

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70169 of 2019

(Arising out of Order-in-Appeal No.455-457-CUS/APPL/LKO/2018 dated 31/08/2018 passed by Commissioner (Appeals) Customs, Central Excise & CGST, Lucknow)

Shri Girish Pandey,

(S/o Sri Kamala Prasad Pandey,
Main Road, Thoothibari, Maharajganj)

VERSUS

Commissioner of Customs (Preventive), Lucknow

.....Appellant

....Respondent

(Customs Commissionerate, Lucknow)

APPEARANCE:

Shri Anuj Agarwal, Advocate for the Appellants

Shri Santosh Kumar, Authorised Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. 70783/2024

DATE OF HEARING	:	19 November, 2024
DATE OF PRONOUNCEMENT	:	29 November, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-In-Appeal No.455-457-CUS/APPL/LKO/2018 dated 31.08.2018 of the Commissioner (Appeals) Customs, GST & Central Excise Lucknow . By the impugned order, Commissioner (Appeals) has modified the Order-in-Original No.54/2016 dated 16.03.2017 passed by Additional Commissioner, Customs, Lucknow to the extent of allowing the appeal no.14 before him and appeal of the present appellant has been dismissed by holding as follows:-

"ORDER

- i. I order confiscation of the seized battery scrap 14200 kg of Foreign Origin Third Country Origin valued at Rs. 7,10,000/-*

under Section 111(b) & 111(d) of the Customs Act, 1962. I, however give an option under section 125 of the Customs Act, 1962, to redeem the goods on fine of Rs 60000/- (Rupees Sixty Thousand only) alongwith applicable duty and charges, to its lawful owner against the confiscation of the said goods. The battery scrap has already been released provisionally on furnishing of a cash security of Rs 1,70,000/- (Rupees One Lakh Seventy Thousand only). I, therefore, order for appropriation of Rs. 60000/- against the fine out of the cash security of Rs 170000/- and duty and charges may be appropriated from the remaining amount of cash security of Rs 110000/-;

- ii. I order for confiscation of the said seized vehicle, Registration No. HR 38 0 9185 valued at Rs. 10,00,000/- used in transportation of the aforesaid seized battery scrap under section 115(2) of the Customs Act, 1962. However, I give an option under section 125 of the Customs Act, 1962, to redeem the vehicle on fine of Rs 50000/- (Rupees Fifty Thousand only) to its lawful owner against the confiscation of the said vehicle. The vehicle has already been released provisionally on furnishing of a cash security of Rs 50,000/- (Rupees Fifty Thousand only). I therefore order to appropriate this cash security against the proposed confiscation.*
- iii. I impose Penalty upon each of the following eight noticees under section 112 of the Customs Act, 1962:*
 - a) Shri Ravi Sharma (Noticee No. 1) -Rs. 5000/- (Rs. Five Thousand only).*
 - b) Shri Dharmendra Kumar Alias Banty Sharma (Noticee No. 2) - Rs. 3000/- (Rs. Three Thousand only).*
 - c) Shri Ehsan Ali (Noticee No. 3) -Rs. 5000/- (Rs. Five Thousand only).*
 - d) Shri Mohd. Arif (Noticee No. 4) - Rs. 5000/- (Rs. Five Thousand only)*
 - e) Shri Girish Pandey (Noticee No. 5) -Rs. 25000/- (Rs. Twenty Five Thousand only).*
 - f) Shri Santosh Kumar Gupta (Noticee No. 6) - Rs. 10000/- (Rs. Ten Thousand only). g) Shri Rajkumar Khandelwal (Noticee No. 7) - Rs. 10000/- (Rs. Ten Thousand only).*

g) Shri Shakir (Noticee No. 8)-10000/- (Rs. Ten Thousand only)."

2.1 The officers of Gorakhpur Customs (Preventive) intercepted a vehicle bearing registration no.HR-38/Q-9185 on the Karmaini Bridge at Campierganj-Mehndawal Road at around 17.00 hrs on 24.02.2016. The driver of the vehicle Shri Ravi Sharma produced tax invoice No.01 dated 24.02.2016 issued by M/s Pandey Traders, Thoothibari, Maharajganj, whose proprietor is Appellant, showing sale of battery scrap to buyer in Amraoha. There were two more people in the truck besides the driver and cleaner

2.2 The Driver of the vehicle Shri Ravi Sharma disclosed as under-

- the goods were loaded on the vehicle at Rajabari village situated at Indo-Nepal border.
- The said goods were loaded on the truck at Rajabari adjacent to Thootibari by Shri Girish Pandey and his workers.
- owner of the vehicle Shri Ramkumar Khandelwal directed him to carrying the foreign origin battery scrap to Amraoha. These facts have been confirmed by the cleaner of the vehicle Shri Bunt Sharma.

2.3 The driver and co-driver in their statements dated 24.02.2016 under Section 108 of the Customs Act, 1962 (the said Act) reiterated the above facts. The said statements have not been retracted.

2.4 Third person in the vehicle identified himself as Shri Ehsan Ali S/o Shri Liyakat Ali and stated that he is agent of Shri Mohd Sakir, Proprietor of Turkey Metal Industries Amroha. He stated that,-

- On 23.02.2016 he as per the instructions of Shri Mohd Sakir met Shri Girish Pandey and Shri Santosh Gupta in Toothibari who trade in scrap. They informed him that vehicle with driver Ravi Sharma has been arranged.
- He along with the Shri Girish Pandey and Shri Santosh Gupta boarded the truck and went to Indo Nepal border,

where Shri Girish Pandey and Shri Santosh Gupta bought the battery scrap loaded in a tractor trolley which was then loaded in the truck.

- He was told by Shri Girish Pandey and Shri Santosh Gupta to reach at the shop of Sahu Traders and that the documents for transport of these goods will be arranged there.
- Next day i.e. on 24.02.2016 at about 1200 Hrs Shri Santosh Gupta provided him the documents (invoice) of M/s Pandey Traders Thoothibari covering the good i.e. used battery scrap loaded in the truck.
- Thereafter he along with other left for Amroha in the truck.

2.5 Fourth person in the truck identified himself as Shri Mohd Arif S/o Shri Chote and stated that he is agent of Shri Mohd Sakir, Proprietor of Turkey Metal Industries Amroha. He stated that he is transporting the Foreign/ Third Country Origin battery scrap from Thoothibari to Amroha as per the directions of Shri Sakir and that he was present at the time of loading of said scrap brought from Nepal on a tractor trolley in the truck near Rajabari village on Indo Nepal Border.

2.6 From the revelations made by the persons on the truck, vehicle was nabbed and Foreign/ Third Country origin battery scrap was found loaded on the truck. All the proceedings were recorded in proper panchnama as the said scrap had been brought into India through an unauthorized route, in contravention of Notification No 63/94 Cus (NT) dated 21.11.1994 issued under Section 7 (1)(c) of the Customs Act, 1962, Notification No 9/96-Cus dated 22.01.1996 issued under Section 11 of the Customs Act, 1962 read with Section 3 of Foreign Trade (Development and Regulation) Act, 1992 and in contravention of the provisions of Foreign Trade Policy 2015-20

2.7 In view of the above, it appeared that the said scrap is liable to confiscation under section 111 and 119 of the said Act. The said vehicle also appeared liable to confiscation under section 115(2) of the said Act. Therefore, the scrap valued at

Rs. 7,10,000/- along with the truck valued at Rs 10,00,000/- and the vehicle were seized under section 110 of the said Act.

2.5 After completion of investigations a show cause notice dated 22.08.2016 was issued to the appellants and other concerned persons asking them to show cause as to why:-

"23. Now, therefore, Shri Girish Pandey (Noticee No. 5) is hereby called upon to show cause to the Additional Commissioner /Joint Commissioner, Customs(P) Hqrs, 5th floor, Kendriya Bahawan, Sector-H, Aliganj, Lucknow- 225024 within 30 days from the date of receipt of this Show Cause Notice as to why the aforesaid seized Foreign Battery scrap (14200 Kgs.) valued at Rs 7,10,000/- (Rupees Seven lakh Ten thousands only) should not be confiscated under section 111 of the of the Customs Act, 1962 and penalty should not be imposed upon him under section 112 of the of the Customs Act, 1962.

24. Now, therefore, Shri Ramkumar (Noticee No.7) is hereby called upon to show cause to the Additional Commissioner, Customs(1) Hqrs, 5th floor, Kendriya Bahawan, Sector-H Aliganj, Lucknow- 226024 within 30 days from the date of receipt of this show Cause Notice as to why the aforesaid seized vehicle bearing Regn. No. HR 38 Q 9185 valued at Rs. 10,00,000/-used in transportation of the aforesaid seized Foreign Battery scrap should not be confiscated under section 115(2) of the of the Customs Act, 1962 and penalty should not be imposed upon him under section 112 of the of the Customs Act, 1962.

25. Now, therefore, Shri Ravi Sharma (Noticee No. 1), Shri Dharmendra Kumar Alia Banty Sharma (Noticee No. 2), Shri Ehsar Ali (Noticee No. 3), Shri Mohd Arif (Noticee No. 4), Shri Santosh Kumar Gupta (Noticee No. 6) and Shri Mohd. Sakir (Noticee No. 8) are hereby called upon to show cause to the Additional Commissioner, Customs(P) Hqrs, 5th floor, Kendriya Bahawan, Sector-H, Aliganj, Lucknow- 226024 within 30 days from the date of receipt of this show Cause Notice as to why penalty should not be

imposed upon each of them under section 112 of the of the Customs Ac, 1962."

2.6 The show cause notice was adjudicated as per the Order-in-Original referred in para 1 above. Aggrieved appellant filed the appeal before the First appellate authority which has been disposed as per the impugned order.

2.7 Aggrieved appellants have filed this appeal.

3.1 We have heard Shri Anuj Agarwal Advocate for the appellants and Shri Santosh Kumar Authorized Representative for the revenue.

3.2 Arguing for the appellant learned Counsel submits that-

- appellant have taken a categorical stand that the goods in the truck i.e. used to be scrap was procured locally and the same were transported to Amraoha.
- The case has been made up against the appellant on the basis of the statements of the persons who were in the truck apart from the driver and cleaner, the other two persons were said to be the persons of the buyer of the goods. However, subsequently the said buyer have denied with regard to the purchase of these goods. Hence, reliance on the statements of these persons should not be proper.
- Subsequent to interception of the truck, the office premises of the appellant in Thoothibari, Maharajganj was verified and nothing incriminating were found..
- Statements of driver and cleaner relied upon have been retracted and should not be relied upon for the proceedings against the appellant.
- Total 14200 kg scrap were seized that could not be loaded on a single trolley. Only 2000 to 2500 kg of scrap can be loaded on a single tractor trolley.

3.3 Learned Authorised Representative reiterates the findings recorded in the orders of the lower authorities.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Impugned order records the findings as follows:-

"I have gone through the case record. Shri Ahsan Ali, agent of the Appellant-3, who was present in the intercepted vehicle, in his statement dated 24.02.2016, under section 108 of the said Act, has stated that the impugned scrap was brought from Nepal in a tractor trolley and the same was loaded in the truck in the night of 23.02.2016 near Rajabari village at Indo-Nepal border, in the presence of Appellant-2. This narration has been confirmed by Shri Mohd. Arif, another agent of Appellant- 3, who was also present in the intercepted truck, in his statement dated 24.02.2016 under section 108 of the said Act. The said persons were involved in loading and transportation of the impugned scrap on behalf of the Appellant-3 and, therefore, they have first hand knowledge of the chain of events concerning the impugned consignment. Thus, their statements under section 108 of the said Act are reliable evidence. The smuggled nature of the scrap is apparent from the record. The involvement of Appellant-2 and Appellant-3 is also evident. However, there is no evidence that the truck owner (Appellant-1) was aware about the contraband nature of the scrap loaded on his truck. Therefore, there is no ground to impose penalty on Appellant-1. The penalty imposed on Appellant-1 is set aside. Rest of the order is sustainable."

4.3 Order-in-Original records the following findings:-

29. *The main issue before me to be decided in this case is whether the seized battery scrap has been smuggled from Nepal into India through off routes, whether the seized vehicle was used in transportation of the smuggled goods in India and whether the noticees 1 to 8 are involved in the smuggling.*

29. ...

30. *I find that in all the replies dated 06.12.2016 the defence on behalf of all the eight Noticees has emphasized on following points:-*

- a. *The seized battery scrap was not smuggled*
- b. *It was purchased by vendors*
- c. *It was owned by Shri Girish Pandey of M/s Pandey Traders, Thoonthibari*
- d. *It was loaded from the shop/godown of M/s Pandey Traders, Thoonthibari.*
- e. *Record of purchase of battery scrap is not maintained by M/s Pandey Traders, Thoonthibari*
- f. *Seized battery scrap was accompanied with invoice.*
- g. *The driver, cleaner and both the representatives of M/s Turkey Industries, Amroha were forced to sign on blank papers and later their statements u/s 108 was written by someone else and without their knowledge.*
- h. *Shri Santosh Kumar Gupta (Noticee No. 6) is not involved in this case .*
- i. *Battery scrap is not an item of section 123 hence burden of proof lies with the Department*
- j. *Customs law has not been violated.*
- k. *SCN may be dropped*

31. It is clear from panchnama that the vehicle transported plywood from Rajasthan India to Kathmandu Nepal. In return it was transporting battery scrap upto Amroha India on the directions of vehicle owner Shri Ramkumar. The seized battery scrap was smuggled from Nepal into India through off route on tractor trolley and then it was loaded on the seized vehicle at Indg-Nepal border near village Rajabari. At the time of loading Shri Girish Pandey, Shri Santosh Kumar Gupta, Shri Mond Arif and Shri Ehsan Ali alongwith the driver and cleaner of the truck were present. While loading of the aforesaid FO/TCO battery scrap the driver Shri Ravi Sharma objected to Shri Girish Pandey, Shri Santosh Kumar Gupta and Shri Ehsan Ali when he saw the FO/TCO markings on the scrap but on the directions of the vehicle owner he loaded the goods.

32. I find that in the confessional statements tendered under section 108 of the Act the Noticees No. 1, 2, 3 and 4 who were present at the time of interception, have admitted

that the seized battery scrap was smuggled from Nepal into India and was brought on tractor trolley and loaded on the seized truck at Indo-Nepal border near village Rajabari, in presence of Shri Girish Pandey, Shri Santosh Kumar Gupta, Shri Mohd Arif, Shri Ehsan Ali, the driver and cleaner of the truck. They know that they have involved themselves in illegal act.

In addition Shri Ravi Sharma (Noticee No. 1 and driver of the seized truck) and Shri (Dharmendra Kumar Alias Banty Sharma Noticee No. 2 and cleaner of the seized vehicle) have admitted that the goods were loaded on the direction of the vehicle owner. The freight was negotiated by the vehicle owner.

In addition Shri Ehsan Ali and Shri Mohd. Arif (Noticee No. 3 & 4 and representative of Shri Shakir Prop. M/s Turkey Metal Industries, Amroha) have admitted that negotiations for procuring the seized goods from Nepal were managed by their employer Shri Shakir. The vehicle was also managed by their employer Shri Shakir.

All the four noticees, No. 1, 2, 3 and 4 have admitted that they were not well literate and can only make their signatures therefore their statements were written by someone else and they signed it after listening it and understanding it.

Shri Girish Pandey (Noticee No. 5) has accepted in his statements dated 27.02.16 and 29.03.16 that he is owner of the seized scrap; he deals in battery scrap; he sells the battery scrap to M/s Turkey Metal Industries, Amroha; he maintains no record of purchase and sale of battery scrap; he has sold 28 MT of battery scrap to M/s Turkey Metal Industries, Amroha; he has issued invoice No. 07 dated 24.02.16 to M/s Turkey Metal Industries, Amroha in respect of seized goods; the seized goods may contain foreign origin battery scrap.

Shri Santosh Gupta (Noticee No. 6) stated in his statement dated 27.02.16 that he deals in scrap.

Shri Ramkumar Khandelwal (Noticee No. 7) has accepted in his statement dated 02.03.16 that the seized goods were loaded on the vehicle on his directions. The freight also was negotiated by him.

Shri Shakir Proprietor of M/s Turkey Metal Industries, Amroha (Noticee No. 8) was summoned vide letter dated 25.02.2016 and 06.04.2016 to tender his statement u/s 108 of the Act but neither the letters returned nor Shri Mohd. Sakir turned up

*32.1 Later the noticee No. 1, 2, 3 and 4 retracted from their statements tendered under section 108 of the Act and alleged that they were forced to sign on blank papers and the statements were written by someone else without their knowledge. **I find that retraction to their confessions made before the Customs Officers has for the first time emerged in their respective defence replies dated 06.12.2016 i.e. after more than nine months of their admission before the Customs authorities u/s 108 of the Act. Such belated retraction is not admissible.***

32.2 In this connection, I rely upon the judgment of Hon'ble CESTAT, Delhi in case of Anil Das vs Commissioner of Customs, New Delhi, 2002 (141) ELT 135 (Tri.-Del.) and Para, 6 of the said judgment is reproduced as under:-

"The perusal of the impugned order shows that all the appellants were interrogated and during the course of recording of their statements under Section 108 of the Customs Act, admitted of having indulged in the smuggling of the impugned goods. Their own confessional statements, in our view, were sufficient under the law to charge them under Section 112(b) of the Customs Act. No more corroborative evidence was required in the adjudication proceedings being not totally judicial but only

quasi judicial nature. It is also evident from the record that these appellants had been booked in the criminal cases also and even were detained under Section 3(1) of the COFEPOSA on account of their Anti-national and smuggling activities. The retraction of the confession had been made by them only when they happened to engage a counsel at the time of their production before the Judicial Court later on. Therefore, retraction being belated and afterthought, had been rightly ignored by the adjudicating authority. It is well settled that in such a situation, retraction of the confessional statement by the maker thereof, has to be discarded. Reference in this context may also be made to V. Kannan and Another v. Collector of Customs [1987 (31) E.L.T. 373] and Ashok Kumar Agarwal v. Collector [1989 (41) E.L.T. 454], wherein it has been so observed."

32.3 I find that Hon'ble CESTAT Mumbai in case of P.B. Nair C&F Pvt, Ltd. Versus Commissioner of Customs (General), Mumbai, 2015 (318) E.L.T. 437 (Tri. - Mumbai) has held that the proceedings under section 108 of the Customs Act, 1962 is a judicial proceeding and if any retraction of the confession has to be made, the same should be made before the same authority who originally recorded the statement. The relevant para is reproduced as under:-

"5.5 It has been argued that in the inquiry proceedings conducted in April, 2011, Shri Dhamale and Mr. Menon had deposed during their cross-examination that they had given statements admitting their involvement of the commissions and omissions before the DRI under duress and threat and therefore, these statements cannot be taken at face value. This argument is not valid for more than one reason. The proceedings under Section 108 of the Customs Act is a judicial proceeding and if any retraction of the confession has to be made, the same should be made before the same authority who originally recorded the statement. In Zaki Ishrati v. Commissioner

of Customs & Central Excise, Kanpur [2013 (291)_E.L.T. 161 (All.)], the hon'ble Allahabad High Court has held that subsequent retraction cannot take away the effect of the statement; if the retraction is not addressed to the officer to whom the statement was given. In the present case, it is an admitted position that both Mr. Dhamle and Mr. Menon never retracted their statements given before the DRI in October and November, 2009. Only during the cross-examination conducted during the inquiry proceedings, they have stated that their statements were obtained under duress and threat. Such belated retractions made in April, 2011, after about one and half years after, the statements made cannot take away the evidentiary value of their original statements and we hold accordingly."

32.4 I also rely upon the judgment of The Hon'ble Supreme Court in the case of Naresh J. Sukhawani v. Union of India reported in 1996 (83) E.L.T. 258 wherein it has been held that the statement made before the Customs officials, is not a statement recorded under Sec. 161 of Cr.P.C. Therefore, it is a material piece of evidence collected by the Customs officials under Sec. 108 of the Customs Act, 1962 and it can be used as substantive evidence connecting the petitioners with the contravention of Customs Act.

32.5 I find that the ratio of judgment in the case of KTMS Mohammed vs UOI AIR 1992 SC1831 applicable in the instant case wherein the Apex Court held that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is for the maker of the statement who alleges inducement, threat, promises etc. to establish his allegations of inducement, threat etc. against the officer who recorded the statement.

32.6 In case of Surjeet Singh Chhabra vs UOI 1997 AIR SCW 2507, the Hon'ble Supreme Court held that a confession made before Customs Officer is binding even if

retracted later. In view of this, it is obvious that retraction from Noticees in this regard is not tenable

32.7 Applying ratio of above referred judgments to instant case, I find that confessions of the said Noticees No. 1 to 4 made before the Customs Officers while tendering their statements u/s 108 of the Customs Act, 1962, stand undiluted and are admissible as evidence.

33. I find that Noticee No. 5 and 6 have accepted in their statements u/s 108 of the Act that they deal in battery scrap. Shri Ramkumar Khandelwal (Noticee No. 7) has accepted in his statement dated 02.03.16 that the seized goods were loaded on the vehicle on his directions and the freight also was negotiated by him.

34. I find that Shri Shakir (Noticee No. 8) was summoned vide letter dated 25.02.2016 and 06.04.2016 to tender his statement u/s 108 of the Act but neither the letters returned nor Shri Mohd Sakir turned up. It is clear that he has deliberately not availed the opportunity provided to him by the department considering natural justice. This shows that he has nothing to offer in his defence,

34. Shri Girish Pandey (Noticee No. 5 and Proprietor of M/s Pandey Traders, Thoonthibari, Mahrajganj) has mentioned in his reply dated 06.12.16 to the SCN that battery scrap is not an item of section 123 of Customs Act therefore burden of proof is on the department. In this regard it is to mention that the seized scrap is prohibited in nature when smuggled from Nepal and otherwise it is restricted.

I observe a number of contradictions in the defence replies dated 06.12.16 submitted by the advocate on behalf of all the eight noticees which are as under-

- a. Shri Ehsan Ali (Noticee No. 3) and Shri Mohd. Arif (Noticee No. 4) have mentioned in their joint reply that negotiations for purchase of scrap and the vehicle for its transportation was managed by Shri Shakir their employer; they don't know Shri Santosh Kumar, Shri Santosh Kumar has no relation*

with the seized scrap; Shri Santosh Kumar has been implicated by the Customs. Now if they don't know Shri Santosh Kumar then how can they say that Shri Santosh Kumar had no relation with the seized scrap and he was implicated by the Customs

- b. Seized scrap has been owned by Shri Girish Pandey. It is mentioned in reply that he does not maintain any record of purchase. He is dealing in huge quantity of FO/TCO scrap and not maintaining records of its purchase. This corroborates to the fact that seized scrap was procured through smuggling*
- c. Shri Santosh has mentioned in his reply that he has no relation with the seized scrap, Shri Girish Pandey is owner of the seized scrap and it was covered by the invoice of Shri Pandey's firm which is stated in the Panchnama. I notice that on one hand Shri Santosh is saying that he has no relation with the seized scrap and on the other hand he is confirming that Shri Girish Pandey is owner of the seized scrap. It is surprising that if he had no relation with the seized goods how can he confirm that the same is owned by Shri Pandey.*
- d. Shri Girish Pandey who has claimed the ownership of the seized goods has issued an invoice No. 07 dated 24.02.16 showing him as consignor and Shri Shakir as consignee. The invoice can't be issued without mutual consent. Whereas Shri Shakir has denied of placing any order to Shri Girish Pandey and has further denied having any relation with the seized scrap*
- e. Owner of the seized vehicle Shri Ramkumar has mentioned in the reply that Cement Sheet was transported on his vehicle to Kathmandu whereas the driver and cleaner of the vehicle have mentioned in the Panchnama as well as in their statements u/s 108 of the Act that plywood was transported to Kathmandu*

Therefore in view of above discussion and the confessional statements of the noticees No 1 to 4 u/s 108 of the Act, which are already accepted as evidence, I find that the burden of proof has been discharged by the department.

35. As discussed above, the statements tendered by Noticee No.1, Noticee No.2, Noticee No.3 & Noticee No.4 u/s 108 of the Customs Act,1962, are acceptable as

evidence in the instant case and Noticee No.1, Noticee No.2, Noticee No.3 & Noticee No.4 have confessed to the effect that the said seized battery scrap has been smuggled into India from Nepal

Therefore, in view of foregoing paras, applying the ratio of judgement passed by the Apex Court in case of CC vs D. Bhoomull 1983 (13)ELT 1546(SC), wherein It was held "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 facts in the issue....prosecution is not obliged to prove as part of its primary burden the facts which are especially within the knowledge of accused. Since smuggling is done secretly, it is impossible for preventive department to unravel every link of the process.It is for him(accused)to explain or establish those facts within his peculiar knowledge , failing which the prosecution will be entitled to take advantage of the presumption of facts arising against him, in discharging its burden of proof. Deptt. Would be deemed to have discharged its burden (of proof) if it adduces so much evidence , circumstantial or direct , as is sufficient to raise a presumption in its favour with regard to the existence of fact sought to be proved.'

read along with the ratio of judgement passed by the Apex Court in case of Commissioner of Central Excise Madras Vs. Systems and Components (P) Ltd. reported in 2004(165)ELT 136 (SC) wherein it was held that What is admitted need not to be proved.', I find that the said seized battery scrap of foreign origin/Third Country Origin are smuggled into India from Nepal in contravention of Notification No. 63/94-Cus (N.T.) dated 21.11.94 issued under section 7(1)(c) of the Customs Act, 1962, and Notification No. 9/96-Cus dated 22.01.96 issued under section 11 of the Customs Act, 1962 read with Section 3 of the Foreign Trade (Development & Regulation) Act, 1992

and in contravention of the provisions of Foreign Trade Policy 2015-20 and are liable to confiscation under section 111(b) & 111(d) of the Customs Act 1962, as amended 36. I, therefore, find that:-

Shri Ravi Sharma (Noticee No. 1) Driver of the vehicle is deliberately involved in the act of transportation of smuggled Foreign Origin/Third Country Origin Battery Scrap. He is, therefore liable for Penalty under Section 112 of the Customs Act 1962;

Shri Dharmendra Kumar Alias Banty Sharma (Noticee No. 2), Cleaner of the vehicle, is deliberately involved in the act of transportation of smuggled Foreign Origin/ Third Country Origin Battery Scrap. He is, therefore, liable for Penalty under Section 112 of the Customs Act 1962;

Shri Ehsan Ali (Noticee No. 3) and Shri Mohd. Arif (Noticee No. 4), Agents of M/s Turkey Metal Industries, Amroha have deliberately involved themselves on instructions of their boss Shri Mohd. Sakir in the purchase and transportation of smuggled Foreign Origin/Third Country Origin Battery Scrap. They are, therefore, liable for Penalty under Section 112 of the Customs Act 1962;

Shri Girish Pandey (Noticee No. 5), who has claimed the ownership of the seized goods has deliberately involved himself in the act of smuggling of Foreign Origin/Third Country Origin Battery Scrap from Nepal into India and then onwards its sale and transportation into India from Indo-Nepal border to Amroha, He is, therefore, liable for Penalty under Section 112 of the Customs Act 1962;

From revelations made by the noticees No 1 to 4 in the Panchnama and in their respective statements under Section 108 of the Act it is evident that Shri Santosh Kumar Gupta (Noticee No. 6), was actively & knowingly involved in smuggling, sale and transportation of Foreign Origin/Third Country Origin Battery Scrap. He is, therefore, liable for Penalty under Section 112 of the Customs Act 1962;

Shri Ram Kumar Khandelwal (Noticee No. 7), Owner of the vehicle, has managed the transportation of smuggled Foreign Origin/Third Country Origin Battery Scrap knowingly, from Indo-Nepal border to Amroha for monetary gain. He is, therefore, liable for Penalty under Section 112 of the Customs Act 1962;

Shri Mohd Sakir (Noticee No. 8) Prop. of M/s Turkey Metal Industries failed to appear before the Customs Authorities despite of several Summons. He deliberately not joined the departmental proceedings to conceal the facts. From revelations made by the noticees No 1 to 4 in the Panchnama and in their respective statements under Section 108 of the Act it is evident that Shri Mohd Sakir, was knowingly involved in purchase and transportation of Foreign Origin/Third Country Origin Battery Scrap. He is, therefore, liable for Penalty under Section 112 of the Customs Act 1962;

4.4 The order in original has held Noticee No 1 to 8 to be responsible for the act of smuggling of battery scrap, through un-notified route from Nepal. The case is based on the interception of the truck containing the said goods and on examination the goods were found to be battery scrap of third country origin. Both the driver and co-driver admitted about the goods being loaded in the truck by the appellant on the Nepal border, and gave other details in respect of transportation. They categorically stated that the owner of truck had instructed them to load the said consignment which was brought in tractor trolleys from Nepal through unauthorized routes. The above facts have been stated by them in their statement recorded under Section 108. In the case of Naresh J. Sukhawani [1996 (83) E.L.T. 258 (S.C.)] Hon'ble Supreme Court has observed as follows:

4. *It must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore it is a material piece of evidence collected by*

Customs officials under Section 108 of the Customs Act. That material incriminates the petitioner inculpating him in the contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculpates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India. Therefore we do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine.

4.5 In the case of K.I. Pavunny [1997 (90) E.L.T. 241 (S.C.)] Hon'ble Supreme Court has observed as follows

19. *Next question for consideration is : whether such statement can form the sole basis for conviction? It is seen that, admittedly, the appellant made his statement in his own hand-writing giving wealth of details running into five typed pages. Some of the details which found place in the statement were specially within his knowledge, viz., concealment of the 200 biscuits in his earlier rented house till he constructed the present house and shifted his residence and thereafter he brought to his house and concealed the same in his compound; and other details elaboration of which is not material. The question then is : whether it was influenced by threat of implicating his wife in the crime which is the sole basis for the claim that it was obtained by threat by PW-2 and PW-5? In that behalf, the High Court has held that it could not be considered to be induced by threat that his wife will be implicated in the crime and accordingly disbelieved his plea. It is seen that admittedly after the appellant gave his statement, he was produced before*

the Magistrate though no complaint was filed and was released on bail. He did not complain to the Magistrate that Ex. P-4 statement was given under inducement, threat or duress. It was raised only subsequently making accusations against PW-5, the Inspector of Customs. Therefore, obviously it was only an afterthought. The High Court, therefore, rightly has not given any weightage to the same. It is true that the Magistrate has given various reasons for disbelieving the evidence of PW-3, the panch witness who had also, at one point of time, indulged in smuggling. It is unlikely that PW-3 would bring 200 gold biscuits of foreign marking and conceal them in the compound of the appellant without appellant's knowledge for safe custody. It is not his case that he had facilitated PW-3 in concealing them in his compound. The place of concealment of the contraband is also significant at this juncture. It is just near and visible from the window of his bed-room through which he or family members could always watch anyone frequenting the place where the contraband was concealed. This fact becomes more relevant when we consider that after concealment of the contraband in the compound one would ensure that others having access to the compound may not indulge in digging and carrying away the same. As soon as the appellant and/or the members of his family had sight of such visitor or movement by others, they would immediately catch hold of such person or would charge them. Obviously, therefore, it would be the appellant who had concealed 200 gold biscuits of foreign marking in his compound at a place always visible from his bed-room window. Therefore, the High Court was right in its conclusion, though for different reasons, that Ex. P-4 is a voluntary statement and was not influenced by

threat, duress or inducement etc. Therefore, it is a voluntary statement given by the appellant and is a true one.

26. *In Naresh J. Sukhawani v. Union of India - 1996 (83) E.L.T. 258 (S.C.) = 1995 Supp. 4 SCC 663 a two-Judge Bench [to which one of us, K. Ramaswamy, J., was a member] had held in para 4 that the statement recorded under Section 108 of the Act forms a substantive evidence inculcating the petitioner therein with the contravention of the provisions of the Customs Act as he had attempted to export foreign exchange out of India. The statement made by another person inculcating the petitioner therein could be used against him as substantive evidence. Of course, the proceedings therein were for confiscation of the contraband. In Surjeet Singh Chhabra v. Union of India - 1997 (89) E.L.T. 646, decided by a two-Judge Bench to which one of us, K. Ramaswamy, J., was a member the petitioner made a confession under Section 108. The proceedings on the basis thereof were taken for confiscation of the goods. He filed a writ petition to summon the panch (mediator) witnesses for cross-examination contending that reliance on the statements of those witnesses without opportunity to cross-examine them, was violative of the principle of natural justice. The High Court had dismissed the writ petition. In that context, it was held that his retracted confession within six days from the date of the confession was not before a Police Officer. The Custom Officers are not police officers. Therefore, it was held that "the confession, though retracted, is an admission and binds the petitioner. So there is no need to call Panch witnesses for examination and cross-examination by the petitioner". As noted, the object of the Act is to*

prevent large-scale smuggling of precious metals and other dutiable goods and to facilitate detection and confiscation of smuggled goods into, or out of the country. The contraventions and offences under the Act are committed in an organised manner under absolute secrecy. They are white-collar crimes upsetting the economy of the country. Detection and confiscation of the smuggled goods are aimed to check the escapement and avoidance of customs duty and to prevent perpetration thereof. In an appropriate case when the authority thought it expedient to have the contraveners prosecuted under Section 135 etc., separate procedure of filing a complaint has been provided under the Act. By necessary implication, resort to the investigation under Chapter XII of the Code stands excluded unless during the course of the same transaction, the offences punishable under the IPC, like Section 120B etc., are involved. Generally, the evidence in support of the violation of the provisions of the Act consists in the statement given or recorded under Section 108, the recovery panchnama (mediator's report) and the oral evidence of the witnesses in proof of recovery and in connection therewith. This Court, therefore, in evaluating the evidence for proof of the offences committed under the Act has consistently been adopting the consideration in the light of the object which the Act seeks to achieve.

32. *It is true that in criminal law, as also in civil suits, the trial Court and the appellate Court should marshal the facts and reach conclusion, on facts. In a criminal case, the prosecution has to prove the guilt beyond doubt. The concept of benefit of doubt is not a charter for acquittal. Doubt of a doubting Thomas or of a weak mind is not the road to reach the result. If a Judge on*

objective evaluation of evidence and after applying relevant tests reaches a finding that the prosecution has not proved its case beyond reasonable doubt, then the accused is entitled to the benefit of doubt for acquittal. The question then is : whether the learned Single Judge of the High Court has committed any error of law in reversing the acquittal by the Magistrate. Not every fanciful reason that erupted from flight of imagination but relevant and germane requires tested. Reasons are the soul of law. Best way to discover truth is through the interplay of view points. Discussion captures the essence of controversy by its appraisal of alternatives, presentation of pros and cons and review on the touchstone of human conduct and all attending relevant circumstances. Truth and falsity are sworn enemies. Man may be prone to speak falsehood but circumstantial evidence will not. Falsity is routed from man's proclivity to faltering but when it is tested on the anvil of circumstantial evidence truth trans. On scanning the evidence and going through the reasoning of the learned Single Judge we find that the learned Judge was right in accepting the confessional statement of the appellant, Ex. P-4 to be a voluntary one and that it could form the basis for conviction. The Magistrate had dwelt upon the controversy, no doubt on appreciation of the evidence but not in proper or right perspective. Therefore, it is not necessary for the learned Judge of the High Court to wade through every reasoning and give his reasons for his disagreement with the conclusion reached by the Magistrate. On relevant aspects, the learned Judge has dwelt upon in detail and recorded the disagreement with the Magistrate and reached his conclusions. Therefore, there is no illegality in the approach adopted by the

learned Judge. We hold that the learned Judge was right in his findings that the prosecution has proved the case based upon the confession of the appellant given in Ex. P-4 under Section 108 of the Evidence Act and the evidence of PWs 2, 3 and 5. The prosecution proved the case beyond doubt and the High Court has committed no error of law."

4.6 On the basis of the objective evaluation of the evidences the authorities below have arrived at the conclusion that the impugned goods are smuggled goods smuggled through unauthorized routes from Nepal. Appellant is the master mind in the entire episode has been subjected to penalty of Rs.25,000/- as per the impugned order, which in my view is not excessive and needs to be upheld, which also is not harsh, taking into account the fact that "battery scrap", falls under the category of **"Hazardous Goods"**, to dangerous for the environment and eco system of our country.

4.7 Appellant has claimed that the Old and Used Battery Scrap seized and confiscated was procured by him locally through local vendors and hence no violation of Customs Act, 1962 can be alleged. The story fabricated by the appellant about local procurement of scrap cannot be substantiated, simply for the reason that he has in his own statement admitted that he do not maintain any record of procurement of the Battery Scrap. Old and used battery scrap is being "Hazardous Goods" and the same are governed by BATTERIES (MANAGEMENT AND HANDLING) RULES, 2001. As per these rules used batteries don't get disposed off in the open market. Rule 4 related to responsibilities of the manufacturer, importer, assembler and re-conditioner. The said rule provides as follows:-

"4. It shall be the responsibility of a manufacturer, importer, assembler and re-conditioner to

(i) ensure that the used batteries are collected back as per the Schedule against new batteries

sold excluding those sold to original equipment manufacturer and bulk consumer(s);

(ii) ensure that used batteries collected back are of similar type and specifications as that of the new batteries sold;

(iii) file a half-yearly return of their sales and buy-back to the State Board in Form-I latest by 30th June and 31st December of every year;

(iv) set up collection centers either individually or jointly at various places for collection of used batteries from consumers or dealers;

(v) ensure that used batteries collected are sent only to the registered recyclers;

(vi) ensure that necessary arrangements are made with dealers for safe transportation from collection centers to the premises of registered recyclers;

(vii) ensure that no damage to the environment occurs during transportation;

(viii) create public awareness through advertisements, publications, posters or by other means with regard to the following-

(a) hazards of lead;

(b) responsibility of consumers to return their used batteries only to the dealers or deliver at designated collection centers; and

(c) addresses of dealers and designated collection centers.

(ix) use the international recycling sign on the Batteries;

(x) buy recycled lead only from registered recyclers; and

bring to the notice of the State Board or the Ministry of Environment & Forests any violation by the dealers.

(xii) ensure that the new batteries shall be sold only to the registered dealers.

Notes. - *The assemblers and reconditioners are excluded from the purview of responsibilities as specified in sub-clauses (iv), (vii), (ix) and (xii).]*”

4.8 Rule 7 specifically provides for responsibilities of dealer, and the same are reproduced as follows:-

“7. RESPONSIBILITIES OF DEALER.–

It shall be the responsibility of a dealer to-

(i) ensure that the used batteries are collected back as per the Schedule against new batteries sold;

(ii) give appropriate discount for every used battery returned by the consumer;

(iii) ensure that used batteries collected back are of similar type and specifications as that of the new batteries sold;

(iv) file half-yearly returns of the sale of new batteries and buy-back of old batteries to the manufacturer in Form-V by 31st May and 30th November of every year;

(v) ensure safe transportation of collected batteries to the designated collection centers or to the registered recyclers; and

(vi) ensure that no damage is caused to the environment during storage and transportation of used batteries.

(vii) (a) registration with State Pollution Control Board for five years and a provision of cancellation for failure in collection of the required number of used batteries as per the said rules, non-submission of timely half yearly returns to the State Pollution Control Boards, renewal of the registration shall be as per the compliance status, to submit details as per Form IV, registration would be considered as deemed registered if not objected to within thirty days:

Provided that the registration granted to the dealer shall not be cancelled unless he has been given a reasonable opportunity of hearing;

(b) an appeal shall lie against any order of suspension or cancellation or refusal of registration passed by the Member-Secretary of the State Pollution Control Board or

any other officer designated by the State Pollution Control Board;

(c) the appeal shall be in writing and shall be accompanied with a copy of the order appealed against and shall be made within period of thirty days from the date of passing of the order] "

4.9 Rule 8 specifically provides for responsibilities of recycler, and the same are reproduced as follows:-

"8. RESPONSIBILITIES OF RECYCLER. –

Each recycler shall

(i) apply for registration to the Ministry of Environment & Forests or an agency designated by it if not applied already, by submitting information in Form VI;

(ii) ensure strict compliance of the terms and conditions of registration, however, those already registered with the Ministry of Environment & Forests or an agency designated by it for reprocessing used batteries would be bound by the terms and conditions of such registration;

(iii) submit annual returns as per Form VII to the State Board.

(iv) make available all records relating to receipt of used batteries, sources, quantities and metal yield to be submitted to the State Pollution Control Board for inspection;

(v) mark 'Recycled' on lead recovered by reprocessing; and

(vi) Create public awareness through advertisements, publications, posters or others with regard to the following–

(a) hazards of lead; and

(b) obligation of consumers to return used batteries only to the registered dealers or deliver at the designated collection centers. "

4.10 In terms of above rules the used batteries are not freely traded in the market. They to be collected back by the manufacturer, dealer or importer at the time of sale of new batteries and thereafter transported to recyclers in the manner

prescribed. The entire story made by the appellant to the effect that he has procured these batteries scrap from the local market, goes contrary to the specific provisions of these rules and hence cannot be relied upon. If that is so, the entire defense of the appellant fails.

4.12 None of the co-noticees whose statement have been relied upon by the lower authorities are in appeal before the CESTAT. The statements of the of the co-noticee relied in the proceedings were retracted only in the defence reply filed by them to the show cause notice, and adjudicating authority has not found any merits in the retraction made during the course of adjudication proceedings as per the defence reply, filed by those co-noticees. The findings recorded by the lower authorities on the retraction made by co-noticees have not been challenged by the said co-noticee have thus acquired finality.

4.13 However I find that Additional Commissioner has in the impugned order imposed a penalty of Rs. 25,000/- on the appellant whereas penalty Shri Shakir who was to be the actual beneficiary of these goods penalty imposed is only Rs 10,000/-. I also find that penalty of Rs 10,000/- has been imposed on Shri Santosh Kumar Gupta, who was equal accomplice in the case with Appellant as he had gone along with the appellant for loading the scrap on truck at Nepal border with the appellant, and was responsible for arranging the invoice of the appellant as cover up during the transportation. Taking note of this fact I am inclined to reduce the penalty imposed to Rs 17,500/-

4.14 Accordingly, I uphold the impugned order against the appellant by reducing the penalty imposed upon him from Rs 25,000/- to Rs 17,500/-.

5.1 Appeal partly allowed as indicated in para 4.13 above.

(Order pronounced in open court on- 29 November, 2024)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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