IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI

Customs Appeal No.41818 of 2016

(Arising out of Order in Appeal No. 129 to 133/2016 dated 22.6.2016 passed by the Commissioner of Central Excise (Appeals – II), Trichy)

Shri Soundarajan **Appellant**
S/o Velumailum
272/2, Morse Street
Coonoor, Nilgiris – 643 102.

Vs.

Commissioner of Customs **Respondent**
No. 1, Williams Road
Trichy – 620 001.

With

(i) Customs Appeal No. 41820/2016 (Shri N. Senthilvelan);
(ii) Customs Appeal No. 41821/2016 (Shri M. Gajendran);
(iii) Customs Appeal No. 41822/2016 (Smt. Santhi) and
(iv) Customs Appeal No. 41823/2016 (Smt. Saravanambal)

(Arising out of Order in Appeal No. 129 to 133/2016 dated 22.6.2016 passed by the Commissioner of Central Excise (Appeals – II), Trichy)

<u>APPEARANCE:</u>

Shri A.V. Arun, Advocate for the Appellants
Smt. Anandalakshmi Ganeshram, AC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order Nos. 40581-40585/2024

Date of Hearing : 13.12.2023
Date of Decision: 31.05.2024

Per M. Ajit Kumar,

The above appeals are filed against Order in Appeal No. 129 to 133/2016 dated 22.6.2016 passed by the Commissioner of Central Excise (Appeals – II), Trichy.

2. Brief facts of the case are that on 30.9.2014 police officers attached to Kenikarai Police Station, Ramanathapuram handed over the appellants herein and others to the Customs authorities along with Indian currency valued at Rs.50,91,500/- allegedly being the sale proceeds of smuggled gold from Sri Lanka; three used cars for the transportation of the smuggled gold from the seashore of Manamelgudi – Kottaipattinam to Chennai and three used cell phones recovered from the said persons. The Customs officers seized the above goods under a mahazar dated 30.9.2014 for further action under the Customs Act, 1962. Statements were recorded from the accused persons. After due process of law, the adjudicating authority absolutely confiscated the Indian currency of Rs.50,91,500/- for allegedly being the sale proceeds of gold under sec. 121 of the Customs Act, 1962; confiscated the three seized cars which were allowed to be redeemed on payment of fine and also imposed penalty on all the the appellants as follows:-

S. No.	Appellant	Penalty imposed
1.	Soundararajan	Rs.10,00,000/-
2.	Senthilvelan	Rs.10,00,000/-
3.	Gajendran	Rs.10,00,000/-
4.	Smt. Shanthi	Rs.10,000/-
5.	Smt. Saravanambal	Rs.10,000/-

Aggrieved by the adjudication order, the appellants preferred appeals before Commissioner (Appeals), who vide the order impugned herein rejected the appeals, hence the present appeals before this Tribunal.

3. We have heard learned counsel Shri A.V. Arun for the appellants and Smt. Anandalakshmi Ganeshram, AC (AR) for the respondent.

3.1 Shri A.V. Arun learned counsel at the outset submitted that the criminal case against the appellants ended in acquittal. He stated that there are two statements recorded from the same person, one is by the Police and the other one is by the Customs officer who wrote it in his own handwriting. It was recorded during the period of 29.09.2014 and 01.10.2014 and the same was retracted within a short period of time i.e. on 15.11.2014. In **Bhagwan Singh Vs State of Punjab** (AIR 1952 SC 214) the Hon'ble Supreme Court held, "if the accused is able to prove the facts creating a reasonable doubt that the confession was not voluntary or that it was obtained by threat, coercion or inducement, the burden would be on the prosecution to prove that the confession was made by the accused voluntarily". The learned Counsel stated that the non-seizure of the Gold allegedly smuggled from Sri Lanka; the non-identity and non-arrest of one Pawar, resident of Mannadi, Chennai, who is said to be the purchaser of gold; the inability of the prosecution to prove the link or relationship between the sale proceeds of smuggled Gold and the seized Indian currency from Senthilvelan who has accounted for the money, though not required to do so, being Indian currency, pointed to grave flaws in the investigation. The rejection by the Joint Commissioner of the request to cross examine the police officer before the personal hearing date, in spite of filing a supporting decision of a High court has affected their defence and the OIO should have been set aside on this score alone. In this case total cash of Rs. 50,91,500/- was seized by police. Senthilvelan alone is claiming ownership of it with suitable explanation, supported by documentary evidence for its origin and possession throughout the proceedings including in the court case. He stated that seizures were made merely on suspicious information, which cannot occupy the place of proof however strong it may be. It was therefore prayed that the Tribunal may set aside the impugned orders of the lower authorities and order the return of seized currency along with the cars and the penalty amounts paid by the appellants and pass suitable orders deemed fit and proper in the interest of justice.

3.2 The learned Smt. Anandalakshmi Ganeshram, AC (AR) submitted on behalf of the department that there is nothing on record to show that the voluntary statement made immediately after the detection of the case was made under any pressure or duress. She placed reliance on the judgement of Hon'ble Supreme Court in the case of Surjeet **Singh Chhabra Vs. Union of India** [1997 (89) ELT 646 (SC)] and the judgement of Hon'ble High Court of Madras in the case of **Roshan Beevi and Others** [1984 (15) E.L.T. 289 (Mad.)] that statement made before Customs Officers though retracted within six days is an admission and binding since Customs Officers are not police officers under Section 108 of the Customs Act 1962. She stated that it is clearly seen that their retraction after 7 months is nothing but only an afterthought. She submitted that the three appellants namely S/Shri Soundararajan, Senthilvelan and Gajendran are liable for penalty for their direct role in the Illicit import of gold from Sri Lanka and subsequent sale of the same. The buyer of the gold has been identified as Shri Pawan. Even though he could not be apprehended, other finding like his cell number is a clear proof of his participation in the episode. Even the presence of Shri Naufer the alleged mastermind behind smuggling has been confirmed by the fact that he was involved in crime no 410/14dt 27/09/2014 booked by Kenikarai police station as stated in the SCN. The absence of any material evidence as argued by the concerned parties and their counsels is mitigated by the principle of preponderance of possibilities adopted and recommended by various judicial and appellate forums in deciding cases of this nature unlike the civil cases. Based on the confessional statement coupled with recovery of the sale proceeds and a belated retraction which is nothing but an afterthought. S/Smt. K. Santhi and Saravanambal, have received a part amount of the sale proceeds from the appellant Shri. Senthilvelan, hence the LAA correctly imposed a penalty on the appellants S/Smt.K.Santhi and Saravanambal for their active role in this case. She prayed that the appeals filed by the party may be rejected on merits and render justice.

4. We have heard both sides.

5. The counsel for the appellant has stated that the criminal case against the appellants ended in acquittal. However, it is relevant to note that standards of evidentiary requirement differ greatly between civil and criminal laws. In criminal trials the standard of proof is 'beyond reasonable doubt'. In civil matters, the degree of proof required is 'preponderance of probability'. However the onus is on the department to establish the allegations and facts in issue are beyond reasonable doubt and meet the standard of proof required.

6. Oral evidence of a witness is generally admissible evidence if he has direct and personal knowledge of the fact deposed by him. However in this matter the whole case is largely made up of statements where the main parties have not been apprehended and the smuggled

gold not seized. In such a case when reliance is placed on the third party statements who are available, the benefit of cross-examination should be allowed to the appellant. More so because no independent evidence has been produced to corroborate the truth of the statements and facts in issue. There was nothing to suggest that gold of foreign origin was actually smuggled into the country other than the statements made which were retraced. Reasonable belief to seize the currency cannot be based on presumption. Allegations based on assumptions and presumptions have no legs to stand on. The impugned order has not addressed these legal issues satisfactorily. In fact the Order states that the appellants have not put forward any other documentary evidence to prove that they are not involved in the illicit transaction and hence rejects their appeal. This is a very strange situation in which the noticees of a town seizure are held guilty only because of their statements and their not possessing documents to prove their innocence, when the burden of proving the case rests with the department.

7. We find that the Hon'ble Madras High Court in **Jet Unipex Vs Commissioner of Customs** [Appeal Number: W.P. No. 5233 of 2016, dated: 19/05/2020] held as under;

> 70. As indicated above, adjudication proceedings under the Customs Act, 1962 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.
> 71. 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.

8. We are thus hold that the department has not proved its allegations on the facts in issue beyond reasonable doubt and have not met the standard of proof of the preponderance of probability as required. The impugned order of the Commissioner Appeals is also similarly flawed as discussed and merits to be set aside. We hereby order the same. The appeals succeed. The appellants are eligible for consequential relief prayed for, as per law.

(Order pronounced in open court on 31.05.2024)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

Rex