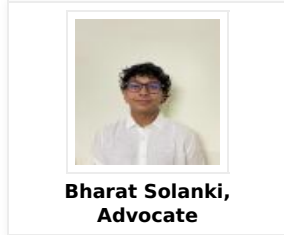


Point of Interception - Evidence in Customs

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Background

Smuggling of electronic goods, gold and other articles has been a problem for every country in the world, especially for a gold obsessed Country like India. A number of films have been made which explore smuggling in all its forms and some of the scripts are not too far away from reality.

A Single Judge of the Madras High Court had an occasion to examine one such interesting case namely **Mohammed Haroon, Shaik Mohammed Vs. The Additional Director General & Others [TS-266-HC-2021(MAD)-CUST]**. The Madras High Court observed that “the misfortune of the prosecution should never be allowed to become the misfortune of the accused. Just as culprits in undetected crimes escape punishment, the unproved persons also must be unhesitatingly acquitted as remarked in **Arulanandu (AIR 1952 Mad 267)**.”

Trouble after landing

The Petitioners had returned to India after a brief international trip and landed at the Trichy Airport around 12.10 am on 06.11.2019. On landing, the Petitioners were stopped and questioned after which, both were found to be carrying 200 gms of gold each in the form of crude gold chains and electronics worth over Rs.40 Lacs. The Petitioners were then detained and arrested and were then released the next day on 07.11.2019 on conditional bail. On 7.11.2019, the Petitioners retracted their statements that were obtained from them. On 26.11.2019, the Petitioners replied to the show cause notices and sought permission to re-export the seized goods. As there was no response from the authority, Writ Petitions were filed.

The crux of the dispute was that the contentions of both the Petitioners and the Directorate of Revenue Intelligence on facts were at variance.

Contentions of the Petitioner

The Petitioners contended that they were carrying the gold and electronic goods and intended to declare the baggage before the customs authority and clear the same on payment of applicable duty. Their main grievance was that before they could do so, they were intercepted by the officials and goods in question were seized. It was also the contention of the Petitioners that they were subjected to indignities and that their private parts were also checked.

Contentions of the DRI

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The DRI contended that they had received specific intelligence that passengers arriving at Trichy Airport from Kuala Lumpur, Dubai, Sharjah and Singapore through particular flights at around midnight on 5.11.2019 would be bringing huge quantities of 24ct gold in the form of crude gold chains and paste and that smuggling would be attempted. The DRI’s information was well founded and among 640 passengers 128 were detained and huge quantity of gold, silver and electronic items were seized. The DRI seized 200 grams of gold and electronics worth more than Rs.40 lakhs from the Petitioners. The Petitioners in their voluntary statements had admitted that they were not the owners of the goods and that they were to be handed over to third parties who were waiting outside the Airport premises and that the Petitioners had offered their services for monetary consideration. The main position of the DRI was that *the Petitioners were intercepted when they were about to exit the green channel*.

Permission for Re-Export

Re-export was not permitted by the Respondents on the ground that the goods were prohibited items. The Madras High Court held that electronics although are not prohibited goods and can be imported and can be cleared after making declaration and paying applicable customs duty. Gold is also not a prohibited item for import, although it comes under regulated/restricted category. The Court referred to the decision of the Madras High Court in the case of **Malabar Diamond Gallery Pvt. Ltd. Vs. ADG, DRI [TS-333-HC-2016(MAD)-CUST]** wherein after considering the definition of prohibited goods under Section 2(33) of

the Customs Act, the Court held that Section 11-A (a) cannot be thrown to winds while interpreting Section 2 (33) of the Act. If any breaches of the restrictive conditions are made the authorities are bound to proceed on the premise that prohibited goods have been imported.

Import of gold as baggage

Any passenger of Indian Origin or a passenger holding a valid passport issued under the Passport Act, 1967 and coming to India after a period of not less than 6 months of stay abroad (short visits not exceeding 30 days excluded) is eligible for importing gold as part of the baggage subject to certain conditions. Concessional rate of customs duty of 12.5% + surcharge was applicable. Similarly, the passenger can bring the gold himself or have it imported in fifteen days of his arrival.

Declaration and Green Channel

The Madras High Court in the case of ***K.R. Ahmed Shah Vs. Additional Collector of Customs (1981) 8 ELT 153*** has held that goods are not deemed to be imported at the moment of the aircraft landing, but importation can only take place when the goods cross the customs barrier. The green channel, depicted by a green line at the Customs clearance in airports, is meant for passengers who have no dutiable goods to declare.

Apart from this decision, the Court also referred to the decision of the Supreme Court in the case of ***DRI Vs. Pushpa Lekhumal Tolani (2017) 16 SCC 93*** wherein quoting International Convention and Harmonization of Customs Procedures, the Court observed that a passenger going through the green channel is itself a declaration that he has no dutiable or prohibited articles.

Point of Interception

The Petitioners alleged that they were stopped before they had even reached the DFMD (Door Frame Metal Detector) whereas the Respondents alleged that the Petitioners were stopped when they were about to exit the green channel.

CCTV Footage

The Court referred to the decision of the Supreme Court in the case of ***Tomaso Bruno & Another Vs. State of Uttar Pradesh (2015) 7 SCC 178*** wherein the Supreme Court had held that as per Section 114 Illustration (g) of the Evidence Act, if a party in possession of best evidence which will throw light in controversy, withholds it, the court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him. In the said case, the appellants who has foreign tourist were charged of murdering their companion in a hotel. The prosecution's case was based on circumstantial evidence that only the appellants could have done the act as all three were lodged in a single room. The appellant's version was that they had gone out of the hotel for a couple of hours while the deceased stayed back as he was not well. The location of the appellant at the material point of time was crucial to unravel the truth. This could be determined with the help of CC TV recordings. The best evidence which could have clinched the issue was withheld by the prosecution. The Supreme Court drew adverse reference against the prosecution under Section 114, illustration (g) of the Evidence Act.

The Madras High Court in the instant case noticed that the Petitioners on 07.11.2019 had invoked the provisions of the RTI Act and sought from the Airport Authorities copies of CCTV footage. This request was declined. Subsequently, the Petitioners had written to the ADGDRI to the effect if the CCTV is seen and verified, the stand of the Petitioners would be borne out. This did not happen. The Airport Authority was impleaded and was directed by the Court to make the footage available. The counsel for the Airport Authority informed the Court that the occurrence had taken place in the 1st week of November, 2019 and the footage was erased a few weeks after.

Key Evidence

The Court held that as important evidence was allowed to vanish and as it was the key evidence for the petitioners to establish their defense, securing the CCTV footage was the bounden duty of the DRI after written appeals to them were made by the Petitioners.

The fundamental right of the noticees/petitioners to fair adjudication has been violated. Adjudication proceedings cannot be allowed to continue for the purpose of determining their guilt. Since the Petitioners defense has been prejudiced, because of non-production of CCTV footage, the adjudication proceedings can be allowed to continue only for the limited purpose of determining whether the goods are allowed to be re-exported or whether they can be cleared on payment of applicable duty.

Suspicion is not proof

The Court had also observed that the innocence of the Petitioners was questionable given the fact that they lived in Chennai and there is no reason why they should land in Trichy. Further, they do not appear to be financially sound and are not even income tax assesseees. There is every possibility that they are what is called in colloquial Tamil as 'Kuruvi'. However, the Court

observed that '*Suspicion is one thing while proof is another*'. It is a prosecution which has to cover the distance. The Court referred to the observations of Justice Panchabikesa Iyer in case of **Re. Arulanandu (AIR 1952 MAD 267)** to the effect that the misfortune of the prosecution should never be allowed to become the misfortune of the accused. Just as the culprits in undetected crime escape punishment, the unproved persons must also be unhesitatingly acquitted. The Court allowed the Writ Petitions.

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Tailpiece

In a world where there is increased use of CCTV, as a measure of security and safety and for investigation purposes, it is important that the CCTV is well maintained and up and running. Investigation agencies often refuse basic requests as demonstrated in this case. Similarly, in GST as well as in an income tax investigation, when cross examination is sought, the same is seldom granted. During investigation or interrogation, there are allegations of coercion and pressure tactics which are promptly denied by the authorities. The Supreme Court in the case of **Paramvir Singh Saini Vs. Baljit Singh (2021) 1 SCC 184** had directed the Union of India to install CCTV camera and recording equipment in the offices of CBI, National Investigation Agency, Enforcement Directorate, Narcotics Control Bureau, Department of Revenue Intelligence, Serious Fraud Investigation Office and any other agency which carries out interrogations and has the power to arrest. The Supreme Court also observed that the CCTV footage should be preserved for a certain minimum period which shall not be less than 6 months and the victim has a right to have the same secured in the event of violation of his human rights.