only and if the same is forged, it is non est therefore, there is no valid DEPB – No credit of duty can be derived thereunder.

xi. Hon’ble Apex court in case of 1983 (13) ELT 1546 (S.C) in the matter of M/s. D.Bhoormull held Department is not required to proved its case with mathematical precision, but what is required is the establishment of such a degree of probability that a prudent man may on its basis believe in the existence of the facts in issue.

In view of above facts and decisions, it was submitted that iinitial burden to prove that seized chatons were of foreign origin and smuggled in nature has been proved by the Department and onus was shifted on the applicants to prove that seized goods were not illicit import and in which they have failed. Hence, it was prayed to dismiss the appeals filed by Shri Karan Khoyani and Shri Dhirajlal Khoyani.

6. Further in rejoinder, advocate for the appellant submitted as follows:

6.1 It is an admitted position that goods, i.e., chatons is not notified under Section 123 of Customs Act,1962. The seized goods bore no foreign markings. The boxes bore markings resembling Chinese names.

6.2 In the written submission filed before this Hon'ble Tribunal, the Department has duly admitted that Shri Gaurav Kushwaha @ Shri Indrajit Singh, Director of M/s. Kanak Dhara Agro Tech Pvt. Ltd. had sold chatons to Shri Dhirajlal Khoyani in 02 lots of 7.5 MT (directly) and 7.9 MT (through Shri Amit Jain, Proprietor of M/s. Om Shanti Impex).

6.3. There is no allegation against Shri Gaurav Kushwaha that he had imported the goods by any illicit means.

6.4. Therefore, the allegation regarding smuggled nature of chatons is based solely on the alleged variation between the chatons (in terms of size) placed under seizure and chatons covered by the 17 bills of entry produced by Shri Gaurav Kushwaha before DRI, that were also produced by appellant before Ld. Adjudicating Authority along with 07 more bills of entry that were received by appellant from Shri Gaurav Kushwaha to establish licit import.

6.5. In their comments, department has cited variation narrated on page 63 and 64 of the appeal momo (para 5.2 (a) to (c) of the Show Cause Notice) to contend that goods were goods were different.

6.6. Without prejudice to the legal position that the burden of proof to establish smuggled nature in respect of non-notified goods is squarely on department, it is submitted that it is evident from the respective tables given in para 5.2 (b) and 5.2 (c) of the show cause notice that confiscation of

5858.12 kgs and 2093.97 kgs of chatons is not tenable given the admission in the show cause notice itself that these items were duly covered by 17 bills of entry that were produced by the importer, i.e. Shri Gaurav Kushwaha @ Shri Indrajit Singh, Director of M/s. Kanak Agro Tech Pvt. Ltd., before DRI as well as by the appellant before Ld. Adjudicating Authority.

6.7 In para 19.3.4 of impugned order, Ld. Adjudicating Authority has erred in failing to give due consideration to Annexure-"D" to reply filed by appellant, wherein, a comparison between the seized chatons with chatons covered by 24 bills of entry was duly made out. However, Ld. Adjudicating Authority has erred in failing to appreciate that except for 08 sizes, all remaining 24 sizes were tallying.

6.8 For the 08 sizes also, there is no positive evidence to establish illicit import by anyone. This item is available in open market, being a non-notified and freely importable item, it is humbly submitted that in the absence of any positive evidence, minor variation in respect of 08 sizes, *per se*, cannot tantamount to smuggling.

6.9 It is submitted that the variation in markings regarding country of origin on the boxes and not chatons, by itself, is not determinative of the goods under consideration inasmuch as the Shri Gaurav Kushwaha had sold goods to appellant by stating their origin as Chinese only. It is a general practice to re-pack chatons as per the convenience/requirement of sellers/buyers.

7. The decisions cited by Department in the written submission are not applicable to the facts of the case:

7.1 The decisions in Conybio Healthcare (India) P. Ltd. v/s Commissioner of Cus. (Airport & Air Cargo Compex), Chennai, 2023 (383) ELT 434 (Mad.) is not applicable as it does not deal with burden of proof that is required to be discharged by department while alleging smuggling of non-notified goods.

7.2 The decision in Jet Unipex v/s Commissioner of Customs, Chennai, 2020 (373) ELT 649 (Mad.) is about valuation of Plaster of Paris, wherein, it is held in para 70 ibid that adjudication proceedings cannot solely be based on the inculpatory statements of witnesses and noticee alone. Such statements can be only used for corroborating the case which the Department proposes to establish before the quasi-judicial authorities. Further, in para 71 ibid, it is held that the department is bound to prove the case based on balance of probabilities as per well-recognised principle of law in the case of departmental adjudications. In this case, Ld. Adjudicating Authority has brushed aside the documentary evidences that is part of show cause notice in the form of tables contained in para 5.2 (b) and 5.2 (c) as well as comparison submitted by appellant in the form of Annexure-D (Page 358 to 364 of appeal memo).

7.3 The decision in Rama Nagappa Shetty v/s Commissioner of Customs, 2020 (374) ELT 683 (Guj.) is regarding diversion of HDPE granules imported under DEEC scheme and not about burden of proof.

7.4 The decision of Hon'ble Supreme Court in the case of Collector of Customs, Madras and Others v/s D. Bhoormull, 1983 (13) ELT 1546 (S.C.) deals with import of prohibited items (para 36 ibid) and hence, not applicable to the facts of this case.

7.5 The decisions in Ganapati Rollings Pvt. Ltd. v/s Commr. of C. Ex. (Appeals), New Delhi, 2015 (315) ELT 91 (Tri. – Del), Thermotech v/s Commissioner of Central Excise, Delhi, 2013 (293) ELT 712 (Tri.-Del.), Western India Ceramics Pvt. Ltd. (Order No. A/11476-11477/2014 dated 01.08.2014 passed by Hon'ble CESTAT, Ahmedabad and Collector of C. Ex., Calcutta v/s Alnoori Tobacco Products, 2004 (170) ELT 135 (S.C.) deals with Central Excise duty and have not bearing on the requirement to discharge the burden of proof to establish smuggling under the provisions of Customs Act,1962.

7.6 The decision cited by Ld. Adjudicating Authority in the case of Abdul I. Albani v/s Commissioner of Customs (P), Mumbai, 2008 (228) ELT 471 (Tri-

Mumbai) would not apply considering that chain of consignor to consignee was established before investigating agency also.

7.7 The decision cited by Ld. Adjudicating Authority in the case of Commissioner of Customs v/s Vikram Jain, 2009 (244) ELT 504 (Kar.) is not applicable as consignor in that case was not traceable, as duly noted by Hon'ble Court in para 24 ibid.

7.8 Attention was invited to the decision of Hon'ble High Court of Mumbai in the case of Commissioner of Customs (Prev.), Mumbai v/s Aakash Enterprises, 2006 (205) ELT 23 (Bom), wherein, it is held that-

> *"**6.** It is pertinent to note that initially the case of the Revenue was that the seized goods were not the goods imported vide Bills of entry submitted by the respondent. However, on re-verification, the only discrepancies that were found were regarding the wrong description or incorrect country of origin. In the facts and circumstances of the case, therefore, the burden lay on the Department to produce some material/evidence to establish that the seized goods were smuggled goods which they miserably failed to do. As to whether the party upon whom the burden lies to prove a fact, has discharged the burden or not is always a question of fact.*
>
> ***7.** The impugned order does not give rise to any substantial question of law.*
>
> ***8.** Custom Appeal is dismissed in limine."*

Appeal filed by Revenue against above order has been dismissed by Hon'ble Supreme Court as reported at 2007 (215) ELT A 103 (S.C.).

7.9 Reliance is placed on the decision of Hon'ble Tribunal in the case of Om Merchants Exports (P) Ltd. v/s Commissioner of Customs, Lucknow, 2017 (358) ELT 643 (Tri-All.), wherein, it is observed that if possessors of non-notified goods are asked to explain possession, distinction between notified and non-notified goods gets blurred.

7.10 In the case of Moti Singh v/s Commissioner of Customs, Patna, 2006 (205) ELT 225 (Tri.- Kolkata), Hon'ble Tribunal has held that some discrepancy in weight or numbers would not establish that goods were imported in a clandestine manner.

7.11 The observation of Hon'ble Tribunal in the case of Rang Birangi Sarees (P) Ltd. v/s Commissioner of Customs, Kolkata, 2007 (219) ELT 574 (Tri.-Kolkta) is reproduced below for the ease of ready reference:

> *"7.* ***..in the event of seizure of non-notified goods, burden of proof is on the Revenue to prove that there was illegal import and inability of the litigant to produce documents showing legal importation does not ipso facto prove the goods were smuggled. Above citations also show that it is rule of law that the Department has to discharge burden of proof of importation of goods were in violation of law. The assessee should not be victim of vaxations (sic) (vexatious) litigation.*** *It is enough to say that smuggling is a clandestine carrying of goods to avoid legal duties. Secrecy and stealts (sic) (stealth) being its covering guards, it is impossible for the Preventive Authorities to un-ravel every link of the process. Many in its relating to this illicit business remained in special and peculiar knowledge of the person concerned in it. However****, this does not mean that the special and peculiar knowledge of the person proceeding against will relieve the prosecution or the Revenue altogether of the burden of producing some evidences in respect of that fact in issue.*** *But it was noticed that Revenue has miserably failed to bring proof of smuggling.."*
>
> (Emphasis Supplied)

8. In view of above, it was submitted that Department has failed to bring on record an iota of positive evidence to indicate smuggling of chatons by anyone. Hence, the order passed by Ld. Commissioner for confiscation of the same under Section 111 (f) of Customs Act, 1962 along with imposition of penalty on the appellants under Section 112 (a) is not tenable in the eyes of law.

9. With prejudice to above, it is submitted that neither DRI nor Ld. Adjudicating Authority have cited any rule of Customs Valuation Rules, 2007 nor observed any procedure laid down there under to determine the value of seized goods as Rs. 1,45,15,919/- (for goods placed under seizure at M/s. Om Bangles) and Rs. 1,79,47,178/- (for goods placed under seizure at M/s. Om Shanti Beads), it is submitted Ld. Adjudicating Authority has erred in levying redemption fine and penalty by considering such value(s) while adjudicating the notice.

10. Therefore, it was prayed to quash and set aside the impugned orders and allow the appeals filed by both the appellants.

FINDINGS:-

11. We have considered the rival submissions made in detail before us by both sides, as well as the facts of the case and relevant case law placed before us for consideration. We have also considered various grounds taken and rebuttal aforesaid by the department as well as by the appellants. We find that that the impugned goods in the present i.e. chatons are non-notified goods under section 123 of the Customs Act which carves out exception in cases where the goods notified as mentioned in Clause (2) of aforesaid Section and as notified are involved. For all other non-notified goods or non mentioned goods, burden of proof is clearly on the department. In the present case, the goods involved i.e. chatons are non-notified under the Customs Act, 1962. It is well settled law that burden of proof remains constant on the party to the litigation on whom, it is placed. Whereas onus of proof being dynamic parameter keeps shifting. Initially, it is on the person on whom burden of proof lies and can shift to the other side if proof to the detriment of second party is produced. Onus is attempted initially to be shifted by the person on whom burden of proof is placed. This is done through initial evidences required to be provided by the person or litigant on whom burden of proof is placed. In the instant case, it is for the department of prove that the goods which entered the territorial waters and/land mass of India were not properly imported but were smuggled. This can require to prove foreign origin as well as smuggling of goods. From the brief facts, narrated by the department in their written submissions, it appears that Shri Dhirajlal Khoyani, Proprietor of M/s. Om Bangles & Power of Attorney Holder of M/s. Om Shanti Beads were persons whose statement were recorded during initial seizure, as they were unable to produce any Bill of Entry invoice etc. Shri Dhirajlal Khoyani as per his statement as brought out by department stated that all seized goods were of Chinese origin but were not imported directly by him, instead same were procured by him from M/s. Om shanti Impex, Mumbai of which Shri. Amit Jain was the Proprietor. The statement also has a content that goods were imported by way of mis-declaration but does not indicate the nature of mis-

declaration or by whom, the same were imported or mis-declared. Further statement of Amit Jain, Propritor by M/s. Om shanti Impex was recorded on 06.06.2016 wherein, he inter alia stated that the goods found in possession of Shri Dhirajlal Khoyani were procured by him from M/s. Kanak Dhara Agri Tech Pvt. Ltd., Indore and same were supplied by him to M/s. Om Shanti Beads. Further statement of Shri. Gaurav Kushwaha (@ Shri. Indrajit Singh, Director of M/s. Kanak Dhara Agro Tech Pvt. Ltd.) was recorded on 17.06.2016 by the department, wherein, he, inter alia, stated that he had sold imported chatons to Shri. Dirajlal Khoyani directly and through Shri. Amit Jain. But at the time of sale, he had not issued any invoice. He provided 17 Bills of Entry as proof of his import which on verification were not found to be tallying with seizure quantity and size of the goods recovered from the premises of M/s. Om Shanti Impex. On the basis of this verification, as per show cause notice seizure was made and adjudication proceedings were started. In the whole sequence of events, we find, Shri Dhirajlal Khoyani proprietor of M/s. Mo Shanti Bangles & Power of Attorney Holder had initially stated that chatons were of Chinese origin and goods were imported by mis-declaration concealment/mis-declaration with other goods though no details were provided nor were they proved to be actual doing the import of goods. However, Shri. Gaurav Kushwaha the person, who actually imported the chatons never admitted that he was involved in smuggling or mis-declaration but only indicated that the goods were being sold by him only to Amit Jain and Dhirajlal Khoyani also. The good were of Chinese origin is not a point in dispute as the same was admitted and even packing on the premises indicated the origin of goods and it is also stated position as per Dhirajlal Khoyani.

12. The Counsel for the appellant submits that apart from above 17 Bills of Entry of Shri. Gaurav Kushwaha used in the show cause notice, they produced another 24 Bills of Entry not recovered or produced by Shri. Gaurav Kushwaha at the time of visit of DRI etc. and same Bills of Entry, the authenticity of which was never doubted as forged etc. indicated that substantially, the goods i.e. 24 out of 32 sizes were tallying. This according to him, clearly showed the

goods were not smuggled but were properly imported through Indian Customs by Shri. Gaurav Kushwaha and dismissing the same, on the ground of afterthought was clearly an omission which rendered the impugned order unsustainable. It was, therefore, the appellant's case that the department has not proved the goods to be of smuggled nature and burden of proof does not stands discharged by the department. We find that the omission which was of issuing goods without invoice/Bills does not discharge the burden of proof that the goods were smuggled into territory of India. Department should have appreciated that it is not for the appellant to prove that the goods were properly imported but it was for the department to prove that the same were smuggled into India. Even, if in the initial statements, it was mentioned that goods were being brought under guise of other goods, same does not stand corroborated by the department as the statement does not indicate the dates on which such clearances were made nor the proprietor of M/s. Kanak Dhara Agro Tech Pvt. Ltd admitted any attempts of smuggling in the manner described or even otherwise of the chatons. Further, it was department only who chose to carry out investigations further which rather weakened its case both in testimonies as well as in documents. There is nothing to indicate as to why such disguised goods were getting cleared from Mumbai port and by whom and how the port Customs was unable to consistently detect such concealment. To the contrary, the factum of importer being involved in importing goods legally and himself not having admitted to doing any concealment is contrary to the department's claim. Therefore, department has not been able to discharge the burden of proof of goods being smuggled and even if through initially testimonial statements, the department was able to shuffle the onus of proof on Shri. Dhirajlal Khoyani through his own statements, the same stands disproved by later investigations of the department done in Mumbai/ Indore with the actual importer and also by substantially tallying of quantity through 24 Bills of Entry produced by the appellant during course of adjudication process. The appellants have clearly shifted back the onus on the department and even their investigators could not bring on record anything relating to goods being smuggled. Simply proving that goods were of Chinese origin does not help the case of the department, as whatever is of foreign origin may or may not be smuggled goods till the department proves, the same with positive un-rebuttable evidence. The facts and circumstances of the case and after considering various case law brought before us, we find that the decision reported in 2006 (205) ELT 23 (Mum.) in the matter of Commissioner of Customs (Prev.), Mumbai v/s Aakash Enterprises, is the most relevant to the facts of the case as reproduced in the relevant portions as follows:-

> ***Para 4.*** *"It would be, thus, seen that the Supreme Court held that even if a person who is to be proceeded against has a special or peculiar knowledge, facts, the Department is not relieved of its burden to establish that the goods have entered into the country illegally and that the said goods were smuggled.*
>
> ***Para 5.*** *In the light of the legal position highlighted by the Supreme Court in D. Bhoormull, it cannot be said that any wrong principle of law was applied by the Tribunal.*
>
> ***Para 6.*** *It is pertinent to note that initially the case of the Revenue was that the seized goods were not the goods imported vide Bills of entry submitted by the respondent. However, on re-verification, the only discrepancies that were found were regarding the wrong description or incorrect country of origin. In the facts and circumstances of the case, therefore, the burden lay on the Department to produce some material/evidence to establish that the seized goods were smuggled goods which they miserably failed to do. As to whether the party upon whom the burden lies to prove a fact, has discharged the burden or not is always a question of fact."*

Following the ratio of the aforesaid decision and consideration of various facts and non-notified nature of the goods, we hold that department has not discharged the burden of proof to indicate that the goods were actually smuggled into India. Further, the preposition put forth by the department that fraud vitiates everything can be put into use only when forgery is proved as was the matter before Supreme Court in M/s. Munjal Showa Ltd. as reported in 2022 (382) ELT 145 (S.C.). In the instant case, illegal importation of the goods is far from proved. Therefore, the decision mentioned by the department cannot apply in the facts and circumstances of this case. Further, without conceding that initial onus was shifted merely by recording statements that the goods were mis-declared which were not corroborate, but rather were disproved by the detailed investigation, onus of proof had not shifted on the appellant party, but to the contrary continued with the department by the outcome of later investigation. Party had substantially proved through the Bills of Entry brought in later (which were not shown by the department to be forged etc.) that the goods were as per the Bills of Entry produced later. Therefore, even onus of proof had in any case again shifted back to the department. The burden of proof, therefore, is far from discharged by the department to show the smuggled nature of the impugned goods. In this regard, the following decisions also provide us the guiding light.

- 2016 (343) ELT 78 (Del.) -Commissioner of Customs vs. Lakhpatri

> ***Para 2.*** *"The bare reading of the provisions of Section 123 of the Customs Act clearly shows that burden of proof is on the person having possession of the goods but only if the goods are specified goods under that Act import of which is not permissible or is permissible with sanction of the authorities and in accordance with law. In the present case, it is not disputed before us that goods in question, i.e., ball bearing is not a specified item under Section 123 of the Act. As such, the burden was on the Department to show that the goods were smuggled in the country. Having failed to discharge their onus, the mere suspicion could not take place of proof and it is so rightly been concluded by the Appellate Authority*."

- 2012 (276) ELT 503 (Mad.)-Commissioner of Customs, Chennai vs. A K. Hamsa Mohideen

> ***Para 4.*** *"The factual findings are that the goods in question, though of foreign origin are freely available in the market and they are non-notified goods. Even in the initial statement, the respondent had stated that the goods had been purchased from one Sujavuthin and therefore, the respondent claimed to be the purchaser of the goods. Therefore, the Tribunal rightly held that the onus is on the authority to establish that the goods were smuggled. In Gian Chand & Other v. State of Punjab reported in 1983 (13) E.L.T. 1365 (S.C.), it was held thus :*
>
> > *"9.........When the goods were seized by the police they ceased to be in the possession of the accused and passed into the possession of the police and when they were with the Magistrate it is unnecessary to consider whether the Magistrate had possession or merely custody of the goods. The suggestion that the goods continued to be, at that stage, in the possession of the caused does not embody a correct appreciation of the law as regards possession. A 'seizure' under the authority of law does involve a deprivation of possession and not merely of custody and so when the police officer seized the goods, the accused lost possession which vested in the police. When that possession is transferred, by virtue of the provisions contained in S.180 to the*

Customs authorities, there is no fresh seizure under the Customs Act. It would, therefore, follow that, having regard to the circumstances in which the gold came into the possession of the Customs authorities, the term of S.178A which requires a seizure under the Act were not satisfied and consequently that provision cannot be availed of to throw the burden of proving that the gold was not smuggled, on the accused."

- Narayanakumar Jain vs Union of India-2000 (125) ELT 450 (Mad.)

Para 42. *" The subject matter Sony Colour T.V. was purchased for household use from Mr. Sellaiyan Karunanidhi residing at No. 2-16, Mari Amman Oil Street, Tanjore District who had imported the same as baggage. He has also produced xerox copy of baggage receipt No. 16809 dated 1-11-1995 of Trivandrum Airport and the sale deed for the purchase of the said T.V. The television was not a specified goods and hence, the burden of proof that the goods under seizure was smuggled goods lies on the Department and not on the petitioners and the Department has not brought any direct evidence on record to prove that the television set is a smuggled goods.*

Para 43. *When the second respondent was not prepared to accept the baggage receipt on its face value, then it was incumbent upon him to have adduced independent evidence to prove that the subject matter T.V. was indeed a smuggled one. In the absence of any tangible evidence to the contrary the second respondent was not justified in discarding the concrete evidence produced by the petitioners in support of their positive case. Further, the respondents have failed to prove that the subject goods is neither prohibited nor notified nor specified under Section 11B or 123 of the Act. Since the television set seized by the Customs Officers on 15-11-1995 was neither notified under Section 123 of the Act not covered by Chapter IV-A of the Act, it would not justify to draw a presumption that the said goods was a smuggled one. Further, the second Respondent was not at all justified in placing the burden on the petitioners to prove the lawful origin of the goods in India. When the petitioners have produced the baggage receipt and an authenticated affidavit from the concerned Air Passenger at Madras. Further confiscation of goods under Section 111(d) of the Act is permissible only when and where there is a proved importation of goods in contravention of any statutory provision. In the instant case, the subject matter of goods were not seized from the possession of any of the petitioners during the course of importation from any foreign country, nor during any attempt of the petitioners to bring the subject goods within Indian Customs Water. The said goods could not have been confiscated since it is not covered by either Section 11B or 123 of the Customs Act. Further, the 1st petitioner has paid the price and purchased the goods. The address on the baggage receipt is not written by any of the petitioners, but, the same has been written by the Air Passenger and counter-signed by the Baggage Inspector as well as the Superintendent at the Trivandrum Airport. The second Respondent ought to have made enquiries with the concerned Officers at the Trivandrum Airport and not with the Assistant Commissioner, Customs, Trichy. According to me, the materials collected by the Second respondent were not sufficient to connect the contravention alleged. The goods are seized long after they have been actually imported or brought as personal baggage by bona fide passengers and there being no direct evidence to identify such goods either having been imported without proper licence or of illicit origin, the seizure cannot be justified and the penalty imposed is beyond the jurisdiction of the Customs Authority."*

- 2004 (172) ELT 26 (Cal.)-COMMR. OF CUS. (PREV.), W.B., KOLKATA Versus SUDHIR SAHA

Para 4. *" The provision relates to the burden of proof in certain cases, therefore, it cannot have a general application and the opening sentence begins with the phrase "where any goods to which this section applies". Therefore, it relates to goods to which the section applies; and the section is made applicable by reason of sub-section (2) to gold (and manufactures thereof) watches and any other class of goods that may be specified by the Central Government by notification in the Official Gazette. Therefore, Section 123, which is a departure from the normal rule of evidence, is applicable only in respect of certain cases where Section 123, applies which has no general application. Under the rules of evidence one cannot be called upon to establish a negative proof. Burden always lies upon him who alleges a particular fact. Particularly when the provision is penal in nature, the burden lies on the prosecution. Section 123 curbs out exception to the general rule of evidence and creates a special rule applicable to the cases contemplated under sub-section (2) viz. gold and manufactures thereof and notified goods. Section 123 does not apply to non-notified goods in respect whereof the general rule of evidence is to be followed.*

Para 5. *In the present case, admittedly, betel-nuts seized is not a notified goods under Section 123. Therefore, Section 123 cannot be attracted to the goods seized in the present case on account of its being non-notified. Section 123 applies only in respect of goods, which are smuggled goods and smuggled goods means something suggesting their foreign origin and their recent importation from abroad, as was held in Shanti Lal Mehta v. Union of India, 1983 (14) E.L.T. 1715. In the present case, goods are of foreign origin, which is an admitted fact. Though allegedly the owner had admitted the goods to be smuggled but ultimately he retracted his statement, therefore, in such circumstances, the burden of proof lies on the department as was held in Santosh Gupta v. Union of India, 1990 (48) E.L.T. 210 = 1991 (33) ECR 380."*

- 2006 (205) ELT 23 (Bom.) maintained in 2007 (215) ELT A103 (s.C), Commissioner Customs (prev) Mumbai Vs. Aakash Enterprises

Para 6. *" It is pertinent to note that initially the case of the Revenue was that the seized goods were not the goods imported vide Bills of entry submitted by the respondent. However, on re-verification, the only discrepancies that were found were regarding the wrong description or incorrect country of origin. In the facts and circumstances of the case, therefore, the burden lay on the Department to produce some material/evidence to establish that the seized goods were smuggled goods which they miserably failed to do. As to whether the party upon whom the burden lies to prove a fact, has discharged the burden or not is always a question of fact."*

- 2022 (382) E.L.T. 592 (Meghalaya) Affirmed in 2022 (382) ELT 588 (s.C), C.C.E (prev) NER Region Shillong vs. Lal Tanpuii

Para 4. *"The Division Bench of the Tribunal recorded the finding that the confiscated betel nut is non-notified goods and therefore, burden to prove the fact of smuggling lies on the department and same has not been discharged. In this regard, the department relied upon the certificate issued by the Arecanut Research and Development Foundation, Mangalore to show that the confiscated goods/betel nuts are of foreign origin. However, the Tribunal refused to consider this certificate on the ground that the said Institution is not accredited and* *hence the report was not relied on. The Tribunal in this regard relied on the decision of the Patna High Court reported in 2020 (371) E.L.T. 353 (Patna).”*

13. In view of the foregoing, we set aside the impugned order in respect of appellants before us, thereby also setting at rest the remaining consequential issues on valuation etc., which become of academic interest only.

14. Appeals are allowed.

(Pronounced in the open court on 23.09.2024)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

Prachi