CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. I

Customs Appeal No. 143 of 2011

(Arising out of Order-in-Original CAO No. 102/2010/CAC/CC/BKS dated 27.12.2010 passed by Commissioner of Customs (Adjn.), Mumbai)

M/s. Noble Marine Traders **Appellant**
156/E, 16, Sarang Chawl,
LBS Marg, Kurla,
Mumbai 400 070.

Vs.

Commr. of Central Exc. (Adjn.), Mumbai **Respondent**
New Custom House, Ballard Estate,
Mumbai 400 001.

WITH

Customs Appeal No. 144 of 2011

(Arising out of Order-in-Original CAO No. 102/2010/CAC/CC/BKS dated 27.12.2010 passed by Commissioner of Customs (Adjn.), Mumbai)

M/s. M.A. Traders **Appellant**
Sarang Chawl,
21, Takiya Ward, Near Kurla,
Mumbai 400 070.

Vs.

Commr. of Central Exc. (Adjn.), Mumbai **Respondent**
New Custom House, Ballard Estate,
Mumbai 400 001.

WITH

Customs Appeal No. 145 of 2011

(Arising out of Order-in-Original CAO No. 102/2010/CAC/CC/BKS dated 27.12.2010 passed by Commissioner of Customs (Adjn.), Mumbai)

M/s. Shree Durga Traders **Appellant**
228, Kolsa Bunder Road,
Darukhana,
Mumbai 400 010.

Vs.

Commr. of Central Exc. (Adjn.), Mumbai **Respondent**
New Custom House, Ballard Estate,
Mumbai 400 001.

AND

Customs Appeal No. 146 of 2011

(Arising out of Order-in-Original CAO No. 102/2010/CAC/CC/BKS dated 27.12.2010 passed by Commissioner of Customs (Adjn.), Mumbai)

M/s. Jubilee Traders **Appellant**
228, Kolsa Bunder Road,
Darukhana, Mazgaon,
Mumbai 400 010.

Vs.

Commr. of Central Exc. (Adjn.), Mumbai Respondent
New Custom House, Ballard Estate,
Mumbai 400 001.

Appearance:

Shri D.H. Nadkarni, Advocate, with Shri C.S. Birader, Advocate, for the Appellant
Shri Bhushan Kamble, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. A/**87117-87120/2019**

Date of Hearing: 23.09.2019
Date of Decision: 23.09.2019

PER: SANJIV SRIVASTAVA

These appeals are directed against the Order in Original CAO No 102/2010/CAC/CC/BKS dated 27.12.2010 of the Commissioner Customs (Adjudication), Ballard Estate, Mumbai. By the impugned order passed in remand proceedings by the Commissioner following has been held-

"4.1 In view of my above discussion and findings the following orders are passed:-

(i) The demand of duty is confirmed against M/s. Noble Marine Works, M/s. M.A. Traders, M/s. Shree Durga

Traders and M/s. Jubilee Traders under proviso to Section 28(1) of the Customs Act, 1962 as under:-

(a) M/s. Noble Marine Works : Rs.2,89,596/- (Rupees Two lakhs Eighty Nine Thousand Five Hundred and Ninety Six Only)

(b) M/s. M.A. Traders : Rs.2,89,542/- (Rupees Two lakhs Eighty Nine Thousand Five Hundred and Forty Two Only).

(c) M/s. Shree Durga Traders : Rs.1,69,865/- (Rupees One lakh Sixty Nine Thousand Eight Hundred and Sixty Five only).

(d) M/s. Jubilee Traders : Rs.4,18,228/- (Rupees Four lakhs Eighteen Thousand Two Hundred and Twenty Eight only)

Total : Rs.11,67,231/- (Rupees Eleven lakhs Sixty Seven Thousand Two Hundred Thirty One Only).

(ii) The goods valued at Rs.3,22,374/-, Rs.3,22,314/-, Rs.1,89,091/- and Rs.4,65,564/- seized from M/s. Noble Marine Works, M/s. M.A. Traders, M/s. Shree Durga Traders and M/s. Jubilee Traders, respectively, are confiscated under Section 111(h), 111(j) and 111(m) of the Customs Act, 1962. However, since seized respective goods have been provisionally released to the noticees, viz., M/s. Noble Marine Works, M/s. M.A. Traders, M/s. Shree Durga Traders and M/s. Jubilee Traders, respectively, against Bonds backed by Bank guarantees submitted separately by each of them, redemption fines of Rs.80,594/- (Rupees Eighty Thousand Five Hundred Ninety Four Only); Rs.47,273/- (Rupees Forty Seven Thousand Two Hundred Seventy Three Only) and Rs.1,16,391/- (Rupees One Lakh Sixteen Thousand Three Hundred Ninety One Only), are imposed in lieu of confiscation, on M/s. Noble Marine Works, M/s. M.A. Traders, M/s. Shree Durga Traders and M/s. Jubilee Traders, respectively, under Section 125 of the Customs Act, 1962.

(iii) Penalties of Rs.2,89,596/- (Rupees Two Lakhs Eighty Nine Thousand Five Hundred and Ninety Six Only); Rs.2,89,542/- (Rupees Two Lakhs Eighty Nine Thousand Five Hundred and Forty Two only); Rs.1,69,865/- (Rupees One lakh Sixty Nine Thousand Eight Hundred and Sixty Five Only) and Rs.4,18,228/- (Rupees Four Lakhs Eighteen Thousand Two Hundred and Twenty Eight only) are imposed on M/s. Noble Marine Works, M/s. M.A. Traders, M/s. Shree Durga Traders and M/s. Jubilee Traders, respectively, under Section 114A of the Customs Act, 1962.

(iv) Penalties of Rs.20,000/- (Rupees Twenty Thousand Only) each is imposed on Shri D.K. Mukhopadhyay and Shri Y.B. Sawant under Section 112(a) of the Customs Act, 1962.

(v) Bonds backed by Bank Guarantee executed separately by each of noticees M/s. Noble Marine Works, M/s. M.A. Traders, M/s. Shree Durga Traders and M/s. Jubilee Traders, are to be enforced and encashed towards the amounts to be recovered from them."

2.1 The facts and observation as recorded in the tribunal earlier order while remanding the matter are as follows:

" M/s Noble Marine Works and M/s M.A. Traders were awarded contract for removing scrap from the vessels of the Shipping Corporation of India (SCI) for the period March, 1994 to May, 1995 and accordingly these parties took delivery of several consignments of scrap from several vessels belonging to the SCI. Later on, upon investigation, officers of Customs found certain stocks of scrap in the premises of M/s. Shree Durga Traders. A statement of the proprietor of M/s. Shree Durga Traders was recorded under Section 108 of the Customs Act, 1962, wherein he stated that he was dealing in sale and purchase of scrap in the local market and that the stock of Polypropylene (PP) Ropes (scrap) found in the premises

was partly owned by him and partly by M/s Jubilee Traders. The proprietor of M/s Jubilee Traders, in his statement, stated that he was engaged in the purchase and sale of scrap from ships, such as PP Ropes. Statements were also recorded from the proprietors of M/s Noble Marine Works and M/s M.A. Traders as well as from two functionaries of SCI, namely, Shri D.K. Mukhopadhyay, Assistant General Manager (Purchase Department) and Shri Y.B. Sawant, Dy. Manager, Freight Customs. Shri Mukhopadhyay and Shri Sawant narrated the manner in which scrap from the vessels of the corporation was delivered to M/s Noble Marine Works and M/s M.A. Traders. Both of them referred to delivery orders, wherein the scrap was indicated as of Indian Origin. Shri Sawant went to the extent of admitting that the mention of 'Indian Origin' in the delivery orders had been made by mistake. From the results of investigation, it appeared to the department that the scrap which was found in the premises of M/s Shree Durga Traders had been imported by M/s Noble Marine Works and M/s M.A. Traders from foreign-going vessels without following the customs procedure and without payment of duty. Accordingly, a show-cause notice was issued to them as well as to M/s Sri Durga Traders and M/s Jubilee Traders for recovery of duty by invoking the extended period of limitation under Section 28(1) of the Customs Act. In this show-cause notice, penalties were also proposed to be imposed on the said parties as well as on the two functionaries of SCI. In their reply to the show-cause notice, M/s Noble Marine Works and M/s M.A. Traders contested the demand of duty on merits as well as on the ground of limitation. They submitted that the scrap, which they described as "condemned ship stores", had been removed from coastal vessels only and not from any foreign-going vessels. It was further contended that these goods were of 'Indian Origin', which fact was clearly borne on the delivery orders *issued by SCI. In this scenario, they contended that they did not suppress any material facts before the department with intent to evade payment of duty of customs. Further, it was submitted that the larger period of limitation was not invocable against them for recovery of any duty. Other noticees also replied to the show-cause notice.*

2. In adjudication of the dispute, the learned Commissioner passed the impugned order, wherein total amount of duty of Rs.11,67,231/- was demanded from M/s Noble Marine Works, M/s M.A. Traders, M/s Jubilee Traders and M/s Sri Durga Traders under Section 28 of the Act and interest thereon was also demanded under Section 28AB of the Act. The break-up of duty for the purpose of recovery from these four parties was also furnished in the Commissioner's order. Penalty equal to duty was imposed on each of them under Section 114(A) of the Act. In respect of the goods seized from the premises of M/s Sri Durga Traders, which was subsequently released provisionally to the above four parties against Bond and Bank Guarantee, confiscation was ordered under Section 111 of the Act and, in connection therewith, penalties were imposed on the two functionaries of SCI under Section 112 of the Act.

3. After examining the records and hearing both sides, we find that the two parties who were found to have evaded payment of duty of customs on the goods in question by suppressing before the department the factum of having imported the scrap from foreign-going vessels are M/s Noble Marine Works and M/s M.A. Traders. Both these parties contested the demand of duty on merits as well as on the ground of limitation. Before the adjudicating authority, they submitted that they had described the goods as of 'Indian Origin' in the relevant Bills of Entry on the basis of the description given in the respective delivery orders issued by SCI and that nothing was deliberately suppressed with intent to evade the payment of duty and, *therefore, the extended period of limitation was not invocable against them. We have found these contentions having been clearly raised in the reply made by these parties vis-à-vis the allegation in the show-cause notice. However, the Commissioner appears to have overlooked this case of the main parties. Learned Commissioner merely looked into the question whether on merits duty was leviable from the appellants. It, therefore, appears that this is a case fit for remand to the lower authority for the purpose of fresh adjudication. The delivery orders are crucial documents in this case but none is forthcoming. Examination of these documents can be better done at the lower level. We have not been able to discern all aspects of these delivery orders from the impugned order. We also note that it is the consistent case of M/s Noble Marine Works and M/s M.A. Traders that they had cleared the goods at customs in accordance with the provisions of the Customs Act. Though copies of some of the Bills of Entry are available on record, none indicates any assessment or out-of-charge. Learned Commissioner can best address these aspects.*

4. For the above reasons, we are inclined to make an open remand. Accordingly, we set aside the impugned order and allow these appeals by way of remand with a direction to the learned Commissioner of Customs to take fresh decision on all issues (including the time-bar issue) after giving the parties a reasonable opportunity of being heard."

2.2 In the remand proceeding, Commissioner has adjudicated the matter as per the impugned order. Aggrieved by impugned order Appellants have filed these appeals.

3.1 We have heard Shri D H Nadkarni and Shri C S Birader, Advocates for the appellants and Shri Bhushan Kamble, Assistant Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the Appellants, learned Counsel submitted-

- M/s Noble Marine Works & M/s M A Traders have procured the goods from Shipping Corporation of India under a contract, and have at the instance of Custom Officers filed the Bill of Entry describing the goods as P P Ropes i.e. condemned ship stores, as they were in the nature of the waste and scrap among other items described as *“8” P P Howser”*, *“10” P P Howser”*, *“Pieces of M Howser Dia 100 mm”* and “*10 inch coil P P Howser worn out and in Pieces”.* After clearance the P P Ropes were stored in the godown of M/s Shree Durga Traders.
- Shree Durga Traders had also procured about 8 MT of goods locally against invoice No 12/94-95 dated 3.08.1994 & 43/94-95 dated 01.02.1995. This quantity of the goods procured locally is more than the quantity of 5.280 MT seized by the department.
- M/s Jubilee Traders had locally procured 9920.3 kgs (M/s Naval Store Department) + 6967 Kgs (M/s Naval Store Department auction sale) + 5306 kgs (local purchase against invoice No 0849 dated 29.06.1993) + 8120 kgs (local purchase against invoice No 42/94-95 dated 01.02.1995) = 30313.3 kgs.
- After having furnished all the details of local procurement of goods, from Shipping Corporation of India and Naval Store Department, the learned adjudicating authority was not justified in holding that they had not discharged the burden of proof to show that the goods were not legally imported and were smuggled. Since the seized goods were not notified goods, by submitting the source of procurement with the relevant documents they have discharged the burden cast on them and in such a situation the goods could not have been held to be

illegally procured as has been held in the following decisions:

- Mahendra Singh Purohit [2008 (225) ELT 426 (Bom)]
- Shri Ganesh Enterprises [2006 (199) ELT 208 (Bom)] & [2007 (208) ELT A195 (SC)}]

➢ By confiscating the goods and allowing them to be cleared against redemption fine, Commissioner has gone beyond the remand order. Since the goods were not subjected to redemption fine in the first order in original, and the order was not challenged by the revenue on that account, it had become final. Thus Commissioner has in remand proceedings gone beyond the scope of remand order which is contrary to the decision in case of Kalyani Sharp India Limited [2008 (226) ELT 197 (T)] upheld at [2010 (255) ELT A 18 (SC)]

➢ Section 114A was brought in the statue w.e.f 28.09.1996 and they had cleared the goods by filing the Bill of Entries during the period 1994-95, the penalty imposed under the said section is not justified as has been held in the following decisions-

- Nucor Wires Ltd [2008 (230) ELT 680 (T)]
- Suman Exports [2007 (213) ELT 374 (T)]
- Sushil Kumar Kanodia [2007 (218) ELT 453 (T)]

3.3 Arguing for the revenue learned Authorized Representative, while reiterating the findings recorded in impugned order submitted that the entire case against the appellants is that they had procured these goods by mis-declaring them as being procured as waste/ condemned goods of coastal run vessels whereas actually they had been procured as condemned goods/ ship stores of foreign going vessel. By doings so they had evaded the duty due on these goods which have been seized/ and confiscated.

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

4.2 Undisputedly the goods have been seized, from the godown/premises which are not located in the customs area. Also on the goods seized there are no markings etc., to establish that these goods were of foreign origin. It is also not disputed that these goods were not amongst the notified goods under Section 123 of Customs Act, 1962. In absence of the notification, notifying the goods under Section 123, the burden to prove that the impugned goods were of foreign origin and were imported/ cleared from the customs area illicitly without payment of duty, is on the revenue. Hon'ble Bombay High Court has in case of Mahendra Singh Purohit [2008 (225) ELT 426 (Bom)] held as follows:

"2. *The reason for setting aside the confiscation is that the goods in question are non notified goods and the revenue failed to discharge the burden that the said goods are smuggled illegally into the country. The Tribunal has further held that even if the duty paying documents produced by the respondent did not tally with the description of the goods, still the onus was on the revenue to discharge the burden by producing positive evidence. The Tribunal has held that in the absence of such evidence, the confiscation order cannot be sustained."*

4.3 Hon'ble Supreme Court has in case of D Bhoormull [1983 (13) ELT 1546 (SC)] laid down the law in this respect stating as follows:

"43. *If we may so with great respect, it is proper to read into the above observations more than what the context and the peculiar facts of that case demanded. While it is true that in criminal trials to which the Evidence Act, in terms, applies, this section is not intended to relieve the prosecution of the initial burden which lies on it to prove* *the positive facts of its own case, it can be said by way of generalisation that the effect of the material facts being exclusively or especially within the knowledge of the accused, is that it may, proportionately with the gravity or the relative triviality of the issues at stake, in some special type of case, lighten the burden of proof resting on the prosecution. For instance, once it is shown that the accused was travelling without a ticket; a prima facie case against him is proved. If he once had such a ticket and lost it, it will be for him to prove this fact within his special knowledge. Similarly, if a person is proved to be in recent possession of stolen goods, the prosecution will be deemed to have established the charge that he was either the thief or had received those stolen goods knowing them to be stolen. If his possession was innocent and lacked the requisite incriminating knowledge, then it will be for him to explain or establish those facts within his peculiar knowledge, failing which the prosecution will be entitled to take advantage of the presumption of fact arising against him, in discharging its burden of proof.*

44. *These fundamental principles, shorn of technicalities, as we have discussed earlier, apply only in a broad and pragmatic way to proceedings under Section 167(8) of the Act. The broad effect of the application of the basic principle underlying Section 106,. Evidence Act to cases under Section 167(8) of the Act, is that the Department would be deemed to have discharged its burden if it adduces only so much evidence, circumstantial or direct, as is sufficient, to raise a presumption in its favour with regard to the existence of the fact sought to be proved. Amba Lal's case, (1961) 1 SCR 933 = 1983 E.L.T. 1321, was a case of no evidence. The only circumstantial evidence viz. the conduct of Amba Lal in making conflicting statements, could not be taken into account because he was never given an opportunity to explain the alleged discrepancies. The status of Amba Lal viz. that he was an* *immigrant from Pakistan and had come to India in 1947-before the customs barrier was raised-bringing along with him the goods in question, had greatly strengthened the initial presumption of innocence in his favour. Amba Lal's case thus stands on its own facts."*

4.4 In the present case based on intelligence/ information, the premises of the Appellants were searched on 02.02.1995 (Resulting in detention of 3600 kgs of Polypropylene Rope) and on 03.02.1995 (Resulting in detention of 32,680 kgs of Polypropylene Rope).

In the statement recorded on or about the same time i.e. on 02.02.1995, 04.02.1995 and 06.02.1995 they took a definitive stand in respect of procurement of the goods locally and also produced certain documents in respect of the purchases made by them. The facts as stated by the Appellants, were also corroborated by Shri D K Mukhopadhyay (Assistant General Manager, Shipping Corporation of India) and Shri Yeshwant B Sawant (Deputy Manager Freight Customs, Shipping Corporation of India) in their statements recorded on 16.02.1995. Commissioner has in para 3.5, 3.6, 3.7 and 3.8 of his order recorded as follows:

"3.5 Further M/s. Jubilee Traders and M/s. Shree Durga Traders respectively claimed ownership of 13 MTs and 5 MTs of the seized goods. They produced certain documents vide their letters No. Nil dated 12.7.95 to claim that these goods were procured by them locally but the goods under seizure could not be correlated to these documents.

3.6 It has been pointed out by the Noticees during their defence that as the goods are not notified under Section 123 of the Customs Act, 1962, burden is on the department to prove the non-duty paid nature of the goods. The case laws cited by them are:-

(i) CC v. Sudhir Saha (Cal HC) reported in 172 ELT 26

(ii) AC v. Umed Jain (Gauhati HC) reported in 23 ELT 307

(iii) Pradip Agarwal v. CC (Tribunal) reported in 153 ELT 307.

(iv) CC v. National Radio Product (Tribunal) reported in 156 ELT 908.

(v) CC v. Mahendra Purohit (Bombay HC) reported in 225 ELT 426

(vi) MD Isha v. CC (Tribunal) reported in 251 ELT 588.

M/s. Noble Marine Works, M/s. M.A. Traders, M/s. Shree Durga Traders and M/s. Jubilee Traders were given enough opportunities to submit the evidence regarding their claim, which they could not submit. M/s. Noble Marine Works and M/s. M.A. Traders have claimed that said 18 MT of seized P.P. Robes was cleared vide Bills of Entry (as mentioned in Para 1.24 and 1.25 above) which were filed by them with Coastal Trade Establishment for clearance of condemned ship store goods, without payment of Customs Duty, by clearing the same as of 'Indian origin' and which were purchased by them from M/s. SCI. However said P.P. Ropes placed under seizure could not be correlated with the goods mentioned in the said Bill of Entry. On perusal of the three bills of entry (as in Para 1.24 above), it is observed that the value of goods cleared through these bills of entry is not adequate to cover these goods and hence the claim of M/s. Noble Marine Works is not acceptable. The department has thus discharged its onus by giving ample opportunities to the noticees to prove their bonafide. However the noticees failed on this account by submitting either no evidence or irrelevant evidence which were not correlatable with the impugned goods. In the above case laws relied upon by the noticee the facts and circumstances are different from the facts and circumstances of the present case. In view of the same, the case laws cited by noticees in their defence are thus of *no use to them and therefore, of no consequence in the matter.*

3.7 It is also observed that the officials of SCI during the course of investigations could not confirm the origin of the goods purchased by M/s. Noble Marine Works and M/s. M.A. Traders i.e. whether same were of foreign origin or otherwise. They stated that while issuing delivery orders they had indicated 'Indian Origin' without verifying the same. They also never indicated on the delivery orders as to whether the goods were removed from Coastal-run vessels or foreign going vessels.

3.8 Both Shri D.K. Mukhopadhyaya and Shri Y.B. Sawant, the employees of M/s. Shipping Corporation of India have clearly admitted in their statements recorded under Section 108 of the Customs Act, 1962 before the investigating officers of the DRI Zonal unit, Bombay that they had mentioned by mistake, on the delivery challans that the goods sold to the Noticees were of 'Indian Origin' without knowing anything about the origin of the goods. Moreover, one of the Vessels shown in the Bills of Entry mentioned by the Noticees was admittedly a 'Foreign going vessel'. Further, there is a wide difference in the description of the seized goods vis-à-vis the goods described in the Bills of Entry submitted by the Noticees. Whereas the impugned goods are 'Poly Propylene Ropes', the description of the goods as per Bills of Entry are Wire-Ropes, scrap material, Moorings, Anchor Chains etc. On perusal of the three bills of entry (as in Para 1.24 above), it is observed that these are for value Rs.15,000/-, Rs.35,000/- and Rs.50,000/- respectively. As per contract between M/s. Noble Marine and M/s. Shipping Corporation of India, the value at which PP Ropes were to be cleared was Rs.41,825.55 per MT for coastal vessel and Rs.35,812.60 for foreign going vessels. Obviously these bills of entry can not be for the goods under reference, as *the value of goods cleared through these bills of entry is not adequate to cover these goods. Thus the claim of M/s. Noble Marine Works remains unsubstantiated and hence not tenable. It is, therefore clear that the seized goods are entirely different and can not be co-related to the Bills of Entry submitted by the Noticees. Moreover, even the goods of Indian origin, when re-imported into India are liable to be assessed to Customs duty in terms of the provisions of Section 20 of the Customs Act, 1962. Even the procedure for clearance of 'Coastal goods', has not been followed by the Noticees. For clearance of such goods as 'Coastal goods', the Noticees has filed 'Bills of Entry' which gives a clear indication that the goods had been imported into India from 'Foreign going Vessel'."*

From the facts as recorded above though Commissioner has recorded the existence of such documents he has brushed asides the same stating that the documents could not be co-related with the goods under seizure, without specifying anything further. In our view department has failed to discharge the initial burden cast on them to prove that the goods were illicitly cleared by the appellants. Hence in view of the decision of Hon'ble Bombay High Court in case of Shri Ganesh Enterprises [2006 (199) ELT 208 (Bom)] the impugned order cannot be sustained. In that decision, Hon'ble High Court stated as follows:

"3. *In paragraph 32 of the report, the Supreme Court held thus :*

"32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned: and if he fails to establish or

explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in 'Law of Evidence' (12th Ed. Article 320, page 291), the "presumption of innocence is, no doubt, presumptio juris : but every day's practice arising from the recent (unexplained) possession of stolen property," though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice."

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.*

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.*

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."*

4.5 In case of Mamta Marketing [2016 (334) ELT 71 (Tri.-Mumbai)] in similar circumstances CESTAT has held as follows:

"13. *Section 123 of the Customs Act relates to seizure of smuggled goods and other notified goods. The emphasis is on "smuggled goods" and not on "goods". Presumption under Section 123 of the Customs Act would arise only after proof of the fact that the goods seized were within the meaning of Sec. 123 of the Customs Act. This section does not rise to a presumption that any goods seized should be taken to be gold or other such articles to which the Section applies; Section 123 of the Act enacts that where any goods to which the section applies, are seized under the Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized. The burden thus shifts on the condition specified in the section. These conditions are :*

(1) seizure of goods to which the section applies.

(2) seizure under the Act, and

(3) seizure in the reasonable belief that they are smuggled goods.

When all the three elements are proved, the burden would shift to the accused to show that they are not "smuggled goods". The correct legal position is that in the absence of special notification under Sec. 123 of the Customs Act specifying goods to which the section applies, the onus of proof under that section cannot be placed on persons *whose goods are seized. Where no presumption under Sec. 123 of the Act could be used against the accused it is for the prosecution to prove that the accused knew that the goods in possession was smuggled and imported into the country without a permit.*

14. *The Digest of the Law of Evidence by Stephen, Article 104 wherein it is stated that -*

"the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the burden of proving the fact shall lie on any particular person; but the burden may in the course of a case be shifted from one side to the other and in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by parties respectively."

The Hon'ble Supreme Court delivered a landmark judgment in the case of CC, Madras and Others v. D. Bhoormull - 1983 (13) E.L.T. 1546 (S.C.) which lays down the principle in respect of discharge of the burden and the same is being followed in all subsequent cases by all High Courts, subordinate Courts and Tribunals etc. in the country. The aforesaid principle has been explained by the Hon'ble Bombay High Court in the case of CC (Prev.) v. Shri Ganesh Enterprises [2006 (199) E.L.T. 208 (Bom.)] (in specific terms) that "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 of fact, 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" The above principle as explained by the Hon'ble High Court being canvassed by the Department that "it is not the law that in all cases of non-notified goods, the burden is on the Revenue to prove illegal entry of those goods into the *country. Earlier the Tribunal in the same case observed that it is well settled law that in the case of non-notified it is Revenue to prove the illegal entry to the country. The Hon'ble Bombay High Court has upheld the order of the Tribunal in the light of the legal position highlighted by the Hon'ble Supreme Court in the case of D. Bhoormull."*

5.1 In view of the discussions as above, we do not find any merits in the impugned order and set it aside. Thus the appeals filed by the Appellants are allowed.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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