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BHANABHAI KHALPABHAI

v.

THE COLLECTOR OF CUSTOMS AND ANR.

MARCH 8, 1994

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[K. JAYACHANDRA REDDY AND N.P. SINGH, JJ.]

Customs Act, 1962 : Ss.11-J, 135(1)(a) and 138-A—Silver ingots—Notified as specified goods—Recovery of—From specified area—Fraudulent evasion or attempt at evasion—Prohibition of—Culpable mental state—Presumption of—Accused to prove that such mental state did not exist.

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On suspicion that some contraband goods were unloaded at the *wadi* of the appellant, officials of the Police and Customs carried out a search in the *wadi* and on digging the ground near a well, 101 silver ingots worth over Rs. 18 lakhs were recovered. After the recovery, the statement of the appellant was recorded in accordance with S.108 of the Customs Act, 1962, in which he admitted the recovery, but stated that he did not know how the silver bars came there. Silver ingots has been notified as 'specified goods' and the *wadi* of the appellant was within 50 kms. from the Coast of India and as such was within the 'specified area' notified under the Customs Act. prosecution was laid against the appellant and he was convicted for an offence under S. 135(1)(a) of the Customs Act. He preferred an appeal and the High Court dismissed the same. Hence the appeal.

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On behalf of the appellant it was contended that the ingredients of S. 135(1)(a) had not been fulfilled so as to hold that the appellant committed an offence under that section, since the prosecution had not established that the silver ingots had been kept buried in connection with any fraudulent evasion or attempt at evasion of any duty chargeable thereon.

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Dismissing the appeal, this Court

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HELD : 1.1. Sub-section (1) of Section 11-J of the Customs Act, 1962 which had come in force w.e.f. 3.1.1969, required every person who owns, possesses, or has control, on the specified date, over any specified goods, the market price of which exceeds fifteen thousand rupees, to deliver to the proper officer, an intimation containing the particulars of the place where such goods had been kept or had been stored within the specified area.

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Sub-section (2) of S.11-J prescribed a bar on acquiring any specified goods within the specified area unless before making such acquisition, he delivers to the proper officer an intimation containing the particulars of the place where such goods are proposed to be kept or stored, after such acquisition. *Per se* this will amount to be prohibition in acquiring specified goods within the specified area, the value whereof exceeds fifteen thousand rupees unless the conditions for such acquisition are fulfilled with. [345-D-G]

1.2. There is no dispute in the present case that the appellant, never before making acquisition, delivered to the proper officer any intimation in respect of acquisition, of those silver ingots and the place where such silver ingots were proposed to be kept or stored after the acquisition. In this background, there should not be any difficulty in contending that the appellant was concerned in fraudulent evasion or attempt at evasion of the aforesaid prohibition under sub-section (2) of Section 11-J in relation to specified goods. [354-G-H; 355-A]

1.3. In view of Section 138-A of the Act a presumption has to be drawn, in respect of existence of the alleged mental state. An option has been given to the accused to prove by way of defence the fact, that he did not have any such mental state with respect to the act charged which is an offence. This provision is an exception to the general criminal jurisprudence that onus never shifts on the accused and he had only to raise a doubt in the mind of the Court, in respect of the correctness of the prosecution version. It is different from Sections 106 and 114 of the Evidence Act. In view of Section 138-A, once a presumption is raised about a culpable mental state on the part of the accused, that he had stored the silver ingots, to export them outside the country evading payment of custom duties, the accused has to provide as a defence that no such mental state with respect to the act charged, did exist. No material has been produced on behalf of the appellant to discharge this burden.

[355-F-H, 356-A]

1.4. The prosecution has established that the appellant was concerned in an attempt at evasion of duty under the provisions of the Act, and as such committed the offence under first part of Section 135 (1)(a) of the Act. He was also concerned in evasion of the prohibition imposed by sub-section (2) of Section 11-J of the Act, thereby committing the offence even under the second part of Section 135(1)(a) of the Act. The very fact that 3,274.98 kgs. of silver ingots worth more than rupees 18 lakhs had

- A been kept buried near the well in the garden, leads to irresistible conclusion that the said silver ingots had not been kept or stored in the normal course of business. [356-E-G]

- B *Asstt. Collector of Customs v. Babu Miya Sheikh*, AIR (1983) SC 447 and *State of Maharashtra v. Natwarlal Damodardas Soni*, [1980] 4 SCC 669, relied on.

Veera Ibrahim v. State of Maharashtra, AIR (1976) SC 1167; *R.C. Mehta v. State of West Bengal*, [1969] 2 SCR 461 = AIR (1970) SC 940 and *Heydon's case* [1584] 76 DR 73, referred to.

- C CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 757 of 1980.

From the Judgment and Order dt. 10/15-10-80 of the Gujarat High Court in Crl. Appeal No. 1038/78.

- D U.R. Lalit, A.A. Khan and Ms. Rani Jethmalani for the Appellant.

M. Gauri Shanker Murthy, Dilip Tandon, D.S. Mahra and Ms. A. Subhashini for the Respondents.

- E The Judgment of the Court has delivered by

- F N.P. SINGH, J. The appellant was convicted by the Magistrate for an offence under Section 135(1)(a) of the Customs Act (hereinafter referred to as the 'Act') and was sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 5000, in default of payment thereof, to undergo rigorous imprisonment for further period of six months. The appeal preferred on behalf of the appellant, before the Sessions Judge, was transferred to the High Court, to be heard along with the appeal filed on behalf of the State, against the order of acquittal, passed by the Magistrate against other co-accused persons. The High Court, by the impugned judgment, dismissed the appeal of the appellant.

- G It is the case of the prosecution that on 30.1.1969, the patrolling officials found a truck coming from the side of Moti Daman and proceeding towards Mohangam Railway Crossing, without the headlights being on in a suspicious manner. On inquiry, it was found that the said truck had unloaded some contraband articles at some *Wadi*. Police and the officials
- H

of the Customs Department, found out that goods had been unloaded at the *wadi* of the appellant at Iklora. A search was carried out in the said *wadi*, and on digging the ground near a well 101 silver ingots, weighing 3,274.98 kgs., worth about 18,08,850, were recovered. The said silver ingots were neither covered under any transport voucher nor any of the requirements contemplated under Chapter IV-B of the Act, were found to have been complied with. The Customs officials had reasonable belief that the said silver ingots had been stored at the *Wadi* of the appellant, for the purpose of illegal export and as such liable for confiscation. Further investigation disclosed that the said silver ingots had been brought by two motor trucks bearing Nos. M.H.T. 2304 and M.R.T. 2751. So far the truck No. M.H.T. 2304 was concerned, which was spotted out first moving in a suspicious manner, was carrying contraband silver ingots 20 in number. Several persons including the drivers and owners of the trucks were made accused in connection with the said recovery. The original accused No.2 Shankarbahi Haribahi, brother-in-law of the appellant, was at the time of seizure, present at the *wadi* and was guarding the said place. Later he absconded and could not be made available for trial.

By a notification No. C.S.R. 37 dated 3.1.1969, issued by the Government of India, Ministry of Finance, in exercise of the powers conferred by the Act 'Silver Bullion and Coins' had been declared as 'specified goods'. By Notification No. C.S.R. 38 dated 3.1.1969, issued in exercise of powers conferred by the said Act, the area of 50 kilometers in width from the coast of India, falling within the territories of the States of Gujarat, Maharashtra, Mysore and Union Territory of Goa, Daman and Div, had been declared as 'the specified area'. There is no dispute that the *Wadi* of the appellant was within 50 kilometers from the coast of India as such within the 'specified area', and before the seizure were made on 30.1.1969, the silver ingots had been notified as 'specified goods'.

After the recovery aforesaid, the statement of the appellant had been recorded, in accordance with Section 108 of the Act. During course of the statement, the appellant admitted that the *Wadi* belonged to him and 101 silver bars had been buried near a well in the said *Wadi*. He stated :-

"Customs personnel came at night at my Iklora Wadi and they took away 101 silver bars which were buried near the well....."

He again repeated the same thing later in his statement by saying :-

- A "On date 30/31.1.69 the Customs Officials dugged the land near the well in the Wadi of my Iklora and found 101 Silver bars"

- B He, however, stated that he did not know how the silver bars came there. In the case *Veera Ibrahim v. State of Maharashtra*, AIR (1976) SC 1167, it was examined, as to whether the statement of the accused in that case recorded by the Customs Officer under Section 108 of the Act before any complaint or first information had been lodged against him, can be used against such accused when he was charged for having committed an offence under Section 135(1)(a) of the Act. It was said that mere facts that at the relevant time the person was arrested on suspicion of having committed an offence under Section 124 of the Bombay Police Act and a panchnama had been prepared seizing the goods, were immaterial when neither the case was registered nor the F.I.R. was recorded by the police. It was pointed out that when the Customs Officer recorded the statement of the appellant, in that case he was not formally accused of any offence and as such the statement recorded by the Inspector of Customs was not hit by Article 20(3) of the Constitution. In that connection, reference was made to the judgment of this Court in the case of *R.C. Mehta v. State of West Bengal*, [1969] 2 SCR 461 = AIR (1970) SC 940. As such the statement made by the appellant under Section 108 of the Act, can be used against him. The appellant stated in clear and unambiguous words (i) that the *Wadi* belonged to him by saying twice "my Iklora Wadi" (ii) Customs personnel came at night and took away "101 silver bars, which were buried near the well". At the time of trial, the appellant took a stand that the *Wadi* did not belong to him, it belonged to his wife and as during the recovery of the silver ingots, he was not present at the *Wadi*, no inference of guilt against him could be drawn.

- G On behalf of the appellant, nothing has been brought to our notice to reject his statement under Section 108 of the Act, saying that said statement was not voluntary or made under coercion. On behalf of the prosecution, witnesses have been examined to prove as to how after digging the ground near the well, 101 silver ingots were recovered. Witnesses have also stated that the *Wadi*, from where recovery was made, belonged to the appellant. The statement of the appellant made under Section 108 of the Act along with the evidence of the witnesses, who have been examined to prove the recovery from the *Wadi* aforesaid, establish that *Wadi* belonged

to the appellant and 101 silver ingots had been concealed under the ground, which were recovered after digging the ground. A

Now the only question which is to be examined, is as to whether on basis of the recovery, the appellant can be held to be guilty for an offence under Section 135(1)(a) of the Act? On behalf of the appellant, a stand was taken before this Court that even if the prosecution case regarding recovery aforesaid is accepted, the ingredients of Section 135(1)(a) have not been fulfilled, so as to hold that the appellant committed an offence under that Section. The relevant part of Section 135(1)(a) is as follows :- B

"135. *Evasion of duty or prohibitions* (1) Without prejudice to any action that may be taken under this Act, if any person - C

(a) is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods; or D

....."

According to appellant, the prosecution has not established that the silver ingots had been kept buried in connection with any fraudulent evasion or attempt at evasion of any duty chargeable thereon. In the case of *Asst. Collector of Customs v. Babu Miya Sheikh Imam*, AIR (1983) SC 4 '7, it was pointed out that Section 135(1)(a) has to be read in three parts:- E

"1. If any person is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon, he shall be punishable with imprisonment for a term which may extend to three years or with fine or both. F

2. If any person is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any prohibition for the time being imposed under the Customs Act, 1962 with respect to such goods, he shall be punishable with imprisonment for a term which may extend to three years or with fine or both. G

3. If any person is in relation to any goods in any way knowingly H

A concerned in any fraudulent evasion or attempt at evasion of any prohibition for the time being imposed under any other law for the time being in force with respect of such goods, he shall be punishable with imprisonment for a term which may extend to three years or with fine or both."

B As such if any person is in relation to any goods in any way knowingly
concerned in any fraudulent evasion or attempt at evasion of any prohibition for the time being imposed under the said Act with respect to such goods, even then he shall be punishable with imprisonment as prescribed under the said Section. In other words, the person must be concerned in
C any fraudulent evasion or attempt at evasion of any prohibition imposed under the Act. In the instant case, the 'silver bullion' had been declared as specified goods and the inland area of 50 kilometers in width from the coast of India including the area in which the *Wadi* of the appellant was situated had been declared as 'specified area' under the provisions of the
D Act. Sub-section (1) of Section 11-J, which had come in force w.e.f. 3.1.1969, required every person who owns, possesses, or has control, on the specified date, over any specified goods, the market price of which exceeds fifteen thousand rupees, to deliver to the proper officer, an intimation containing the particulars of the place where such goods had been kept or had been stored within the specified area. Sub-section (2) of Section 11-J
E enjoins that every person who acquires, within the specified area, after the specified date, any specified goods, the value whereof exceeds fifteen thousand rupees, to deliver to the proper officer an intimation containing the particulars of the place where such goods were proposed to be kept or stored "before making such acquisition". In other words sub-section (2)
F prescribes a bar on acquiring any specified goods within the specified area unless before making such acquisition, he delivers to the proper officer an intimation containing the particulars of the place where such goods are proposed to be kept or stored, after such acquisition. *Per se* this will amount to be prohibition in acquiring specified goods within the specified area, the value whereof exceeds fifteen thousand rupees unless the conditions for such acquisition are fulfilled with. There is no dispute in the present case that the appellant, never before making acquisition, delivered to the proper officer any intimation in respect of acquisition, of those silver ingots and the place where such silver ingots were proposed to be kept or stored after the acquisition. In this background, there should not be any
H difficulty in holding that the appellant was concerned in fraudulent evasion

or attempt at evasion of the aforesaid prohibition under sub-section (2) of Section 11-J in relation to specified goods. A

In the facts and circumstances of the case, it can also be held that the appellant was concerned with the specified goods in connection with 'fraudulent evasion or attempt at evasion' of duty chargeable on the specified goods. It is well known, that it is very difficult for the prosecution, to prove every link, in respect of the commission of the offence under the Act by direct evidence. The whole process of smuggling, for evading payment of custom duty consists of different links. The links aid and abate each other, sometimes through a remote control. That is why, the Parliament has introduced Section 138-A in the Act. Section 138-A says :- B C

"138-A. *Presumption of culpable mental state*- (1) In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. D

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability." E

This Section had come in force before the trial commenced. The provision relates only to burden and nature of proof at the trial, as such it was applicable in the present case. In view of the aforesaid Section, a presumption has to be drawn, in respect of existence of the alleged mental state. An option has been given to the accused to prove by way of defence the fact, that he did not have any such mental state with respect to the act charged which is an offence. It can be said that the provision aforesaid is an exception to the general criminal jurisprudence that onus never shifts on the accused and he has only to raise a doubt in the mind of the Court, in respect of the correctness of the prosecution version. it is different from Sections 106 and 114 of the Evidence Act. In view of Section 138- A, once a presumption is raised about a culpable mental state on the part of the accused, that he had stored the silver ingots, to export them outside the country evading payment of custom duties, the accused has to prove as a defence that no such mental state with respect to the act charged, did exist. F G H

- A No material has been produced on behalf of the appellant to discharge this burden. He has not explained as to why 3,274.98 kgs. of silver ingots, worth rupees more than 18 lakhs had been concealed underground near a well in his *Wadi* without any intimation being given to the proper officer concerned, before acquisition of those silver ingots, as required by sub-section (2) of Section 11-J.

B

- This Court in the case of *State of Maharashtra v. Natwarlal Damodardas Soni*, [1980] 4 SCC 669, in which the trial had been completed before the introduction of Section 138-A in the Act, examined as to what is the nature of proof required for establishing a charge for an offence under Section 135(1). It was said that the requisite guilty knowledge or *mens rea* under clauses (a) or (b) or Section 135(1), can be established by circumstantial evidence as well. Even without applying Section 138-A of the Act, it was held that the burden of proving an innocent receipt of gold lay upon the appellant under Section 106 of the Evidence Act. The totality of facts proved, was enough to raise a presumption under Section 114 of the Evidence Act, that the gold had been illegally imported into the country. It was further said that provisions of Section 135(1) had been designed to suppress smuggling, as such it has to be construed in accordance with the Mischief Rule first enunciated in *Heydon's case* [1584] 76 ER 73.

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- According to us, the prosecution has established that the appellant was concerned in an attempt at evasion of duty under the provision of the Act, as such committed the offence under first part of Section 135(1)(a) of the Act. He was also concerned in evasion of the prohibition imposed by sub-section (2) of Section 11-J of the Act, by not having delivered to the proper officer, an intimation containing the particulars of the place, an intimation containing the particulars of the place, where the silver ingots, in such a huge quantity were to be kept and stored, as such he committed the offence even under the second part of Section 135(1)(a) of the Act. The very fact that 3,274.98 kgs. of silver ingots worth more than rupees 18 lakhs had been kept buried near the well in the garden, leads to irresistible conclusion that the said silver ingots had not been kept or stored in normal course of business.

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As such there is no merit in this appeal and it is accordingly dismissed. The Trial Court shall take all necessary steps to take the appellant in custody to serve out the remaining period of sentence.

G.N.

Appeal dismissed.