

CASE NO.:
Appeal (civil) 3077 of 1999

PETITIONER:
UNION OF INDIA

Vs.

RESPONDENT:
RAJENDRA PRABHU & ANR.

DATE OF JUDGMENT: 21/03/2001

BENCH:
S.P. Bharucha, N. Santosh Hegde & Y.K. Sabharwal.

JUDGMENT:

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SANTOSH HEGDE, J.

The respondent herein was intercepted in the early hours of 22nd October, 1994 by the Circle Inspector of Police, Chalakudy while he was travelling in a car. The Police recovered 30 gold biscuits of foreign markings from him and the respondent was handed over to the Superintendent of Customs, SCP Unit, Kodungalloor. It is stated that the respondent made a statement the same day to the Customs authorities that he had purchased the said gold from one P. Thomas of Kottayam for Rs.15 lakhs and that he did not have any document to prove the licit importation of the said gold. Therefore, the gold was seized under the Customs Act under a reasonable belief that the gold biscuits were liable to be confiscated under the provisions of the Customs Act. On 23.10.1994, the respondent made a statement before the Customs Officers wherein he reiterated that the gold in question was purchased from one P.Thomas and gave a telephone number as belonging to said Thomas. The efforts of the Customs Officers to locate the said Thomas proved futile as he was found to be a non-existing person and the telephone number given by the respondent was found to be a telephone registered in the name of State Bank of Travancore, Mannanam Branch.

On 28.10.1994, i.e., 6 days later, one Balan wrote a letter to the Central Excise Superintendent, SCP Unit, Kodungalloor and claimed that he had bought 42 gold biscuits from Dubai on 19.10.1994 and cleared the same on payment of customs duty at Trivandrum Airport. He also stated that out of the same he had handed over as many as 30 gold biscuits to the respondent herein for selling them at Coimbatore. He enclosed a copy of the receipt indicating the payment of duty on 42 gold biscuits. After the receipt of the letter of said Balan, i.e. on 31.10.1994, the respondent wrote a letter corroborating the claim of said Balan. In a subsequent statement made on 14.11.1994 he retracted the statement made to the Customs Officers on 23.10.1994 and affirmed the claim of said Balan.

Both the respondent as well as Balan were issued show cause notices by the Customs authorities asking why the gold in question should not be confiscated and penalty imposed under the Customs Act. Pursuant to the said show cause notice, the respondent as well as Balan filed a reply and after hearing the parties the Commissioner of Central Excise and Customs, Cochin by his order dated 12.1.1996 held that the gold seized from the respondent was not duty-paid and not imported legally and accordingly was liable to confiscation under Section 11(a) of the Customs Act, 1962. He further held that the respondent from whose possession the gold was seized was liable for a penalty under Section 112(b) of the Customs Act, 1962 and accordingly while confiscating the gold in question imposed a penalty of Rs. 5 lakhs on the respondent. The said Commissioner, however, came to the conclusion that the said Balan was only lending his name in order to make the importation of gold licit, hence he has not committed any offence punishable under Section 112(a) and (b), and held him not liable to any penalty under Section 112 of the Customs Act.

The respondent and said Balan both preferred an appeal before the Customs Excise & Gold (Control) Appellate Tribunal, South Zonal Bench at Madras (the tribunal) wherein it was contended that since the gold biscuits were seized by the Police originally, the provisions of Section 123 of the Customs Act, 1962 cannot be invoked. Therefore, in the absence of any presumption being available in favour of the Department the burden was on the Department to prove that the gold in question was smuggled. It was also contended that in view of the fact that the initial statement of the respondent was taken under duress and coercion, and also in view of the fact that the said statement was retracted, his original statement cannot be taken into account. It was also argued that the document produced by said Balan established the fact that the gold in question was legally imported after payment of duty. The tribunal, after hearing the parties while dismissing the appeal, reduced the penalty imposed on the appellant from Rs. 5 lakhs to Rs. 4 lakhs.

Aggrieved by the said order of the tribunal, the appellant respondent herein as well as said Balan preferred a writ petition before the High Court of Kerala which petition came to be allowed by the judgment and order of the High Court dated 5.1.1999 and the High Court by the said order came to the conclusion that the finding recorded by the statutory authorities is based on no evidence and can be regarded as perverse, consequently issued a direction to the Commissioner of Central Excise, Cochin, to return the 30 gold biscuits seized from the respondent herein.

It is against the judgment of the High Court that the appellants have preferred this appeal. It is contended on behalf of the appellants before us that both the original and the appellate authorities have carefully considered the material that was placed before them by the Department as well as the respondent and said Balan (who is not a respondent in this appeal before us) and having appreciated the evidence on record, the said authorities have correctly come to the conclusion that the gold in question was not legally imported into India. It was also pointed out that from the first statement of the respondent it was clear that he did not even know who was the importer of the gold and whether any duty was paid for the import of the said gold.

It was also pointed out that the respondent was not in possession of any document to show the licit importation of the gold. In the said background, the authorities justly came to the conclusion that the respondent at the time of his arrest was transporting gold which was smuggled into the country. It was also contended that the authorities below have correctly held that the document produced by said Balan could not be correlated to the gold seized from the respondent and it was only an attempt on the part of the respondent and said Balan to misuse the document which has no connection with the gold seized. In this factual background according to the appellants before us, the High Court exercising a power under Article 226/227 of the Constitution of India could not have re-appreciated the evidence on record and come to a different conclusion. According to the appellants, the finding of the High court that the decision of the authorities impugned before it was either based on no evidence or perverse is wholly unjustified. On behalf of the respondent before us while supporting the judgment of the High Court, it is contended that the authorities below failed to take note of the fact that the original statement of the respondent was in fact obtained under duress and the said statement was rightly retracted once the respondent was out of the clutches of the Customs Officers and, therefore, no reliance could have been placed on the original statement made by the respondent to the Customs Officers. In support of this contention, the counsel for the respondent drew our attention to a noting made by the Magistrate on 24.10.1994 when the respondent was produced before him which reads thus:

The accused is produced before me at 6.30 p.m. He stated that he was threatened while recording statement. But no physical harm was caused to him. No visible mark of violence also. Perused the remand report for the reasons stated therein accused is remanded to sub Jail, Ernakulam till 30.10.1994.

Based on the above notings of the Magistrate on behalf of the respondent, it is contended that the said statement made to the Customs Officers cannot be relied upon and if the same is eschewed, according to the counsel, there is no other material based on which the respondent could have been found guilty of possessing or transporting smuggled gold.

Having heard learned counsel for the parties and after perusing the records, we are of the opinion that even though the High Court rightly noticed its limited jurisdiction under Articles 226 and 227 of the Constitution, it still proceeded to reappreciate the evidence on record and substitute its subjective opinion in place of the concurrent findings given by the statutory authorities. We are also of the opinion that the finding of the High Court that the conclusions arrived at by the statutory authority were not based on any evidence or could be regarded as perverse, is erroneous and contrary to facts. Therefore, it has become necessary for us to refer, though briefly, to the findings arrived at by the statutory authorities while deciding this case to find out whether the High Court was justified in reversing the finding of fact recorded by the statutory authorities.

It is an undisputed fact that the respondent herein was intercepted in the early hours of 22.10.1994 by the Police of Chalakudy. During that process, Police recovered from

his possession as many as 30 gold biscuits with foreign markings. The respondent was then handed over to the Customs Authorities at Kodungalloor who recorded his statement in which admittedly the respondent did state that he purchased the said gold biscuits from one P. Thomas of Kottayam for a sum of Rs.15 lacs. He had also admitted that he did not have any document to prove the licit importation of the said gold. According to the case of the appellants, it is because of that that the gold was seized by the officials of the Customs under the provisions of the Customs Act on the reasonable belief that the said gold biscuits were smuggled and liable for confiscation. The respondent was thereafter produced before the jurisdictional Magistrate on 24.10.1994 when he did mention before the Magistrate that he had made a statement under threat but the Magistrate has recorded that no physical harm was caused to him nor any physical marks of violence were found on his person, and thereafter the said Magistrate remanded him to judicial custody till 30.10.1994. It is also to be noticed that on an inquiry, it was found that the name of P. Thomas given by the respondent was found to be a bogus name and the telephone number of the said Thomas was also a fictitious one inasmuch as the said telephone belonged to the State Bank of Travancore. Therefore, the authorities below rightly came to the conclusion that at the time when he made the statement the respondent was not in a position to explain the circumstances under which he came into possession of the said gold and had obviously put forward a false case. The authorities below have also taken note of the fact that when the respondent moved the bail application, he had in specific terms retracted his statement made earlier but on a consideration of the material on record, they chose to rely on the earlier statement holding his later retraction was an after thought. It is only on 28.10.1994 that one Balan came forward with a claim that he had imported the said gold from Dubai on 19.10.1994 and that he had paid the customs duty at Trivandrum airport. In that claim statement, Balan had also stated that he handed over 30 gold biscuits to the respondent for selling them at Coimbatore. The authorities below came to the conclusion that this belated claim of said Balan could not be believed because if as a matter of fact the gold was licitly imported into this country, and Balan had as a matter of fact given the gold to the respondent to sell it in Coimbatore then there was absolutely no reason why the respondent could not have disclosed the source of the gold which was found in his possession as being legally imported and belonging to Balan. Both the authorities below also rejected the document produced by Balan on the ground that the gold mentioned in that document could not be correlated to the gold recovered from the possession of the respondent. We do not find any perversity in the appreciation of this evidence by the original authority and the tribunal. It is based on these facts and circumstances that the gold seized from the possession of the respondent was confiscated by the order of the original authority as confirmed by the appellate authority. These findings of the authorities below to which we have made a brief reference to show that the findings are based on the material on record and, in our opinion, are arrived at on a reasonable and legitimate assessment of the evidence on record.

The High Court, however, by the impugned order came to the conclusion that the initial burden of proving that the goods in question were smuggled, lay on the Department which

according to it, was not discharged by the Department. This conclusion of the High Court is obviously based on a misappreciation of the evidence that was already considered by the lower authorities. The High Court, in our opinion, not only erred in reappreciating the evidence already considered by the authorities below and in that process committed a further error of substituting its subjective opinion in the place of the findings of the authorities below. Therefore, we are of the opinion that the finding of the High Court that the concurrent conclusions of the statutory authorities were either not based on evidence or were perverse, is unsustainable.

On behalf of the respondents, it was contended before us that the Department could not have taken advantage of the presumption available under Section 123 of the Customs Act, 1962 in view of the fact that the gold in question was seized originally not by the Customs authorities but by the Police personnel. From the material available on record, we find that on finding the respondent carrying the gold in question, the Police as a matter of fact did not seize the gold but actually produced the respondent with the gold which was in his possession, before the Customs Authorities who in fact on such production, seized the gold. Be that as it may, we notice that the appellate authority itself did not choose to rely upon any presumption available under Section 123 of the Customs Act but proceeded to consider and rely upon the material that was available to establish that on the date of arrest the respondent was in possession of unmarked gold biscuits; in regard to origin of which or importation of which the respondent was either ignorant or was not willing to divulge and remained evasive. The authorities also have taken note of other materials on record to which we have already made reference and which, in our opinion, are sufficient in the circumstances of this case to come to the conclusion that the gold found in possession of the respondent is liable for confiscation and the respondent was liable for the penalty de hors the presumption contemplated under Section 123 of the Customs Act.

For the reasons stated above, this appeal succeeds, the impugned judgment is set aside and the order of confiscation and the penalty as imposed by the Commissioner and as modified by the tribunal shall be restored.