

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :30.03.2019

Coram:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Appeal No.32 of 2009

The Assistant Commissioner of Customs
Prosecution Unit (Sea Port),
Customs House,
Chennai

... Appellant/Complainant

/versus/

1.S.Suresh
Proprietor,
M/s.Asian Shipping Services

2.P.Vijayaraghavan
Marketing Executive,
M/s.Asian Shipping Services .. Respondents/Accused

Criminal Appeal has been filed under Section 378 of Criminal Procedure Code praying against the judgment passed in E.O.C.C.No.23 of 2006 dated 21.11.2008 passed by the Additional Metropolitan Magistrate, E.O.I, Egmore, Chennai.

For Appellant : Mr.N.P.Kumar

For R1 : Mr.B.Satish Sundar

For R2 : Ms.Lavanya
Legal aid counsel

J U D G M E N T

This appeal is directed against the order of acquittal passed by the trial Court in E.O.C.C.No.23 of 2006, dated 21.11.2008.

2. The respondents were prosecuted under Section 132 and 135(1)(a) of the Customs Act, 1962 for clandestinely import into India foreign made cigarettes by mis-declaration.

3.The brief facts involved in this appeal is that the consignment in a container bearing No.TGHU 2449657 was imported from China declaring that it contains 435 pieces of computer

tables. On reaching the Port, the DRI officials, based on intelligence, verified the consignment and compared the consignment with the bill of lading, dated 16.04.2004. They found that the computer tables in dismantled condition along with 400 carton boxes of Benson & Hedges cigarettes value of Rs.48 lakhs concealed in it. Since there was mis-declaration of goods, the Custom Officials have taken up the investigation. During the course of investigation, they have found that the importer viz., M/s Om Exports and Imports located at Kancheepuram is not aware of the transaction. The documents were fabricated in their names by the shipping agents represented by the first and second accused. Based on the statement given by the importer and the statements of the accused persons, which were confessional in nature satisfied that the foreign made cigarettes were clandestinely imported from China, the accused persons were prosecuted.

4. The trial Court, after considering the evidence let in by the prosecution, had held that the prosecution not proved the guilt of the accused persons, since they have not placed materials to show that the import on behalf of M/s Om Exports and Imports was done without the knowledge of the Importer and the accused persons as shipping agents had knowledge about the goods, which were not declared in the invoice. Particularly, the trial Court has found fault with the prosecution for not marking the bill of lading which is the sheet anchor document for the prosecution. Further, the trial Court has also found fault with the prosecution for not prosecuting the Importer or if the investigation has revealed that he is not involved in the crime and innocent, he should have been examined as witness. Further, the Court below has also pointed out the non-examination of Thomas, who was the go between the shipping agents (accused) and the importer, was not examined. Pointing out the lapses in the prosecution, the trial Court has extended the benefit of doubt and acquitted the accused.

5. The learned Special Public Prosecutor would submit that the trial Court has failed to consider the statement of witnesses, which were recorded under Section 108 of the Customs Act, which is admissible in evidence and retraction of the accused persons at a later point of time only enhanced the culpability, as held by the Hon'ble Supreme Court in K.I.Pavvuny Vs. Assistant Collector reported in 1997 (3) Supreme Court Cases 721.

6. Further, the learned Special Public Prosecutor would submit that the bill of lading spoken by the authority who accorded sanction and the other witnesses, who have seized the documents in the course of the investigation. The copy of the document was also furnished to the accused which form part of list of documents filed along with the complaint. While so, the

non-marking of the document, due to inadvertence cannot be a ground for acquitting the accused persons.

7. The content of bill of lading and the mahazar of the examination of container could clearly show that 400 cartons of cigarettes which is an item not been permitted to import by the importer has been found in the container. The factum of non-declaration of the goods found in the container per se attracts Section 132 and 135(1)(a) of the Customs Act, besides the number of dismantled computer tables does not tally with the number of computer tables as found in the invoice.

8. Regarding the non-examination of the importer, the learned Special Public Prosecutor would submit that the statement of the importer which is admissible in evidence has given a reasonable belief that the importer had no role in the crime. Therefore, the non-examination of importer and non-filing of bill of lading no way prejudice the accused or affect the case of the prosecution in proving the guilt of the accused, However, the Court below has failed to appreciate the law and has erroneously acquitted the accused.

9. It is also submitted by the learned Special Public Prosecutor that the application has been taken out to receive the additional document under Section 391 Cr.P.C., and for marking of bill of lading, copy of which has already been furnished to the accused along with the complaint copy. Same has to be taken into evidence for better appreciation and to avoid miscarriage of justice.

10. The legal principles involved in receiving the additional evidence at the appellate stage is settled by the Hon'ble Supreme Court as early as 2011 in Ashok Tshering Bhutia v. State of Sikkim reported in (2011) 4 Supreme Court Cases 402, wherein the Hon'ble Supreme Court has held under what circumstances the additional evidence at the appellate stage is permissible. It is beneficial to extract the view of the Hon'ble Supreme Court on this point. Hence, para 18, 29 to 32 are extracted below:

"18. Much has been argued on the issue that investigation has been conducted without a proper order in writing, by an officer not authorised otherwise and sanction has been granted under Section 19 of the PC Act 1988 vide order dated 5.4.1997, without taking into account the assets and income shown in Ext. D-4, though the said assets represented known sources of income within the meaning of Section 13(1)(e) and the Explanation attached thereto.

Additional Evidence:

28. Additional evidence at appellate stage is permissible, in case of a failure of justice. However, such power must be exercised sparingly and only in exceptional suitable cases where the court is satisfied that directing additional evidence would serve the interests of justice. It would depend upon the facts and circumstances of an individual case as to whether such permission should be granted having due regard to the concepts of fair play, justice and the well-being of society. Such an application for taking additional evidence must be decided objectively, just to cure the irregularity.

29. The primary object of the provisions of Section 391 Cr.P.C. is the prevention of a guilty man's escape through some careless or ignorant action on part of the prosecution before the court or for vindication of an innocent person wrongfully accused, where the court omitted to record the circumstances essential to elucidation of truth. Generally, it should be invoked when formal proof for the prosecution is necessary. (Vide *Rajeswar Prasad Misra v. The State of West Bengal & Anr.*, AIR 1965 SC 1887; *Ratilal Bhanji Mithani v. The State of Maharashtra & Ors.*, AIR 1971 SC 1630; *Rambhau & Anr. v. State of Maharashtra*, AIR 2001 SC 2120; *Anil Sharma & Ors. v. State of Jharkhand*, AIR 2004 SC 2294; *Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.*, (2004) 4 SCC 158; and *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)*)

30. This Court in *State of Gujarat v. Mohanlal Jitmalji Porwal & Anr.*, AIR 1987 SC 1321, dealing with the issue held as under:

"5...To deny the opportunity to remove the formal defect was to abort a case against an alleged economic offender. Ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions. The community or the State is not a persona-non-

grata whose cause may be treated with disdain. The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest....."

31. In *Rambhau* (supra), a larger Bench of this Court held as under:

"4. Incidentally, Section 391 forms an exception to the general rule that an Appeal must be decided on the evidence which was before the Trial Court and the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. Be it noted further that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 since the same avoids a de novo trial. It is not to fill up the lacuna but to subserve the ends of justice. Needless to record that on an analysis of the Civil Procedure Code, Section 391 is thus akin to Order 41, Rule 27 of the C.P. Code." (Emphasis added)

32. In view of the above, the law on the point can be summarised to the effect that additional evidence can be taken at the appellate stage in exceptional circumstances, to remove an irregularity, where the circumstances so warrant in public interest. Generally, such power is exercised to have formal proof of the documents etc. just to meet the ends of justice. However, the provisions of Section 391 Cr.P.C. cannot be pressed into service in order to fill up lacunae in the prosecution's case."

11. As far as this case is concerned, if non-marking of bill of lading alone is the sole issue, this Court could have allowed the appeal and remitted the matter back for receiving additional document and ordered trial. But, this Court has found that apart from non-marking of the bill of lading though it has been seized and copy furnished to the accused and form part of the list of documents appended to the complaint, the importer, in whose name the consignment has been brought to India, has not been examined as a witness. The documents perpetrated to have been furnished to the customs department in the name M/s Om Exports and Imports Company for assessment of duty not been subjected to any scientific test whether it was emanated from M/s Om Imports and Exports or fabricated documents. Merely based on the exculpatory statement given by the importer, the investigating Officer in his wisdom has thought fit that they are innocence. Also based on the statement of one Thomas, he has arrived at a conclusion that the shipping agents/the accused 1 and 2 alone are guilty. This inference of the Investigating Officer should have been tested before the Court of law properly. For that purpose, all the evidences collected by the Investigation Officer during the course of investigation should have been placed before the Court for its appreciation. The makers of the statement relied, ought to have been examined or reason for not examining them should have been disclosed by the Investigating Officer.

12. The trial Court has found that very crucial documents and the evidence to prove it are not placed. For the reasons best known, the prosecution has not placed before the Court the crucial evidence and documents for proper appreciation coupled with the fact that the bill of lading itself has not been marked. In such circumstances the acquittal of the trial Court cannot be construed as an order passed without proper appreciation of evidence or improper appreciation of law. Hence, this Court finds that it is not a fit case to interfere. Hence, the appeal is liable to be dismissed.

13. In the result, this Criminal Appeal is dismissed. The judgment of the Additional metropolitan Magistrate, E.O.I., Egmore, Chennai in E.O.C.C.No.23 of 2006 dated 21.11.2008 is hereby confirmed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1.The Metropolitan Magistrate,
E.O.I, Egmore, Chennai.

2.The Assistant Commissioner of Customs,
Prosecution Unit (Sea Port),
Customs House,Chennai.

3.The Public Prosecutor for Customs,
High Court, Madras.

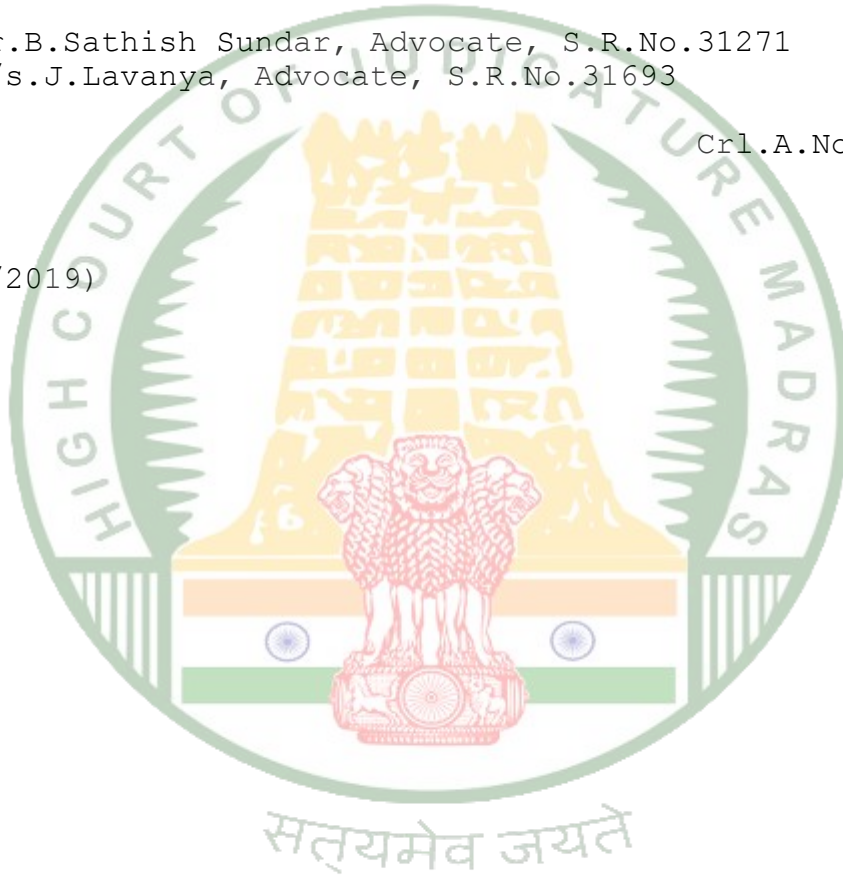
+lcc to Mr.B.Sathish Sundar, Advocate, S.R.No.31271

+lcc to M/s.J.Lavanya, Advocate, S.R.No.31693

Cr1.A.No.32 of 2009

KJ(CO)

RRS (27/05/2019)



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